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are you sure your website terms and conditions and privacy policy are enforceable? maybe not!

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One of the many challenges facing companies that do business on line is taking the steps necessary to make sure their website terms of service and privacy policies (and any other terms and conditions) are enforceable to the greatest extent possible in case of a dispute with their customers/users. There is no specific formula to follow, but yet another court has recently issued a reminder holding that simply including a statement saying accessing our website binds you to our policies (whether the terms of service, terms of use, privacy policy or any other) is not enough.

As a general proposition, to form a contract under the laws in most jurisdictions, both parties to the contract must manifest their assent to the terms of the agreement. While this traditionally happens through written communications or verbal discussions, parties may also manifest agreement through their conduct. However, conduct is not effective as a form of agreement unless the party engaging in the conduct intends to do so and knows or has reason to know what the other party may infer from the conduct taking place. These principles are very important when evaluating whether a party has adequately manifested his or her agreement to the terms and conditions appearing on a website.

This key contract point was reinforced in a recent court decision, see *Berman v. Freedom Financial Network, LLC*, No. 20-16900 (9th Cir. 2022)("*Berman*"), wherein the 9th Circuit affirmed the district court's order denying defendants' motion to compel arbitration, ruling that plaintiffs were not bound by a mandatory arbitration clause that was included in a website's terms of service absent some evidence that plaintiffs had actually agreed to that clause. In its decision, the 9th Circuit discussed the two different types of agreements commonly used in connection with website policies: (1) "clickwrap" agreements, in which a website presents users with specified contractual terms on a pop-up screen and users must check a box explicitly stating "I agree" in order to proceed; and (2)

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"browsewrap" agreements, in which a website offers terms that are disclosed often only through a hyperlink and the user supposedly manifests assent to those terms simply by continuing to use the website. "Clickwrap" agreements are usually found to be enforceable by courts, since they provide a website user with notice of the terms of the agreement and require an affirmative act on his or her part (clicking a box) to proceed. "Browsewrap" agreements, however, are less likely to be enforced by courts, because in those situations website users are often unaware of the terms of the agreement, or that their continued use of the website would be considered acceptance of any stated terms.

In *Berman*, the defendants included a mandatory arbitration clause in small print as a part of a browsewrap terms of service agreement. Plaintiffs argued they did not see the mandatory arbitration clause and had not assented to it. The 9th Circuit ruled the small print arbitration clause, in a browsewrap agreement, was insufficient to form a binding contract under New York and California law. The 9th Circuit also noted the defendants did not argue that plaintiffs had actual notice of the mandatory arbitration clause, and could not establish enough facts to demonstrate that plaintiffs were on inquiry notice of the website's terms and conditions because the notice was not conspicuous enough, and the hyperlink that would have taken the website user to the terms of service was not readily apparent. The Court also found that plaintiffs did not take any actions that unambiguously manifested their assent to the terms of service while browsing the website. Given these findings, it was not surprising when the 9th Circuit affirmed the lower court's ruling, holding the mandatory arbitration clause in the terms of service was not binding on plaintiffs, a ruling that is consistent with many others published by courts throughout the country.

As a practical matter, *Berman* underscores yet again that businesses should work with their web designers to make sure that notice of any terms and conditions with which the company intends to bind its customers/users should be clear and conspicuous on their websites, and the presentation of those terms and conditions should be accomplished by website design features that require users to affirmatively agree to the terms and conditions in question. One way to accomplish this is by incorporating a clickwrap agreement into the website's design. In addition, hyperlinks that take users to additional terms of service should be clear so that users are not required to ferret them out.

While *Berman* addressed only terms of service (often called terms of use), its holding applies equally to any privacy policy a company may post on its website, PLUS, each time there are updates to any website posted policies, among other steps, the company must also keep evidence its customers/users accepted those changes. Different companies implement this requirement differently, but the first rule when it comes to establishing anyone is bound by your terms and conditions is to be able to provide tangible evidence the party in question actually accepted those provisions.

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