

Court Finds Online Arbitration Provision Unenforceable

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A California federal judge recently ruled against Dick's Sporting Goods' motion to compel arbitration of a consumer's proposed TCPA class action. Although Dick's Sporting Goods' website terms of use contained an arbitration provision, the court found that no valid arbitration agreement existed because the consumer was not made aware of the terms of use or of the fact that the terms contained an arbitration clause. The court categorized the terms of use as a "browsewrap" agreement (rather than a "clickwrap" agreement) and found insufficient facts to support the inference that the lead plaintiff had actual knowledge of the terms. The court also considered whether the consumer had constructive knowledge of the terms but concluded that no such constructive knowledge existed because the link to the terms of use on the website was not adequately conspicuous given that it was grouped with 27 other hyperlinks covering diverse topics in four separate columns.

Tip: In order to increase the likelihood that your online terms of service will be found to be enforceable, require consumers to take some affirmative step accepting the terms before they can move forward.

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