

## **Insurance Implications Of Online Terms And Conditions**

As you read this sentence, someone is accepting — without thought — online terms and conditions to purchase the latest version of Angry Birds. Online terms and conditions are not limited to \$1.99 application purchases, however, and are increasingly incorporated by reference into a variety of contracts. Indeed, as a number of courts across the country are using traditional contract principles to enforce online terms and conditions incorporated by reference into contracts, there may be surprising effects on insurers.

## **Incorporation by Reference**

Under standard contract principles, a party may incorporate contractual terms by reference into a separate, noncontemporaneous document, if the contract expressly references and describes the document and the parties to the agreement agree to the incorporated terms. As commerce continues to move online, an emerging area of law is the enforceability of online terms and conditions incorporated by reference into other contracts.

Case law on the enforceability of online terms and conditions incorporated by reference fits generally into three categories: 1) online terms and conditions which are expressly incorporated by reference in the agreement; 2) online terms and conditions which are not referenced in the agreement; and 3) situations involving clickwrap agreements — where the user has to “agree” or “accept” the applicable terms and conditions — before downloading the product or accessing the website.

Courts are increasingly willing to enforce online terms and conditions incorporated by reference when one or more of the following conditions are met:

1. The agreement, purchase order, invoice, or contract specifically references the terms and conditions and uses explicit incorporating language. *See e.g., Sparteck CMD LLC v. Int’l Auto. Components Group N. Am. Inc.*, No. 08-13234, (E.D. Mich. Feb. 23, 2009) (enforcing arbitration clause contained in terms and conditions on defendant’s website where “Defendant’s intent to incorporate its Terms [w]as clear on its face”: “This purchase order ... incorporates by reference [Defendant’s] Purchase Order Terms and Conditions which are available through links provided on [Defendant’s] Web Site at [www.IABCGROUP.COM](http://www.IABCGROUP.COM).”);
2. The agreement, purchase order, invoice, or contract expresses the parties’ intent to be bound by the contract’s terms. *See e.g., MicroMetl Corp. v. TranzAct Techs. Inc.*, No. 1:08CV0321-LJM-WTL (S.D. Ind. June 5, 2008) (“As their signatures suggest, both [parties] intended to be bound by the words of the written three-page Contract, which repeatedly acknowledged the governing principles on [Defendant’s] website and made clear that [Plaintiff] would be subject to these principles.”); and

3. The agreement, purchase order, invoice, or contract includes the web address where the terms and conditions may be found and the terms and conditions are readily available. *Int'l Star Registry of Ill. v. Omnipoint Mktg. LLC*, No. 05 C 6923 (N.D. Ill. Sept. 6, 2006) (enforcing forum selection clause in the defendants' online terms and conditions which provided that the signing party "read and agree[d] to the provisions set forth in th[e] invoice and to the terms and conditions posted at <http://www.omnipointmarketing.com/genterms.html>").

### **Impact on Insurers**

One recent case, *One Beacon Ins. Co. v. Crowley Marine Services Inc.*, 648 F.3d 258 (5th Cir. 2011), demonstrates the potential impact incorporation of online terms or conditions can have on insurers. In *One Beacon*, Crowley Marine Services Inc., the owner and operator of several marine vessels, hired Tubal-Cain Marine Services Inc., a contractor, to perform work on one of Crowley's vessels. *Id.* at 261. Tubal-Cain in turn hired a subcontractor to perform additional work on the vessel. *Id.* During repairs to the vessel, one of the subcontractor's employees suffered injuries and sued Crowley and Tubal-Cain for negligence. *Id.*

Crowley demanded defense and indemnity from Tubal-Cain for expenses incurred from the employee's suit. Crowley also demanded defense and indemnity from One Beacon Insurance Company, as an additional insured under Tubal-Cain's Maritime Comprehensive Liability Policy ("the policy"). *Id.* One Beacon denied coverage and filed a declaratory judgment action asserting that Crowley was not entitled to coverage as an additional insured under its policy. *Id.*

Crowley filed a third-party complaint against Tubal-Cain in the declaratory judgment action, alleging that Crowley's online terms and conditions — which were incorporated by reference in each of Crowley's repair service orders ("RSOs") and issued for each project — required Tubal-Cain to defend and indemnify Crowley and to carry various insurance policies naming Crowley as an additional insured. *Id.* at 261-62. The first page of each RSO contained the following notice: "THIS RSO IS ISSUED IN ACCORDANCE WITH THE PURCHASE ORDER TERMS & CONDITIONS ON WWW.CROWLEY.COM." *Id.* at 263 (emphasis in original).

The Fifth Circuit affirmed the district court's holding that "Crowley's online terms and conditions were clearly incorporated [by reference] into the RSO and that Tubal-Cain had adequate notice of and opportunity to review them." *Id.* at 269. Confirming that online terms and conditions may be validly incorporated by reference into a contract, the Fifth Circuit explained that:

Terms incorporated by reference will be valid so long as it is "clear that the parties to the agreement had knowledge of and assented to the incorporated terms." Notice of incorporated terms is reasonable where, under the particular facts of the case, "[a] reasonably prudent person should have seen" them.

We see no reason to deviate from these principles where, as here, the terms to be incorporated are contained on a party's website. We note that contracts formed in whole or in part over the internet

present relatively new considerations for the courts, and will continue to challenge the courts as the internet plays an increasingly important role in commerce. However, “[w]hile new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.”

*Id.* at 268 (internal citations omitted).

The Fifth Circuit found that Crowley’s intent to incorporate the terms and conditions on its website was “clear from the explicit incorporating language prominently placed on the face of the RSO in all capital letters.” *Id.* at 269. Further, “the RSO clearly referred to a particular document — Crowley’s website — containing these terms and conditions,” and the terms and conditions were readily accessible on Crowley’s website at all times. *Id.*

The court also held that Tubal-Cain assented to the terms and conditions by accepting the RSOs without objection. *Id.* at 270. The Fifth Circuit concluded that Tubal-Cain could not “avoid contractual terms by pleading ignorance of their existence, if the contract is clear on its face that such terms were intended to be incorporated” and Tubal-Cain had “knowledge of and an opportunity to review those terms.” *Id.*

Despite the fact that the Fifth Circuit affirmed the enforceability of Crowley’s online terms and conditions — including the provision that required Tubal-Cain to insure Crowley — the court concluded that Crowley was not an additional insured under the One Beacon Policy. *Id.* at 272. Relying on the policy’s “Additional Insured” endorsement,[1] the Fifth Circuit held that the endorsement “unambiguously require[d] an additional insured to be named in the endorsement” to be afforded coverage. *Id.* Because Crowley failed to demonstrate that it was named in the endorsement, the Fifth Circuit affirmed the district court’s holding that Crowley was not an additional insured under the policy. *Id.*

Although specific policy language precluded coverage in *One Beacon*, the case illustrates a potential area of exposure for insurers in situations where the insured is susceptible to online terms and conditions incorporated by reference into contracts the insured enters into with third parties. As more and more courts are willing to enforce online terms and conditions, insurers should consider how their policies may be implicated by contracts that their insureds have with third parties.

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[1] The endorsement provided: “Section IV of the policy (Who is an Insured) is amended to

include the person(s) or organization(s) shown below as an Insured hereunder to the extent that you are obligated by an 'insured contract' to include them as Additional Insured . . ." *Id.*

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