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Beware of the Fine Print: Website Design Choices that Carry Legal Significance

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Website owners who seek to bind visitors to the terms of an arbitration agreement must make those terms "reasonably conspicuous" under the law, and website visitors must "manifest unambiguous assent" to those terms. That means that the smallest of details – the font and color of the text, the color of the page, the location and appearance of the hyperlinks and the "I agree" button – carry tremendous legal significance. Those seemingly small design details could make the difference between a dispute being resolved in arbitration, or in litigation.

That was the issue at bar in *Berman v. Freedom Financial Network LLC*, a case decided by the Ninth Circuit on April 5, 2022. A putative class of consumers sued website operators who allegedly obtained and used the consumers' contact information to make telemarketing calls in violation of the Telephone Consumer Protection Act. The websites contained a fine print "Terms and Conditions" section that included a requirement that all disputes be resolved in arbitration. But the arbitration agreement itself was not part of the Terms and Conditions; it was available only if the consumer clicked a hyperlink, which was neither capitalized nor in a different color than the surrounding text. And the website did not inform the users that clicking the big green "Continue" button next to the terms and conditions meant they were agreeing to them.

These were among the details that the Ninth Circuit focused on when it held that the defendants' arbitration agreements were unenforceable because notice of the terms were not "reasonably conspicuous," and consumers did not "unambiguously" assent to the terms and conditions.

The majority opinion highlighted several problems with the lack of conspicuousness of the terms and conditions. For one thing, the font was "tiny" – "considerably smaller than the font used in the surrounding website elements," and "barely legible to the naked eye." In addition, the Court reasoned that other "visual elements" on the same page draw the eye "away from the most important part of the page."

The Court also focused on the failure to identify "hyperlinks." While the Court acknowledged that hyperlinking to the arbitration agreement terms is acceptable, the hyperlinked text was the same color and size as the rest of the terms and conditions. The Court explained: "Consumers cannot be required to hover their mouse over otherwise plain-looking text or aimlessly click on words on a page in an effort to 'ferret out hyperlinks.'"

The Court also found insufficient evidence of assent, reasoning that merely clicking a big green button stating "Continue" (next to the sentence "I understand and agree to the Terms & Conditions which includes mandatory arbitration") did not manifest unambiguous assent, because there was no indication of the "legal significance" of clicking the "Continue" button.

The Court's concurring opinion reached the same conclusion, but emphasized different details. After conducting a choice of law analysis (which the majority found unnecessary), the concurring opinion reasoned that California law is a "gray zone" when it comes to "sign-in wrap agreements" – those agreements that notify a user (after signing up) that a separate agreement is required before the user can access the service. Finding the law so unsettled, the Court stated that website designers who "knowingly choose sign-in wrap [agreements] . . . practically invite litigation" over enforceability. Beyond the facts the majority had already noted, the concurring opinion highlighted that an intervening "I agree" button – asking if the website visitor consents to receiving daily emails – was confusingly placed, which Judge Baker characterized as "an independent reason to find the notice . . . insufficiently conspicuous."

The case is a cautionary tale for both website owners and operators: when it comes to terms and conditions containing arbitration agreements, ***design matters***.

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