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## A Binding "Clickwrap Agreement" From Paper?



By [Richard Stobbe](#)

Consumers and businesses routinely enter into binding contracts by means of both paper agreements and online "click-through" agreements. But what happens when you face a "hybrid" contract? Can a binding contract be formed merely with a link to another set of terms?

The answer is clear... it depends. Consider the American case of *Holdbrook Pediatric Dental, LLC, v. Pro Computer Service, LLC* (PCS). This decision considered the enforceability of a set of terms which were "linked" from a paper hard-copy version of the contract.

In *Holdbrook Pediatric*, PCS sent a contract to its customer electronically. The customer printed out the paper version, signed it in hard copy and sent it back. Near the signature line, a hyperlink appeared pointing to a separate set of Terms and Conditions in HTML code. Of course, on the paper copy these terms could not be hyperlinked. It was simply a static line typed out on the paper copy that appeared like this:

```
"<a  
href=http://www.helpmepcs.com/site_media/terms.conditions.pdf>Download  
Terms and Conditions</a>
```

PCS asserted that these separate terms were incorporated into the signed paper contract, since they function as a clickable hyperlink in the electronic version. The Court disagreed: "In order for there to be a proper and enforceable incorporation by reference of a separate document ... the party to be bound by the terms must have had 'knowledge of and assented to the incorporated terms.'"

In this contract, there was no independent assent to the additional Terms and Conditions, and the mixed media nature of the contracting process worked against PCS. In addition to the fact that the separate terms were not easily accessible by the customer in the paper version, the text was not clear. It merely said "Download Terms and Conditions," without providing reasonable notice to the customer that assent to the main contract included assent to these additional terms.

The Court held that these additional terms were not binding on the customer.

Want to hear more? For more background on this topic, check out our earlier post entitled "[What, exactly, is a browswrap?](#)" which reviews browswraps, clickwraps, clickthroughs, terms of use, terms of service and end-user license agreements.

Field Law's Intellectual Property and Technology Group has considerable experience in creating binding Terms and Conditions, and can assist your business in ensuring that your agreements can be enforced.

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