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Internet terms of use: Ninth Circuit enforces arbitration agreement accessible through browsewrap hyperlink

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Takeaway: Technology advances. Business processes evolve. Internet transactions become increasingly ubiquitous. Contract formation, however, remains an old-fashioned concept. An Internet consumer must, at a minimum, be on inquiry notice of terms to be bound by them. The best option for showing assent is "clickwrap," where a consumer must click "I agree" after being presented with terms to proceed. With "browsewrap," where the consumer is not required to but has the option of accessing terms by hyperlink, the question of assent often focuses on conspicuousness. In *Dohrmann v. Inuit, Inc*., --- Fed.Appx. ---, No. 20-15466, 2020 WL 4601254 (9th Cir. Aug. 11, 2020), a divided Ninth Circuit panel concluded that browsewrap terms on the Turbo Tax website were sufficiently conspicuous to establish assent under California law. Because the consumer was on inquiry notice of the terms of use, the arbitration agreement embedded in those terms should have been enforced, and the majority reversed the district court's order denying the defendant's motion to compel arbitration.

In *Inuit*, Andrew Dohrmann filed a putative class action against Intuit in connection with its "TurboTax" online tax preparation software, asserting various claims under state law arising out of the filing of his 2018 federal income tax returns. Intuit moved to compel arbitration based on the "browsewrap" terms of use accessible through the Turbo Tax website. The district court (Northern District of California) denied Intuit's motion. Intuit appealed, and a divided Ninth Circuit panel reversed.

The majority (Circuit Judges Ikuta and Hurwitz) observed that the Internet has "not fundamentally changed the requirement that mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract." 2020 WL 4601254, at *1 (citation omitted). Mutual assent, however, does not require that a person using a website have actual notice of the arbitration agreement's terms. Instead, a consumer will be bound by the terms if "a reasonably prudent Internet consumer" would be put on "inquiry notice" of the "agreement's existence and contents." *Id*. (citation omitted).

The majority then discussed the difference between clickwrap and browsewrap. The stronger assent mechanism – clickwrap – requires a consumer to click on an "I agree" box after being presented with terms. Browsewrap terms, on the other hand, are merely posted on a website via a hyperlink.

The closer browsewrap is to clickwrap, the better. Courts are "more willing to find the requisite notice for constructive assent where the browsewrap agreement resembles a clickwrap agreement," and "where the website contains an explicit textual notice that continued use will act as a manifestation of the user's intent to be bound, courts have been more amenable to enforcing browsewrap agreements." *Id*. (citations omitted).

Reviewing the record evidence, consisting of undisputed screenshots from the Turbo Tax website, the majority concluded that Mr. Dohrmann was bound by the terms of use. When using the site, he was

required to click a “Sign In” button immediately above the following language: “By clicking Sign In, you agree to the Turbo Terms of Use, TurboTax Terms of Use, and have read and acknowledged our Privacy Statement.” *Id*. at *2. Each of the referenced terms consisted of a blue hyperlink which, if clicked, directed Dohrmann to the webpage displaying the terms. If he clicked on the “TurboTax Terms of Use” hyperlink, he would have been directed to the “Intuit Terms of Service for TurboTax Online Tax Preparation Services” containing the arbitration clause. That was enough to establish inquiry notice and mutual assent: “[t]he relevant warning language and hyperlink to the Terms of Use were conspicuous – they were the only text on the webpage in italics, were located directly below the sign-in button, and the sign-in page was relatively uncluttered. . . . TurboTax's website therefore provided sufficient notice to a reasonably prudent internet user of its Terms of Use, which include an arbitration clause.” *Id*.

Judge Hilda Tagle of the Southern District of Texas (sitting by designation) dissented, agreeing with the reasoning of the district court's denial of Intuit's motion to compel arbitration. She concluded that the display of links for terms that applied to multiple on-line products would be confusing to a typical Internet consumer. She also found problems with the conspicuousness of both the placement and color of the hyperlinks in relationship to the small sign-in box. Finally, she had a problem with the sequencing, given that the site purported to bind Mr. Dohrmann to the terms *after* he signed in to the site. Accordingly, she concluded that the required inquiry notice was lacking.

Intuit was fortunate enough to win on appeal in a 2-1 decision. Two judges (the majority) concluded that Dohrmann was on inquiry notice. Two judges (the dissent and the district judge below) concluded he was not. So, even though this decision upheld browsewrap terms, it still confirms that clickwrap is the superior mechanism for businesses seeking to bind Internet consumers to on-line terms of use.