



Federal Appeals Court Provides 3-Step Roadmap For Creating Enforceable Online Agreements

Insights

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A recent federal appeals court decision rejecting a business's attempts at enforcing its online arbitration agreement offers lessons for businesses across the country on how to craft a valid agreement for your website. The Ninth Circuit's February 27 decision in *Chabolla v. ClassPass* took issue with an online gym membership page that contained different design elements and language on three distinct sign-up screens, concluding that a reasonable consumer would not have understood the terms of use. What do you need to know about this key ruling and what are the three steps you should take to put yourself in the best position to enforce your online agreements?

Consumer Didn't Appreciate Gym Membership's Auto-Renewal

California resident Katherine Chabolla signed up for a trial gym membership with ClassPass in January 2020, purchasing a package deal access to gyms, fitness studios, and fitness classes through the company's website. But when the pandemic hit in March 2020, ClassPass suspended charges for all of its customers, including Chabolla.

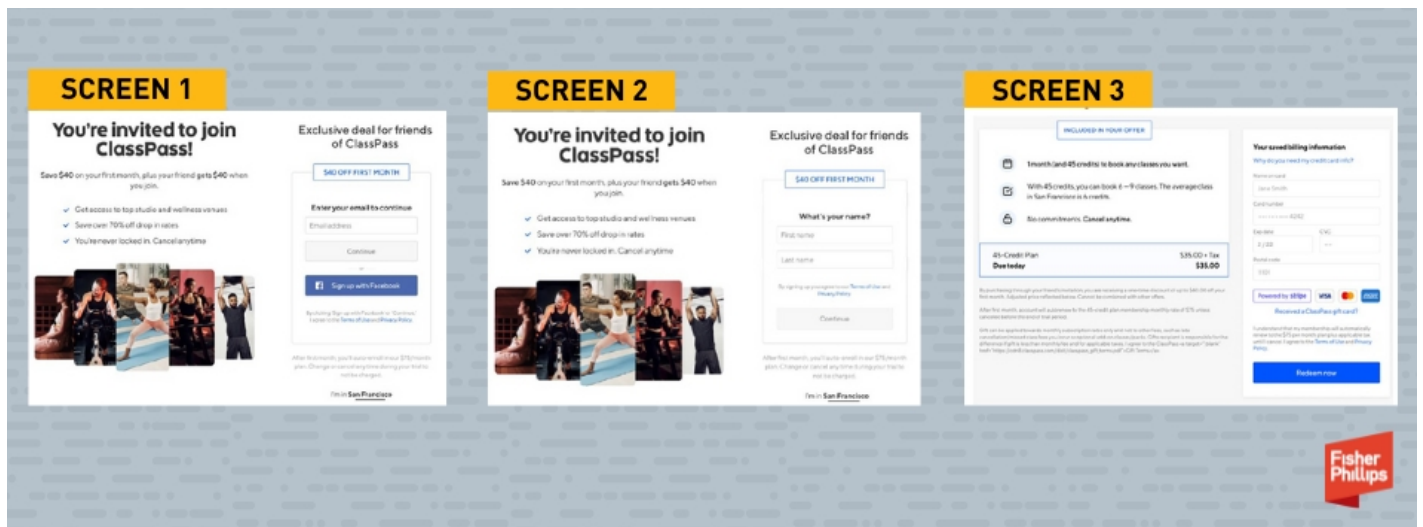
A few months later, it renewed charges when its facilities re-opened – and Chabolla wasn't pleased to learn that the company auto-renewed her membership. She brought a class action suit in the Northern District of California against ClassPass for violating California's Automatic Renewal Law, Unfair Competition Law, and Consumer Legal Remedies Act.

ClassPass Claimed its Terms of Service Required Arbitration

ClassPass argued that Chabolla agreed to its arbitration agreement contained in its online Terms of Use when she signed up for her online membership. At issue was whether the website provided conspicuous notice of the Terms of Use and whether Chabolla unambiguously manifested her consent. But both the lower court and the appeals court ruled in Chabolla's favor and denied the company's attempts at enforcing the arbitration agreement.

Court Says Website Design Too Confusing for Consumers

The Court analyzed how visitors interacted with the ClassPass website, focusing on "Screens 1, 2, and 3." (See below for screenshots; click to expand)



- **Screen 1** provided information about the rates of memberships and discounts and a text field for an email address with a “Continue” button below. In smaller gray font was language stating, “By clicking Sign up with Facebook or ‘Continue,’ I agree to the Terms of Use and Privacy Policy.”
- Clicking “Continue” directed users to **Screen 2**, which contained the same text on the left side on the screen. But the right side of the screen differed, now asking “What’s your name?” and including a text-prompt for “First name” and “Last name.” Below that, language stating, “By signing up you agree to our Terms of Use and Privacy Policy” and below that a clickable box reading “Continue.”
- Clicking “Continue” directed users to **Screen 3**. The left of the screen no longer had promotional information, but instead read “INCLUDED IN YOUR OFFER” with the terms of the membership, including costs, cancellation, and credits for classes displayed below. The right side of the screen prompted users for billing information and below that a statement, “I agree to the Terms of Use and Privacy Policy.” There was no “Continue” button, but instead a clickable “Redeem now” button.

The Court recognized there was no bright-line test for what design elements would be satisfactory in every circumstance and considered the overall design of the screens, focusing on which visual elements would draw the user’s attention.

- The Court concluded that the design and language of **Screen 1** did not provide conspicuous notice of the Terms of Use. It said users would likely continue without reading the language indicating they agreed to the Terms.
- The Court also found that the notice language on **Screen 2** was ambiguous. The language read, “by signing up, you agree to our Terms of Use and Privacy Policy,” but there was no sign-up button, rather just a “Continue” button.
- **Screen 3** was also ambiguous, the Court said. It contained language that, “I agree to the Terms of Use and Privacy Policy,” but the clickable action that followed was a “Redeem now” button.

Considerations with Different Types of Agreements

The proper test for whether an online agreement is enforceable is whether it provided conspicuous notice and the visitor unambiguously assented to its terms. Practically speaking, there are some simple principles to consider with each type of agreement you can have in place.

- **Clickwrap:** When a user is required to click one button that expressly says they assent to the terms of use by clicking that button. That user will more likely be bound than if no click were required.
- **Browsewrap:** When there is no click required on a website but it nevertheless provides some notice of its terms of use somewhere on the website. Such an arrangement could reduce the chances of binding a user if challenged in court.
- **Scrollwrap:** When you require the user to scroll through the entire terms of use before clicking a button confirming the user's assent. This would enforce the arbitration agreement for users who simply browsed the website without making a purchase, and thus providing a shield from online wiretapping claims alleging unlawful collection of data while browsing. A clickwrap that does require scrolling will be generally enforceable as well, but not as strong as a scrollwrap. Nevertheless, if a business is inclined to use a sign-in wrap instead, lessons can be learned from this ruling.

3 Considerations For Sign-In Wrap Agreements

But what if you want to incorporate a sign-in wrap agreement, like the one in the *ClassPass* case? This is where a user does not click a button affirming their assent but rather clicks a sign-up button after reading language indicating that they agree to such terms by signing up. This type of arrangement may yield advantages to businesses, generating more hits and driving more sales than a clickwrap. However, this arrangement exposes a company to risks of unenforceability – as ClassPass learned the hard way.

The main lesson from this ruling? It is critical to use straightforward design elements combined with language plainly explaining the outcome of a website visitor's click when seeking to bind users to online terms of use or other agreements. Here are three suggestions to overcome court resistance to enforceability.

- First, a reviewing court will pay attention to the **sequential order of screens** accessed from the user's perspective beginning from the home page. The finding of defects on Screen 1 proved fatal in this case, as the Court made clear that Screens 2 and 3 could not have cured the absence of conspicuous notice on Screen 1. Thus, it is most important to provide conspicuous notice on the first screen. Including consistent notice language on each screen will also provide greater chance a court finds conspicuous notice.
- Second, the **language must be clear** in explaining what the user is agreeing to and how they manifest their assent, describing that the user agrees to the terms of use by clicking on that button and that those terms include an arbitration provision and a class action waiver. In the

ClassPass case, the Court found that the words “Continue” and “Redeem now” created ambiguities for the user. Likewise, Screen 2’s “What’s your name” prompt preceded the “Continue” button, which suggested the user is continuing to enter their name rather than clicking to consent to the terms.

- Third, the **positioning, text size, and text color** are important factors. The Court explained that optimal sign-in/sign up pages place the notice language within the “user’s natural flow,” display the language “more centrally,” and include a “less crowded” screen to be considered a conspicuous notice.

Conclusion

If you have questions about your online agreements, please contact your Fisher Phillips attorney, the authors of this Insight, or anyone of the Fisher Phillips [Consumer Privacy Team](#). For more tailored resources and ongoing guidance, [our FP U.S. Privacy Hub](#) offers up-to-date insights, FAQs, and compliance solutions to help you navigate the modern consumer privacy landscape with confidence. Fisher Phillips will continue to monitor developments in this area and provide updates as warranted, so make sure you are subscribed to [Fisher Phillips’ Insight System](#) to get the most up-to-date information direct to your inbox.

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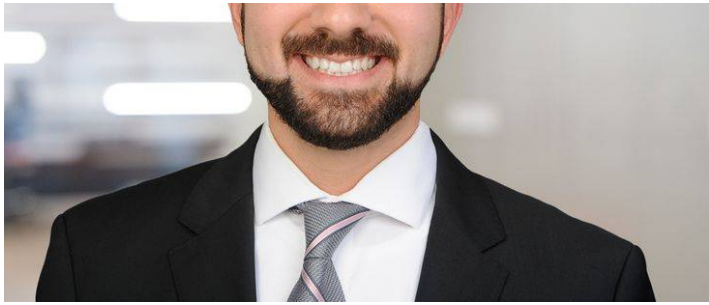
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