

## THE NINTH CIRCUIT REITERATED THE CIRCUMSTANCES OF ENFORCING CONTRACTS MADE ONLINE

In April of 2022, in the case of *Berman v. Freedom Financial Network*, the Ninth Circuit, reiterated the circumstances of enforcing contracts made online. More specifically, the mandatory arbitration clauses found in hyperlinked "terms and conditions" that users often never read. In the *Berman* case, the Ninth Circuit reaffirmed a district court order denying the Defendants' motion to compel arbitration, concluding that the parties had never formed a valid arbitration agreement.

The case involved a digital marketing company that allegedly violated the Telephone Consumer Protection Act ("TCPA") by selling information to telemarketing campaigns at nonconsenting individuals, who were then illegally solicited. Defendants Fluent, Inc. is a digital marketing company that generates leads for its clients by collecting information about consumers who visit Fluent's websites. Fluent's websites offer rewards like gift cards and free product samples as an enticement to get consumers to surrender their contact information and answer survey questions. Fluent then uses the information it collects in targeted marketing campaigns conducted on behalf of its clients.

One of the plaintiffs visited a Fluent website and entered her personal information on her desktop computer. Before doing this, she clicked through multiple pages of brightly colored and large graphics directing her to input her zip code. Next to the large zip code text box and large green "continue" button, was some tiny text in a tiny gray font, stating: "I understand and agree to the Terms & Conditions which includes mandatory arbitration and Privacy Policy." The underlined phrases "Terms & Conditions" and "Privacy Policy" were hyperlinks to an alternate website. The Court pointed out that the text 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. The other lead Plaintiff had a similar experience, but accessed the site on his phone.

Fluent and defendant Lead Science, LLC used the contact information provided by these consumers to conduct a telemarketing campaign on behalf of defendants Freedom Financial Network, LLC and Freedom Debt Relief, LLC (collectively, Freedom). As part of the campaign, Fluent and Lead Science allegedly placed unsolicited telephone calls and text messages to hundreds of thousands of consumers, including Plaintiffs, marketing Freedom's debt-relief services. Plaintiffs filed a putative class action on behalf of consumers who received unwanted calls or text messages from Defendants during the telemarketing campaign conducted on Freedom's behalf. They allege that the calls and text messages were made or sent without their consent and therefore violated the TCPA, 47 U.S.C. § 227 et seq.

Defendants moved to compel arbitration, arguing that Plaintiffs' clicking of the "continue" buttons showed their agreement to the terms and conditions, which included the mandatory arbitration clause. The district court denied this motion, concluding that the webpages' content and design "did not conspicuously indicate" acceptance of Fluent's conditions by clicking the "continue" button. The defendants appealed to the Ninth Circuit.

The Court began by analyzing the terms that create a valid contract online under New York or California law (the subject forums contained in the arbitration agreement). In order to form a contract online, the parties must manifest their mutual assent to the terms of the agreement, and they may do so through conduct. (*Specht v. Netscape Communications Corp.*, 306 F.3d 17, 29 (2d Cir. 2002) *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 74 (2d Cir. 2017) (quoting *Schnabel v.*

*Trilegiant Corp.*, 697 F.3d 110, 119 (2d Cir. 2012); Restatement (Second) of Contracts § 19(2) (1981)).

The Court identified that there are significant legal differences in “clickwrap” agreements and “browsewrap” agreement. A “clickwrap” agreement is where a website presents users with specified contractual terms on a pop-up screen and the user must check a box explicitly interact with the site stating “I agree” in order to proceed. In contrast, a “browsewrap” agreements, is where a website offers terms that are disclosed only through an outside hyperlink and the user supposedly manifests assent to those terms simply by continuing to use the website. Since 2002, Courts have been reluctant to enforce “browsewrap” agreements.

In order to demonstrate a manifestation of mutual assent, a website operator is required to show that a consumer has actual knowledge of an arbitration agreement. An enforceable contract will only be found based on an inquiry notice theory if: (1) the website provides reasonably conspicuous notice of the terms to which the consumer will be bound; and (2) the consumer takes some action, such as clicking a button or checking a box, that unambiguously manifests his or her assent to those terms. (*Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014); *Meyer*, 868 F.3d at 75.)

To be enforceable, a website must provide "reasonably conspicuous notice of the terms to which the consumer will be bound." The Ninth Circuit found that Fluent did not meet this standard for two primary reasons. First, the "terms and conditions" text was "tiny gray font" in proportion to the other nearby graphics and text, resulting in the failure to meet the conditions of *Nguyen*, that a website is required "to capture the user's attention and secure her assent." (*Nguyen*, 763 F.3d at 1178.) Second, if a hyperlink is used to redirect users to the terms and conditions, it must be "readily apparent." The subject hyperlink in this case was exhibited in the same text color as surrounding words, not clearly distinguishing its existence to consumers. As a result, Fluent did not provide "reasonably conspicuous notice."

The second requirement to bind users to a contract without their actual knowledge is through an unambiguous manifestation of assent. Fluent argued that by clicking on the "continue" button Plaintiffs satisfied this standard. The Ninth Circuit concluded that "merely clicking on a button" does not show actual agreement. Further, the court held that "even close proximity of the hyperlink" to other buttons to be clicked is "insufficient to give rise to constructive notice." The Court continued to include suggestions for companies to properly enforce such agreements.

Based on the reasoning of this case, along with many past others, any website, web developer, or webmaster should always require that a site’s terms and conditions are both reasonably conspicuous and that a user takes action such as clicking a button or checking a box to manifest the user’s assent to those terms.

Please do not hesitate to contact us at Brothers Smith LLP if you have any questions.