Florida court rules on enforceability of "browsewrap" vs. "clickwrap" website terms and conditions

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Internet sellers and website designers should be aware of new law in Florida governing internet sales. A Florida state appellate court has ruled, in a case of first impression, against enforcing a "browsewrap" agreement on a sales website and, as an aside, in favor "clickwrap" agreements. Internet sellers and website designers need to ensure that their sites comply with this new ruling which is now the law across Florida unless and until another appellate court weighs in or the legislature passes a bill.

The case is *Vitacost.com, Inc. v. James McCants* (Feb. 15, 2017). The plaintiff, McCants, claimed that he purchased supplements from the defendant, Vitacost, and suffered liver damage. Vitacost claimed that the arbitration clause in its terms and conditions controlled. The trial and appellate courts disagreed because of the method and placement of the browsewrap terms and conditions on the website.

What are browsewrap and clickwrap agreements?

Likely, you're familiar with both agreements, just not by their names.

According to the Florida Fourth District Court of Appeal: "A 'browsewrap' agreement occurs when a website *merely* provides a link to the terms and conditions and does not require the purchaser to click and acknowledgement during the checkout process. A 'clickwrap' agreement occurs when a website directs a purchaser to the terms and conditions of the sale and requires the purchaser to click a box to acknowledge that they have read those terms and conditions. 'Clickwrap' agreements are generally enforceable" (emp. added).

The Florida court relied heavily on the Ninth Circuit decision, *Nguyen v. Barnes & Noble, Inc.*, which noted that "while new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract. […] One such principle is the requirement that mutual manifestation of assent, whether by written or spoken word or conduct, is the touchstone of the contract."

In the *Vitacost.com* case, the site had its terms and conditions "accessible via hyperlink during the online transaction" which the seller intended to incorporate into the transaction as part of a browsewrap agreement. The seller claimed that the browsewrap agreement was "conspicuous enough" to put the purchaser on notice.

The Florida court found two problems with this browsewrap agreement which made it unenforceable:

1. “Throughout most of the purchase process, the hyperlink appears at the very bottom of the seller’s webpage and can be seen only if the purchaser scrolls to the bottom. Based on the webpage printouts, a purchaser would have to scroll through multiple pages of products before reaching the bottom where the link is located.”
2. “When purchasers are ready to check out and click on their shopping cart, the hyperlink shifts over to the far right column, but it is still situated toward the bottom of the page. At this point, the hyperlink is labeled ‘terms and conditions,’ not ‘terms and conditions of sale.'”

Relying on the *Nguyen* case, the Florida court noted that “[u]niformly, courts have declined to enforce browsewrap agreements when the hyperlink to the terms and conditions is buried at the bottom of the page, and the website never directs the user to review them.” That said, there is at least one Illinois case, *Hubbert v. Dell Corp.*, 835 N.E. 2d 113 (Ill. App. Ct. 2005), where a browsewrap agreement was enforced because it was repeated on three pages with a conspicuous blue hyperlink that was consistently labeled and the site made clear that sales were subject to those terms and conditions. The Florida court did not find those facts in the *Vitacost.com* matter. While not cited in Vitacost.com, another Florida court previously applied a similar analysis to amended terms and conditions which were noted on a cellphone user’s monthly bill. *See Briceno v. Sprint PCS*, 911So. 2d 176 (Fla. 4th DCA 2005).

The takeaway message is that browsewrap agreements are weak. They can be enforced under the certain circumstances, but the body of case law, even on a nationwide scale, is not sufficiently developed to create reliable precedent (other than betraying that browsewrap agreements are frequently invalidated).

Based upon the conclusion of the *Vitacost.com* court (and the cases cited therein), the following steps increase the chance that hyperlinked terms and conditions apply to the user/purchaser: (1) the hyperlink is in bright, contrasting color (typically blue); (2) the hyperlink is situated near buttons which users must click and not submerged at the bottom of the webpage which is only visible if the user scrolls down; (3) each hyperlink uses consistent wording; (4) the hyperlink is repeated on multiple webpages; and (5) verbiage that sales/continued use of the website is subject to the hyperlinked terms and conditions. That said, there is no reason to run the risk that a court might later disagree that terms and conditions were “conspicuous enough.”

A simple checkbox or clickwrap agreement is a minor step in website design (and the gold standard) that would require purchasers to confirm their assent to the terms and conditions before checkout. If you are an internet seller, or a website designer, you may want to review your website checkout methods and/or consult counsel licensed in your area.

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