

Agreeing to the Terms and Conditions

Not everyone reads the fine print, but the fine print needs to be present, somewhere. Terms and Conditions are no exception. But to what extent do the Terms and Conditions need to be available?

For those companies that do business-to-consumer transactions with e-commerce solutions, explaining the Terms and Conditions is crucial.

In the case of Hines v. Overstock.com, Inc., Cynthia Hines returned a vacuum cleaner to Overstock.com. The online retailer refunded her the full amount for her purchase, but withheld \$30 for a restocking fee. Hines said she was not aware she would be charged this fee, but Overstock.com said it was a provision in its Terms and Conditions on the website. Hines said she had the understanding she would obtain a full refund without charge and filed a purported class action in the federal court in New York.

Hines elaborated that the Terms and Conditions were only noted in a hyperlink at the bottom of the page between the link to the privacy policy and the company's registered trademark. She continued: "I did not scroll down to the end of the page(s) because it was not necessary to do so, as I was directed each step of the way to click on to a bar to take me to the next step to complete the purchase." The Judge determined Hines lacked notice of the Terms and Conditions and that this was insufficient to form a contract because actual and constructive notice of the Terms and Condition is required, as found by the Second Circuit in the ruling in Specht v. Netscape Communications Corp.

In PDC Laboratories, Inc. v. Hach Co., the ruling concluded it was acceptable to incorporate a limitation of damages clause in the Terms and Conditions through a hyperlink in the online process of a sale. The decision relied on Hubbert v. Dell Corp., which ruled the Terms and Conditions were adequately displayed through a hyperlink underlined, colored blue and with contrasting text. The hyperlink was also displayed a number of times in the ordering process and also referenced in the "final order step" directions.

When it comes to transactions and displaying Terms and Conditions online, the company must at least provide a hyperlink to the Terms and Conditions page, as well as continually provide this link, perhaps in the final order step. While it is not necessary to print every word of the Terms and Conditions, at least give the consumer the option to read the Terms and Conditions of what they are purchasing; it could save a lot of money in the long run. It's better to be safe than sorry.

Source: <http://newmedialaw.proskauer.com/2009/09/articles/contracts/arbitration-provision-unenforceable-where-online-retailers-link-to-browsewrap-terms-and-conditions-was-not-prominently-displayed/>