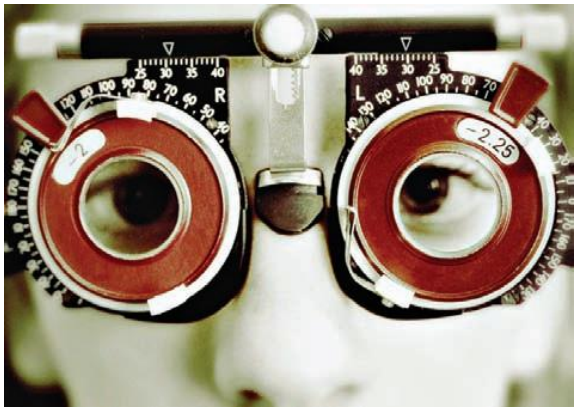
Understanding the fine print

How to make sure the gotchas don't get you.



Here at Consumer Reports, one of the most repeated bits of advice is "read the fine print." But that might be easier said than done, since what you'll find in that tiny type is often a lot of incomprehensible legalese.

But the fine print "is where the devil frequently lurks," says Daniel S. Blinn, managing attorney at the Consumer Law Group in Rocky Hill, Conn. During his 11 years as a consumer advocate, Blinn has seen many examples where people missed important details, like health-club customers who didn't realize they were signing multiyear agreements, car buyers who failed to notice that their deposits were nonrefundable, and home buyers who didn't know that their mortgages had variable rates. "I've told people there is nothing they can do because they received the required disclosures," he says.

DISCLAIMERS BIG AND SMALL

Fine print is everywhere—contracts; retail Web sites; sales receipts; print, broadcast, and Internet offers; prospectuses; privacy notices; product manuals; and manufacturer warranties. Some disclosures aren't small at all, like the sign in a parking garage warning that the facility isn't responsible for anything that happens to your vehicle or its contents. Other fine print is so small and dense that it can be impossible for many consumers to review, such as the extensive disclosures that come with credit cards.

Some provisions can be found in just about every contract or purchase agreement. For example, many types of businesses include provisions that limit customer warranty rights. Other terms are common to specific industries, such as the fine print for bank-issued gift cards that spells out details about fees.

Of course, many people overlook those details because the fine print is tedious to read and might even require a magnifying glass. But you still need to review it so that you understand what you're buying, what you're entitled to in a dispute, and what to expect from the company you're doing business with.

At the same time, those tiny-type provisions might not be legal and enforceable (see box below). Since laws vary by state, terms that are valid under some state laws may not be elsewhere. And fine print that applies in one case may be invalid in another. For example, a retailer's no-return policy is probably binding if you decide that you don't like what you bought. But it probably wouldn't allow the retailer to simply deny responsibility if an item you purchased was misrepresented or turned out to be defective.

And a provision that's defensible in concept may be invalid because of the way it's worded or otherwise presented. For instance, a merchant wouldn't be able to enforce a warranty disclaimer that appears only on the back of a receipt, requiring someone to make a purchase to discover the terms that govern the sale. Federal law requires that such terms be displayed at the point of sale of goods. In fact, a provision's validity often depends on how conspicuous the disclosure was, Blinn says.

COMMON TERMS EXPLAINED

Here are some examples of common but hard-to-understand provisions and what they mean.

▶ **Disclaimer of implied warranty of merchantability.** "This warranty is expressly made in lieu of any and all other warranties, express or implied, including merchantability. … This warranty gives you specific legal rights, and you may also have other rights which vary due to local jurisdiction of claim."

— Woods surge-protector warranty

Meaning: This clause, common in manufacturer warranties and on retail Web sites, negates the assumption that a product is fit for the general purpose for which it was intended, including that it will last a reasonable amount of time with normal use. Some merchants, including walk-in retailers, assert this disclaimer by selling items "as is."

Our take: About half the states and Washington, D.C., limit or prohibit disclaiming implied warranties on new

Taking on the bad terms

Don't assume it's legal. Check with your state attorney general, consumer protection department, or other local or federal regulatory agency. If you don't get satisfaction, you could take the case to small claims court or, if there's a substantial amount of money involved, consult an attorney.

Talk your way out of it. Just because a clause is legal doesn't mean the company will necessarily enforce it, says Jean Braucher, a law professor at the University of Arizona in Tucson. A company may do more than it's required to do by the legalese in order to satisfy a customer, especially a good one.

products. And federal law prohibits such disclaimers while a product's express warranty, if any, is in effect. We've seen the disclaimer's use on virtually every retail Web site we've reviewed—it's applied to both the functioning of the sites themselves as well as the goods sold on them. But its validity in interstate sales, such as those over the Internet, might not be enforceable. If you want the full benefit of traditional consumer protections, shop at a retailer's walk-in store.

▶ **Disclaimer of consequential and incidental damages.** "Nor shall Sharp be liable … for any incidental or consequential economic or property damage. Some states do not allow the exclusion of consequential or incidental damages."

— *Sharp microwave warranty*

Meaning: If a product is detective, this language shields a company from consequential damages (if you lose a day's pay as a result of the product's malfunction, for instance) and incidental damages (for example, the cost of shipping back the product). It's commonly found in manufacturer warranties and in the terms and conditions of retail Web sites.

Our take: Even in states that allow this disclaimer, courts sometimes invalidate it for consumer products. It's rarely seen in walk-in retailers. Incidentally, businesses cannot "fine print" away their responsibility if you're injured by a defective product they've sold.

▶ **Risk of loss.** "The risk of loss and title for all merchandise ordered on this Web site pass to you when the merchandise is delivered to the shipping carrier."

— *www.sears.com*

Meaning: Sometimes referred to as FOB (freight on board) origin, this shipping language shifts the ownership—and the risk of loss or damage—to the buyer once ordered products are delivered to a carrier, such as UPS.

Our take: This provision probably wouldn't be enforceable if the retailer was negligent in handling or packing the merchandise. Also, many items are shipped insured, so file a claim with the shipper as well as the retailer if you receive damaged merchandise. Even if a retailer's policy is to retain ownership until its product arrives at your shipping address (known as FOB destination), its fine print may require you to notify it about damaged or missing items within a certain number of days.

▶ **Governing law.** "These terms are governed and construed by the laws of the Commonwealth of Virginia without regard to its conflict of law rules."

— *www.circuitcity.com*

Meaning: Common on retailer Web sites, this clause subjects sales to the laws of the retailer's home state, not those of the customer's state, even if the latter has stronger consumer protections. In this case, the retailer wants to apply Virginia rules to interstate transactions even if that state's "conflict of law" rules say that the other state's laws should apply.

Our take: This clause, a retailer's attempt to choose which laws it wants to obey, may be unenforceable. But to be certain that your state's consumer protections apply, shop at a retailer that's located in your state.

▶ **Venue for disputes.** "You agree that Waukesha County, Wisconsin, shall be the exclusive venue and jurisdiction for any dispute, liability, damage, claim or loss arising from or in any associated with your use of, or access to, the Site."

— *www.kohls.com*

Meaning: Often used with the clause on governing law, this provision requires consumers to file lawsuits in the company's home state, not where they live.

Our take: Courts have gone both ways in ruling on the enforceability of this clause, which can make it difficult for you to get satisfaction, even if the case is in your favor.

▶ **Arbitration clause.** "Any claim, dispute or controversy … shall be resolved exclusively and finally by binding arbitration."

— *www.dell.com*

Meaning: This requires you to give up your right to sue the company. It's often used with a provision forcing you to agree not to participate in or bring class-action proceedings against the company. Binding arbitration is a dispute-resolution process that requires both sides to present their cases to a third-party adjudicator whose decision is final.

Our take: This provision can make it difficult for you to get satisfaction. Unlike court rulings, arbitration decisions aren't public, which means they can't be cited in legal cases or used to deter companies' bad behavior. Unfortunately, this clause can be hard to avoid, especially in contracts involving credit cards, cell phones, and financial services, where it is commonly found. You can try striking it out of a paper contract before signing. Courts have gone both ways in ruling whether such clauses are enforceable. Consumers Union, the nonprofit publisher of Consumer Reports and this newsletter, has long sought arbitration reform. $

Wrapping up your online rights

You probably haven't heard the terms "click wrap" and "browse wrap," but if you've spent any time on retail Web sites, you've seen examples.

Click-wrap agreements require you to click on a button that says something like "I Agree" before you can proceed with an online transaction. Courts have generally upheld those agreements, which are especially strong if the site requires you to scroll through the fine print before the "I Agree" button becomes active.

In a browse-wrap agreement, the terms and conditions that govern the Web site are spelled out in a separate place, usually accessible by clicking on a "Terms of Use" link at the bottom of the site's pages. If the terms are easy to find and access before making a purchase, they are generally considered to be enforceable.

Two appeals court decisions, one in Illinois in 2005 and another in California last year, have upheld browse-wrap agreements. One required Dell computer customers to agree to arbitrate, rather than litigate, any disputes with the company. The other case required customers of an Internet matchmaking service to file any lawsuits against the company in Texas courts.

The moral? Read the fine print carefully, even if you have to hunt for it.