

June 20, 2025

In today's digital-first world, nearly every online interaction involves agreeing to some form of terms and conditions. Whether browsing a website, signing up for an app, or making an e-commerce purchase, consumers are constantly presented with notices of terms and the need to click the "I agree..." checkbox. Do I want to waive my right to a jury trial and submit to arbitration in California just to hail a ride across town?

With fewer and fewer in-person interactions, businesses are increasingly relying on digital agreements to define relationships with consumers, while trying to protect their interests. As online "agreements" have now become the norm, how do courts view them? Am I bound to an agreement of some kind when I check the "I agree" box and complete my online purchase? As a company, can we enforce the terms on our website?

Whether online terms and conditions are enforceable against the user hinges on contract law principles that have been around well before we could tap a few buttons on a mobile device: **notice of terms** and **mutual assent**.

These fundamental contract law principles require that both parties are not only aware of the terms they're agreeing to but demonstrate their acceptance of those terms. Since we don't typically receive physical copies of online terms, courts looking at online contracts determine whether a user's electronic conduct clearly indicates acceptance of the terms. For an online agreement to hold up and ultimately be enforceable, a company generally needs to demonstrate two critical elements:

1. **Contractual terms were presented to the user.**
2. **The user accepted those terms.**

This brings us to the two most common types of online contracts: "scrollwrap" and "clickwrap" agreements, and why one stands out as the most robust.

## **The Gold Standard: Scrollwrap**

Among the various forms of online contracts, the "**scrollwrap**" **agreement** is widely considered the most likely to be held enforceable by a court because it offers the strongest evidence of both clear notice and affirmative consent.

With a scrollwrap, users are *forced to scroll through the entirety of the terms and conditions* before they can proceed. This mandatory scrolling ensures that the user has actual notice of the terms. The act of scrolling the terms, combined with a subsequent action (like clicking an "I Agree to the Terms" button), provides the user's physical manifestation of assent. While some users might find the mandatory scrolling a bit cumbersome, its legal strength in proving user awareness and acceptance is undeniable.

June 20, 2025

## The Strong Second: Clickwrap

If a scrollwrap isn't feasible for your user experience, a properly implemented **"clickwrap" agreement** is generally the next best option. Courts have also upheld the enforceability of clickwrap agreements, provided they are designed with careful attention to detail.

For a clickwrap to be enforceable, it must ensure:

- **Clear and Conspicuous Notice:** The terms must be prominently displayed or easily accessible via a clearly labeled hyperlink that users can't miss. The terms shouldn't be hidden in fine print or obscure corners of the page.
- **Affirmative Consent:** Users must provide a distinct action demonstrating their agreement, typically by clicking an "I Agree" button or similar clear acceptance prompt. Simply relying on one's use of a website (creating a so-called "browsewrap" agreement) or proceeding without an affirmative click showing acceptance of terms is usually insufficient.

## Key Takeaways for Online Users and Businesses

Consumers should be aware that a "scrollwrap" or properly instituted "clickwrap" is likely to be held enforceable against them. So before agreeing to arbitrate any claims in a far off state, make sure those shoes you're about to buy are really worth it.

For businesses, to ensure your online agreements stand up in court, remember that traditional contract principles of notice and mutual assent remain paramount. While the "scrollwrap" offers the most robust legal protection due to its enforced notice and physical manifestation of assent, a well-executed "clickwrap" can also be highly effective. The critical factor is designing your user interface to leave no doubt that the user was presented with the terms and actively chose to accept them.

## Contact Us

Alan McKenna has more than 25 years of legal and business experience advising clients on a wide range of corporate and transactional matters that support business formation, growth, and ongoing operations. If you have questions about online agreements, please contact Alan or your Hemenway & Barnes advisor.

### Alan E. McKenna

Partner: (617) 557-9759 or [amckenna@hembar.com](mailto:amckenna@hembar.com).

[www.hembar.com](http://www.hembar.com) | Copyright © 2025 Hemenway & Barnes LLP

This advisory is provided solely for information purposes and should not be construed as legal advice with respect to any particular situation. This advisory is not intended to create a lawyer client relationship. You should consult your legal counsel regarding your situation and any specific legal questions you may have.