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Is Arbitration Just a Click Away?

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With online retailers challenging brick and mortar stores, the importance of online transactions and the terms of the contracts they create has never been greater. In the context of arbitration, courts are increasingly being faced with the question of what constitutes a binding agreement to arbitrate in the new online world. While new commerce on the internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.¹ One principle requirement that is as true on the internet as it is on paper is the requirement that a contract requires a, “....mutual manifestation of assent, whether by written or spoken word or by conduct....”²

This raises the question, what is the necessary assent to agree to arbitration in an online transaction? There are two types of basic agreements found in internet sales a “browse wrap” and “click wrap” agreement. A “click wrap” agreement occurs when a website directs a purchaser to the terms and conditions of the sale and requires the purchaser to click a box acknowledging that the purchaser has read those terms and conditions. The terms of a “click wrap” agreement have generally been found to be enforceable by the courts.³

A “browse wrap” agreement occurs when a website merely provides a link to the terms and conditions of the purported contract and does not require the purchaser to click the acknowledgement during the checkout process. The purchaser can complete the transaction without visiting the page containing the terms and conditions. Unlike “click wrap” agreements “browse wrap” agreements are only enforceable when the purchaser has actual knowledge of the terms and conditions or when the hyperlink to the terms and conditions is conspicuous enough to be a reasonably prudent person on notice. This of course raises the question - what is sufficient notice? In the recent Florida decision of *Vitacost.com, Inc. v. James McKants*⁴ the court held that the reference to terms and conditions at the bottom of each page which required scrolling to the bottom in order to see it combined with the fact that the language did not indicate that these terms and conditions were incorporated into the purchase meant that the purchaser was not on reasonable notice. The terms and conditions containing the arbitration agreement were, therefore, not incorporated. It should be noted that in order for a collateral document to be incorporated, Florida law requires that the agreement must sufficiently describe that document.⁵ Therefore, in Florida and in most states, a web retailer uses a “browse wrap” agreement at its peril. A “click wrap” agreement however makes arbitration truly a click away.

If you would like more information, please contact:

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No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.

¹*Register.com, Inc. v. Vero, Inc.*, 356 F.3d 393, 403 (2nd Cir. 2004).

²*Specht v. Netscape Commons Corp.*, 306 F.3d 17, 29 (2nd Cir. 2002) (apply in California law). Also see, *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1175-76 (9th Cir. 2014).

³*Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1175-76 (9th Cir. 2014).

⁴*Vitacost.com, Inc. v. James McKants*, 42 FLW D394A (Fla 4th DCA 2017).

⁵*BGT Group, Inc. v. Tradewinds Engine Services, LLC*, 62 So.3d 1192, 1194 (Fla. 4th DCA 2011).