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One Test, Competing Outcomes: The Ninth Circuit's Latest Guidance on Online Assent

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Earlier this year, the Ninth Circuit addressed assent standards in *Godun v. JustAnswer, LLC*, 135 F.4th 699 (9th Cir. 2025). While *Godun* confirmed the two-part test previously articulated by California courts (conspicuousness and objective manifestation), its application of that test to the facts raised practical concerns about what constituted reasonably conspicuous notice. *Godun*, 135 F.4th at 709-10.

Going beyond the typical "too small font" or "poor contrast" critiques, the *Godun* court picked apart the assent flows before it, finding fault with several elements of the website pages that courts usually do not find problematic. *Id.* at 711-14. For example, the Ninth Circuit concluded that underlining alone was not enough to identify a hyperlink where the text was not in a contrasting color. *Id.* at 711-12. The Ninth Circuit also found that checking a box next to the text: "I agree to the Terms of Service and Privacy Policy. . . " was not an unambiguous manifestation of assent because the "I agree" language did not also include words to the effect that "by clicking the "Connect Now" button, you are agreeing to the Terms of Service. In other words, the Ninth Circuit concluded that California law required a tether between the "I agree" language and clicking the button:

> The advisal lacked an explanatory phrase indicating that "By clicking connect now" or "By connecting," or "By chatting," etc., she agreed to the terms. Like the faulty advisals in *Berman* and *Chabolla*, it instead simply said "I agree" without explaining more. *See id.*; *Chabolla*, 129 F.4th at 1158. Under our precedent construing California law, that is not enough to constitute "an unambiguous manifestation of assent" to those terms.

Id. at 712-13.

Massel v. Successfulmatch.com, Case No. 24-1870, 2025 WL 2452371 (9th Cir. Aug. 26, 2025) came a few months later. In addressing an assent flow similar to the one in *Godun,* the Ninth Circuit confirmed that reasonable conspicuousness turns on the totality of the circumstances, rejected a bright-line focus on the color of hyperlink text, and reiterated the necessity of a textual tether between the "I agree" checkbox and the sign-up button. 2025 WL 2452371, at *1-2. This time, however, the Ninth Circuit found that the statement "Agree to both the Service Agreement and Privacy Policy" following the checkbox was sufficiently unambiguous to manifest assent. *Id.* at *1.

There were nuances in both cases that likely affected their outcomes. Reading the two together, and

considering the specific transactions in both, supports the following general guidance:

- If using a sign-in wrap agreement, the “I agree” advisal should explicitly reference that by clicking, the user is agreeing to the Terms;
- The default for the “I agree” button should be unchecked;
- The advisal should be above the sign-up button; if below, it should stand out through larger and/or contrasting font, and should not be below the fold;
- The context of the transaction remains relevant, and transactions requiring a credit card or other payment may be held to higher standards;
- Autorenewal transactions must comply with statutory conspicuousness requirements;
- Assent flows should be designed to make assent “unambiguous” through placement, color contrast, readable fonts, recognizable hyperlinks, and uncluttered layouts; and
- Companies should maintain records of the users’ click assent.