

# Court Distinguishes Between Clickwrap and Browsewrap Arbitration Agreements

Finds Only One Manifested Consumer Intent to Arbitrate

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The United States District Court for the Middle District of Pennsylvania recently distinguished between clickwrap and browsewrap agreements, finding that one, but not the other, manifested an intent by consumers to arbitrate disputes.

The decision highlights the continuing importance and difficulties of ensuring that consumer consent obtained online is documented in an enforceable arbitration agreement.

## What Happened?

[In \*Hoover v. Cleo AI, Inc.\*](#), the plaintiffs, for themselves and on behalf of a putative class, sued a technology company that operates a lending app and provides cash advances to customers.

- The plaintiffs contended that while the technology company advertised that it charges zero percent interest for these cash advances, it actually charges a monthly subscription fee and very high annual percentage rates.
- The plaintiffs brought a class action on behalf of “[a]ll persons who obtained a cash advance from [the technology company] with a Pennsylvania address and paid a monthly fee, ‘Express Fee,’ or any other interest, fee, charge, cost, or amount.” The technology company moved to compel arbitration of all the plaintiffs’ claims. It argued that, by using the app and, in certain circumstances, clicking an “I Agree” button, the plaintiffs consented to arbitrate all of their disputes and waived their right to bring a class action. The plaintiff opposed, arguing, among other things, that the arbitration agreements were not enforceable.

# How Did the Court Rule?

The court ultimately granted the motion to compel arbitration as to some, but not all, of the named plaintiffs, based on how the plaintiff purportedly manifested their consent to arbitrate, finding a clear difference between clickwrap agreements and browsewrap agreements in that regard.

## What is a “Clickwrap” Agreement?

As the court noted, a “**clickwrap**” agreement is one that “appears on an internet webpage and requires that a user consent to any terms or conditions by clicking on a dialog box on the screen in order to proceed with the internet transaction.”

Under well-settled precedent, a clickwrap agreement is considered enforceable under traditional contract principles, in large part because the customer must take an affirmative step to agree to or accept certain terms and conditions before proceeding.

## What is a “Browsewrap” Agreement?

Conversely, in a “**browsewrap**” agreement, “a website offers terms that are disclosed only through a hyperlink and the user supposedly manifests assent to those terms simply by continuing to use the website.”

Many courts find that a browsewrap agreement is not “automatically deemed valid” when it is not shown that the user had actual notice of the agreement. This, in turn, focuses on whether the browsewrap agreement is “reasonably conspicuous” on the webpage.

“To be reasonably conspicuous, a notice must be displayed in a font size and format such that the court can fairly assume that a reasonably prudent Internet user would have seen it,” the court noted. Because of these differences, courts are more hesitant to enforce browsewrap agreements than clickwrap agreements because customers are often unaware of a browsewrap agreement or the fact that continued use of a website “will be deemed to manifest acceptance to a browsewrap agreement’s terms.”

## Final Ruling Takeaways

Here, the court focused on the content of the webpages themselves and found that plaintiffs who allegedly entered into a browsewrap agreement did not assent to arbitrate their disputes, whereas those who entered into clickwrap agreements did. Regarding the browsewrap agreement, the court found that the webpage was entirely silent about the actions plaintiffs could take to assent to it.

On the other hand, the court found that the plaintiffs who entered into clickwrap agreements did manifest an intent to be bound by its terms, including the arbitration agreement. Not only did the clickwrap agreement display all of the technology company’s current terms and conditions on a scrollable screen, but it also included a box to click stating “I Agree,” which also included language right above that indicating that by clicking “I Agree,” a

customer agreed to all of the technology company’s terms and conditions, including its class action waiver and arbitration agreement.

## What Does it Mean?

Nowadays, online agreements are ubiquitous, and courts will generally enforce agreements formed online in accordance with traditional contract principles.

However, that requires showing proof of actual assent to the terms of the online agreement, evidenced by some affirmative act or step to show that a customer actually agreed to the terms. Absent such an act, companies may have difficulty enforcing online agreements, including arbitration provisions contained in the same.

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