

PUBLICATION

Doing Business Online: Travails and Conflicts (Ts&Cs) in Online Agreements

November 01, 2009

Publication: Nashville Bar Journal

If you have a client that has a website, then you have got a problem. You have probably counseled your client to include a "Terms of Use" hypertext link on the website that, at a minimum, alerts the user of the website that accessing or using the website is an affirmative action that indicates the user's consent to those terms of use. If your client is conducting commerce at the website, you may even have counseled your client to include a "click through agreement" as part of the sales process (where the customer is presented with the terms of the transaction and forced to affirmatively click an "I Agree" icon on the webpage in order to complete the transaction).

The problem is that recent court opinions have called some terms of these online agreements into question. As a result of these recent decisions, your client's ability to conduct business, and contractually bind its customers via industry standard online agreements, may be in jeopardy.

Historically, most businesses have attached certain terms and conditions to each of their commercial transactions. Such "Ts and Cs" may be in the form of a negotiated, executed agreement between the parties. However, more frequently in commercial settings such Ts and Cs are set out as attachments to invoices, additional documentation to purchaser orders, or a host of other non-obvious mechanisms in what has become known as "the battle of the forms."