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The Ninth Circuit Addresses Website Design for Enforceable Terms of Service

Many companies use browsewrap or related sign-in agreements to present their terms of service for consumer acceptance. On April 5, 2022, the U.S. Court of Appeals for the Ninth Circuit refined the standard for enforcing terms of service presented on websites via hyperlinks. The decision affects how companies should design their webpages and present their terms of service to ensure that those terms—including their accompanying arbitration agreements, class-action waivers, product licenses, and warranty disclaimers—are enforceable.

In *Berman v. Freedom Financial Network, LLC*, --- F.4th ---, 2022 WL 1010531 (9th Cir. Apr. 5, 2022), the Ninth Circuit considered whether consumers were bound to terms of service presented via a hyperlink displayed in the same gray font as the surrounding larger text and ostensibly accepted by selecting a green "continue" button near a statement that the consumer understood and agreed to the terms. The court held that those features did not sufficiently inform consumers that they were agreeing to the terms. As a result, there was no agreement between the company and the consumers, including no agreement to arbitrate their disputes.

Berman initially reaffirmed the basic principles that terms of service presented via hyperlinks are enforceable when the website (1) provides "reasonably conspicuous notice of the terms" and (2) requires the consumer to take an action showing that they unambiguously assent to the terms.

But *Berman* did more than just reaffirm those principles. The decision also identified specific website design features that are insufficient and those that companies should use to create enforceable agreements.

To adequately notify consumers about terms of service, a website "must do more than simply underscore the hyperlinked text." The court explained that a hyperlink presented with "a contrasting font color (typically blue) and the use of all capital letters" can sufficiently alert consumers to the terms of service. Companies should also pay attention to the rest of the webpage because "other visual elements" could "draw the user's attention away" from the notice and make the agreement unenforceable.

For consumers to agree to terms, the website also "must explicitly notify a user of the legal significance of the action [they] must take to enter into a contractual agreement." The court explained that consumers clicking a button must be "explicitly advised that the act of clicking will constitute assent to the terms." Per *Berman*, it is insufficient to place a statement about the terms close to a button the consumer selects to proceed, especially when the button's text does not indicate that selecting it conveys agreement to the terms.

Consumer litigation is prevalent in the Ninth Circuit, including for companies headquartered in other jurisdictions. In light of *Berman*, companies are encouraged to engage counsel in review of their webpage design and presentation of their terms of service and implement necessary updates.

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