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3 RECENT COURT WINS SHOW HOW WELL-BUILT WEBSITE TERMS CAN DEFEAT CLASS ACTIONS

Insights
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3 Recent Court Wins Show How Well-Built Website Terms Can Defeat Class Actions

A well-built website “terms of use” is one of the most powerful tools you have to keep a privacy class action out of court, but most businesses simply treat theirs as a boilerplate afterthought. Three recent court decisions show the strong defense the terms of use can create when you get it right. In each case, the business used its own website terms of use to force a proposed class action into individual arbitration or push the fight out of the plaintiff’s preferred courtroom. What do you need to know about these three cases, and what should you do about your own site?

Why Should Businesses Care?

If your website collects information from visitors, you are a target for privacy class actions. California’s Invasion of Privacy Act (CIPA) carries penalties of up to $5,000 per violation, and CIPA class actions routinely settle in the high six figures or even seven figures. If your site gets thousands of California visits a year, you are in danger of being a class-action target.

Recent Wins Are the Flip Side of 2 Recent Losses

These recent wins make the most sense when you read them against losses that businesses suffered in the past year.

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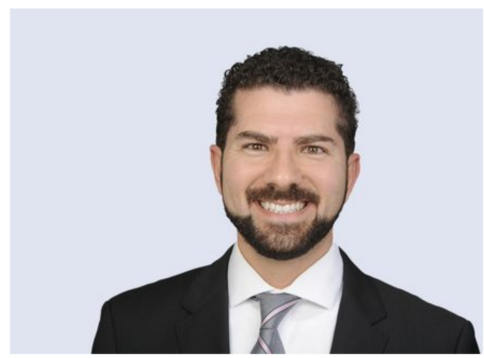

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- In *Chabolla v. ClassPass*, the 9th Circuit refused to enforce a gym's arbitration clause because its three sign-up screen designs used inconsistent design and ambiguous buttons labeled "Continue" and "Redeem now." The court found that a reasonable consumer would not have understood they agreed to arbitration.
- In *Rios v. HRB Digital*, a California federal court struck the arbitration clause as unconscionable. The court pointed to inconspicuous, buried opt-out and mass-arbitration sections that could delay claims for years, then declined to sever the offending terms and tossed the whole clause.

The Key Test in a Nutshell

In the three cases summarized below, all three courts ran the same analysis to decide whether a binding agreement was formed:

1. Did the website give the consumer **reasonably conspicuous notice** of the terms?
2. Did the consumer take some action that **unambiguously manifested assent** to those terms?

What's striking is that the companies cleared this bar in three very different settings: a mortgage refinance application, a med spa intake form, and a website cookie banner.

What Made These Notices "Conspicuous"

- In *Firlej v. Petrosian Esthetic Enterprises* (C.D. Cal., June 2026), the court pushed an entire putative class action into individual arbitration on the strength of an arbitration clause and class waiver. A med spa patient completed a pre-appointment consent form with a checkbox stating, "*By checking this box I am agreeing to the following terms*," directly tied to language confirming she had read and agreed to the Terms of Use available at the links provided. The court found conspicuous notice even though the form used no blue font, no underlining, and no all-caps for the link. It focused on the fact that the form was clean and uncluttered, consistently formatted, only three pages, and set the links off with bullet points.

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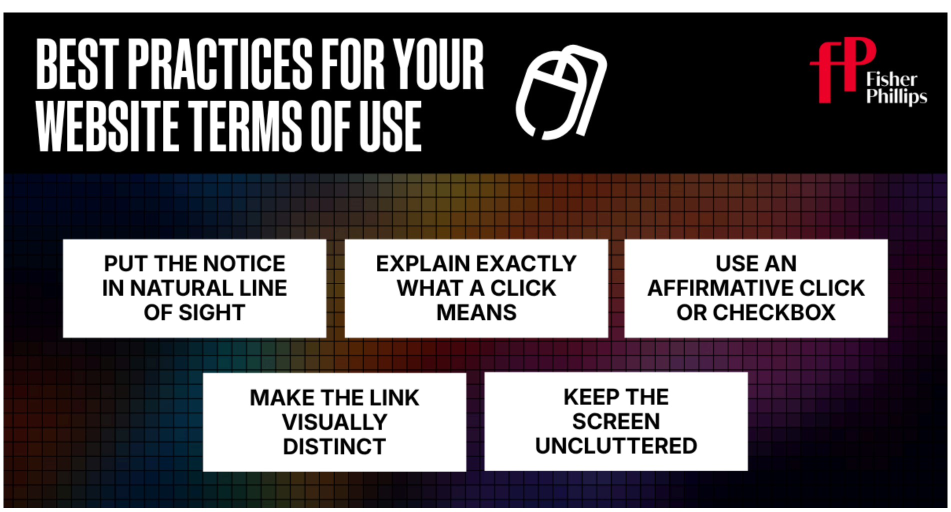
- In *Penning v. NVIDIA* (N.D. Cal., May 2026), the court also forced the dispute into individual arbitration due to a well-constructed arbitration clause and class waiver. The plaintiff browsed the site after declining cookies, then sued under CIPA. NVIDIA's cookie banner stated that by clicking any button the user accepted the Terms of Service "(which contains important waivers)," with "Terms of Service" underlined in contrasting green and placed above the action buttons on a persistent banner. The court found that adequate. It also found something more damaging to the plaintiff: because his own complaint admitted he read and relied on the banner's representations about cookies, he could not turn around and claim he never saw the Terms of Service link sitting in that same banner.

- In *Fedoroff v. Rocket Mortgage* (N.D. Cal., June 2026), the court agreed that the company's forum selection clause to transfer the case from California to Michigan, which was contained in its terms, was enforceable. A borrower filled out an online refinance application, entered his contact information, and clicked a "Confirm & continue" button sitting directly below a line that read, *"By providing your contact info and clicking 'Confirm & continue' below, you agree to our Privacy Policy and Terms of Use."* The court enforced the forum selection clause even though the "Terms of Use" link was not the classic blue hyperlink. It was bolded, underlined, and capitalized, it sat directly above the action button in the user's line of sight, and the surrounding page wasn't cluttered. The court rejected the argument that the link was lost in a "busy paragraph," noting that people read top to bottom and would see the link before reaching the button.



What Are the Key Elements?

Pulling those threads together, here's what consistently moves a court toward enforceability:

- **Put the notice in the user's natural line of sight,** directly above or adjacent to the button they click, not buried at the bottom or off to the side.
- **Make the link visually distinct.** A traditional blue hyperlink is ideal, but bolding, underlining, capitalization, or a contrasting color can be enough when paired with good placement.
- **Tell the user exactly what their click means** in plain language, including that the terms contain an arbitration provision and class action waiver.
- **Keep the screen uncluttered.** A clean, simple page makes the link more readily apparent.
- **Favor an affirmative action** like a click or a checkbox over passive browsing. Clickwrap and scrollwrap are far stronger than browsewrap.

A Word of Caution: Arbitration Is a Trade-Off, Not a Free Win

Before you decide to adopt an arbitration agreement, weigh the costs. Arbitration is cost-effective against one or a few claimants, but it can become a liability in large numbers.

The biggest risk is mass arbitration, where dozens or hundreds of claimants can file individual demands at once as a pressure tactic, and the non-refundable administrative fees alone can be staggering. Arbitrators commonly bill $800 to $1,500 per hour, and a single matter can run past $100,000 through a hearing. Arbitration also tends to push up the settlement value of individual claims. Additionally, arbitrators can be more reluctant than judges to grant dispositive motions, and appellate review is limited or nonexistent.

Arbitration makes sense when the risk and cost of a class action outweigh the risk of losing a handful of individual cases you might have won in court. That's a strategic judgment you should make in consultation with your FP attorney.

Conclusion

If you have questions about your online agreements or want a review of your website terms, please contact your Fisher Phillips attorney, the author of this Insight, or any member of our Privacy and Cyber Team. You can also explore additional resources on our US Privacy Hub at any time. Fisher Phillips will continue to monitor developments in this area, so make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information direct to your inbox.