

## Will Your Online Terms Be Rejected or Enforced?

---

June 21, 2011

If your organization offers goods or services for sale online, you most likely have terms of use that accompany the sale. If your organization purchases goods or services via the Internet, the site you purchase from may present specific terms and conditions for the sale. In either case, are the terms likely to be upheld in court?

In a recent New Jersey case, plaintiff Harold Hoffman alleged that defendant Supplements ToGo Management, LLC violated consumer protection laws regarding a supplement that Hoffman purchased from defendant's website. The site contained a disclaimer that "you are agreeing that any and all litigation will take place in the state of Nevada." Based on this disclaimer, defendant filed a motion to dismiss Hoffman's suit, arguing that it had to be filed in Nevada. The trial court granted defendant's motion and plaintiff appealed that decision to the New Jersey Superior Court Appellate Division.

In analyzing the enforceability of the forum selection clause, the appellate court looked at whether Hoffman was provided "fair notice" of the clause. The court noted that the clause would not be visible on the buyer's computer screen unless he or she scrolled down to a "submerged" portion of the webpage. Additionally, once a buyer selected a product into the shopping cart, the site would jump to new pages that did not even display the clause. The court ruled that the forum selection clause was "presumptively unenforceable" and reversed the lower court's decision, reinstating the case. The court did not address whether a purchaser would have to actually click a button in order to make the clause enforceable.

The lesson to be learned from the Hoffman case is that simply having terms available on your site, even on the undiscovered bottom portion of the page, will not guarantee enforceability. The surest way to present customers with fair notice of your terms is to require them to scroll through the terms and click an acceptance button that demonstrates agreement.