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CONSUMER CLICK ARBITRATION: A REVIEW OF ONLINE CONSUMER ARBITRATION
AGREEMENTS

By
Jeffrey H. Dasteel*

I. INTRODUCTION

In 2016, e-commerce will have accounted for just under \$400 billion in sales in the United States.¹ This represents an increase of 15% over 2015, and, over the last ten years, an increase from 2.5% of annual retail sales to over 8% of total annual retail sales.² That is a lot of shopping. Each transaction includes terms and conditions accessible by hyperlink or by scrolling through a screen with the terms and conditions. How many of the transactions impose arbitration on the consumer? Do the online providers of goods and services inform consumers of the requirement to arbitrate disputes in a manner that reasonably puts them on notice that they have given up the right to resolve disputes in court? Are these online arbitration provisions enforceable?

To answer these questions, we first surveyed existing law on the enforcement of online arbitration provisions. Relying on principles originally developed for paper contracts, the leading cases consider a consumer bound by an online arbitration clause if the consumer had actual or constructive knowledge of the arbitration requirement. Courts consider a consumer to have constructive knowledge of the arbitration requirement if the consumer knew there were significant terms and conditions associated with the transaction.³

To determine whether the consumer had notice that there were significant terms and conditions associated with the transaction, the cases divide websites into two basic types: browsewrap and clickwrap. For browsewrap sites a consumer can complete the transaction without having to actively assent to the terms and conditions associated with the transaction. Browsewrap sites typically provide a hyperlink somewhere on the site that, if clicked, reveals the terms and conditions. Most cases do not enforce arbitration when included in browsewrap-type websites, unless the consumer is determined to have had actual knowledge of the arbitration clause in the terms and conditions or the consumer had special knowledge.⁴

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¹ U.S. DEP'T OF COMMERCE, Quarterly Retail E-Commerce Sales 4th Quarter 2016, https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf (last updated Feb. 17, 2017).

² *Id.*

³ *See infra* Part 1: A Short Survey Of Current Case Law On The Enforcement Of Arbitration In Online Consumer Transactions.

⁴ *Id.*

Clickwrap-type websites require the consumer to click on a box accepting the terms and conditions of the transaction before being permitted to complete the transaction. For clickwrap websites that display the terms and conditions in a box on the same screen as the “accept terms and conditions” button, leading cases enforce these arbitration agreements even if the consumer does not actually read the terms and conditions. According to these cases, the consumer has actual knowledge that there are significant terms and conditions and therefore is on constructive notice of the existence of the arbitration clause included in the terms and conditions.⁵ For clickwrap websites that do not show the terms and conditions on the same screen, but instead provide a hyperlink to the terms and conditions, courts nonetheless will enforce arbitration if the design of the webpage is deemed to provide the consumer adequate notice that there are significant terms and conditions applicable to the transaction.⁶

After our review of existing case law, we conducted a survey of 200 websites that offer goods and services to consumers to determine (1) how frequently online sellers of goods and services include arbitration clauses in their terms and conditions of sale and (2) the manner in which online sellers of goods and services seek to bind consumers to arbitration.⁷ Our survey found roughly 48% of the websites we reviewed included binding arbitration in their terms and conditions.⁸ Based on nearly \$400 billion in online transactions in 2016, it is likely that approximately half that amount is subject to binding arbitration.

We found the way sellers and service providers give notice to consumers that disputes will be resolved in arbitration falls into two basic categories. First, 88% of the websites we reviewed that include binding arbitration rely on passive acceptance of their terms and conditions. In these cases, a consumer “agrees” to binding arbitration by placing an order on the website without having to actively accept the terms and conditions of sale (browsewrap).⁹

Twelve percent of the websites that include binding arbitration rely on active acceptance of terms and conditions.¹⁰ In these cases, a consumer must actively agree to accept the terms and conditions of sale before placing the order (clickwrap). We found two basic categories of clickwrap agreements. The most common form in transactions that sell consumer goods is where the consumer clicks on a box to accept the terms and conditions of the transaction, but must click on a “terms and conditions” hyperlink to see the actual terms and conditions. The other form of clickwrap, which appears to be most common in

⁵ See *infra* Part 1: A Short Survey Of Current Case Law On The Enforcement Of Arbitration In Online Consumer Transactions.

⁶ *Id.*

⁸ See *infra* Part 2: A Review Of Terms And Conditions Of 200 Websites Selling Consumer Products And Services (key features of the online arbitration clauses).

⁸ See Appendix 1.

⁹ See *infra* Part 2: A Review Of Terms And Conditions Of 200 Websites Selling Consumer Products And Services (summary results of the website review).

¹⁰ *Id.*

software and hardware transactions, provides the terms and conditions in a scrollable box on screen and requires the consumer to click an acceptance box below the terms and conditions to proceed with the transaction. In virtually all cases, regardless of the method used to get the terms and conditions on screen, the consumer must scroll through many terms and conditions before learning whether the transaction includes binding arbitration.¹¹

We next conducted a survey of 28 well-known retailers to determine whether these retailers (1) include arbitration as part of their in-store terms and conditions and (2) include arbitration in their online terms and conditions.¹² We found that none of the 28 retailers include arbitration as part of their in-store terms and conditions, but 13 include arbitration as part of their online terms and conditions.¹³ This micro survey raised questions about the possibility of a mismatch between in-store and online terms and conditions for the same retailers and products. Specifically, we consider whether this mismatch heightens the need for online sellers of goods and services to provide robust notice to consumers when sellers seek to bind consumers to resolve disputes in arbitration.

Finally, we reviewed prior studies, which show that virtually no one either clicks on the terms and conditions hyperlink or reads through the list of terms and conditions when provided in a scrollable box.¹⁴ That leads to the question of whether courts are asking the right question when determining whether to apply the doctrine of constructive notice to bind a consumer to arbitrating disputes arising out of online transactions. For paper transactions, courts often require the arbitration clause to be conspicuous for constructive notice.¹⁵ For online transactions, courts currently inquire whether the consumer is on notice there are significant terms and conditions associated with the transaction without regard to whether those terms and conditions may include arbitration.¹⁶ However, it is difficult to understand how the reasonable consumer could be charged with constructive knowledge of an arbitration clause when the consumer must either scroll through a long list of terms and conditions or click a hyperlink and then scroll through a long list of terms and conditions just to find out whether there is an arbitration clause. The concept of constructive knowledge under these circumstances is especially hard to understand when there is a mismatch between the seller's in-store and online terms and conditions because the in-store purchaser has no reason to believe that the online version of the consumer's transaction will include arbitration when the in-store version did not.

¹¹ See *infra* Part 2: A Review Of Terms And Conditions Of 200 Websites Selling Consumer Products And Services (summary results of the website review).

¹² See Appendix 2.

¹³ See *infra* Part 2: A Review Of Terms And Conditions Of 200 Websites Selling Consumer Products And Services (results of the website and brick and mortar review).

¹⁴ See *infra* Part 2: A Review Of Terms And Conditions Of 200 Websites Selling Consumer Products And Services (previous studies regarding whether consumers read terms and conditions on websites).

¹⁵ See *infra* Part 1: A Short Survey Of Current Case Law On The Enforcement Of Arbitration In Online Consumer Transactions (constructive knowledge in online transactions is established if a consumer has been put on reasonable notice of the existence of terms and conditions).

¹⁶ *Id.*

We conclude that the consumer is only properly placed on constructive notice that the consumer is bound to arbitrate disputes when a clickwrap website warns the consumer of binding arbitration in the same location as where the consumer is required to click agreement to terms and conditions. This form of clickwrap is easily achievable for seller websites. Indeed, we have identified at least one gaming website that provides this form of notice. Courts should refuse to enforce arbitration clauses in online terms and conditions unless the website satisfies this form of clickwrap constructive notice. Such refusal would be consistent with the requirement that arbitration is entered into only by the consent of the parties and any waiver of the right to access to courts and a jury trial must be made knowingly.

II. PART 1: A SHORT SURVEY OF CURRENT CASE LAW ON THE ENFORCEMENT OF ARBITRATION IN ONLINE CONSUMER TRANSACTIONS

Before discussing our survey of dispute resolution provisions on websites that sell products and services to consumers,¹⁷ we first discuss the current case law on the enforcement of arbitration in online consumer transactions.

A. Consumer arbitration agreements are valid and enforceable under FAA Section 2 unless grounds exist at law or equity for the revocation of any contract

Under the Federal Arbitration Act, arbitration agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁸ The Supreme Court has expressly approved pre-dispute consumer arbitration agreements in contracts of adhesion.¹⁹ When “deciding whether parties agreed to arbitrate a certain matter, a court should generally apply state-law principles to the issue of contract formation.”²⁰

Applying state law principles, “[w]hether governed by the common law or by Article 2 of the Uniform Commercial Code (‘UCC’), a transaction, in order to be a contract, requires a manifestation of agreement between the parties.”²¹ “Arbitration agreements are no exception to the requirement of manifestation of assent.”²² A party manifests assent if

¹⁷ A consumer is “a person who purchases goods and services for personal use.” Oxford Dictionaries, OXFORD UNIVERSITY PRESS, <https://en.oxforddictionaries.com/definition/consumer> (last visited Mar. 10, 2017).

¹⁸ Federal Arbitration Act, 9 U.S.C. § 2 (1947).

¹⁹ See generally *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

²⁰ *Specht v. Netscape Commc’ns. Corp.*, 306 F.3d 17, 27 (2d Cir. 2002).

²¹ *Id.* at 28.

²² *Id.* at 30.

the party has actual knowledge of the terms before entering into a transaction.²³ In addition, as has long been the case for paper transactions, “[a] party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing.”²⁴ Indeed, it has been expressly held that “receipt of a physical document containing contract terms or notice thereof is frequently deemed, in the world of paper transactions, a sufficient circumstance to place the offeree on inquiry notice of those terms” and, therefore, binds the party to the terms of a contract the party has not read.²⁵

In *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.*,²⁶ the court enforced the terms of a contract where one of the parties failed to read the terms and conditions included on the reverse side of the signature page. The document was titled “Work Authorization and Contract” and included the following statement immediately above the signature line: “This is a contract which includes all terms and conditions stated on the reverse side . . .”²⁷ The court held that the contracting party was on constructive notice of all the terms on the reverse side of the work authorization form, including the arbitration clause.²⁸

When dealing with consumers, courts generally require significant terms, including the arbitration clause, in a paper contract to be conspicuous to charge a consumer with constructive knowledge of these terms.²⁹ This requirement is consistent with the Supreme Court’s mandate in *AT&T v. Concepcion* that only state law contract principles of general application survive the Federal Arbitration Act’s preemptive effects.³⁰

After centuries of paper transactions, the courts now must deal with formation of electronic contracts entered into over the Internet and decide whether consumers have agreed to arbitrate disputes regarding those transactions. The question then is whether “in the world of the Internet, ordinary consumers are deemed . . . to have given up their access to the courts altogether, because they supposedly agreed to lengthy ‘terms and conditions’

²³ Cf. *United States v. J. C. Schaefer Elec., Inc. v. O. Frank Heinz Constr. Co.*, 300 F. Supp. 396, 400 (S.D. Ill. 1969) (an enforceable contract was formed when subcontractor refused to lower his bid price and the general contractor assented to performance, knowing of the refusal to lower price).

²⁴ *Specht*, 306 F.3d at 30 (internal citations omitted).

²⁵ *Specht*, 306 F.3d at 31.

²⁶ *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng’g, Inc.*, 89 Cal. App. 4th Supp. 1042 (2001).

²⁷ *Id.* at 1049.

²⁸ *Id.* at 1057. *But see, e.g.*, *Hines v. Overstock.com*, 668 F. Supp. 2d 362 (E.D.N.Y. 2009) (Not all courts deal with the constructive notice issue as one of contract formation. Many courts analyze the issue in terms of procedural unconscionability).

²⁹ *Janda v. T-Mobile, USA, Inc.*, No. C 05-03729, 2006 WL 708936, at *5-6 (N.D. Cal. Mar. 17, 2006) (placing arbitration clause on page 49 of 60-page “Welcome Guide” is procedurally unconscionable); *see also All American Roofing, Inc. v. Zurich American Ins., Inc.*, 404 Ill. App. 3d 438, 453 (2010) (finding an arbitration clause enforceable that was sufficiently separated from other clauses).

³⁰ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

that they had no realistic power to negotiate or contest and often were not even aware of.”³¹ Courts apply the same principles applicable to paper contracts when considering whether to bind parties to online transactions and the arbitration agreements included in the terms and conditions of the transactions.³² That is, courts ask the question whether a reasonable consumer was properly on notice that there are terms and conditions to the transaction.³³

B. Constructive knowledge in online transactions is established if a consumer has been put on reasonable notice of the existence of terms and conditions

Courts engage in a factual inquiry as to whether the consumer had actual notice of the terms and conditions of a transaction or can be charged with constructive notice of the terms.³⁴ Absent actual notice of the terms and conditions, the goal of the inquiry is to determine whether “a reasonably prudent offeree in these circumstances would have known of the existence of license terms.”³⁵

When scrutinizing online transactions for constructive notice, courts divide the types of notice into two basic categories – “browsewrap” and “clickwrap.”³⁶ Case law is not entirely consistent when defining these two terms. For purposes of this article, however, “browsewrap” denotes passive acceptance of terms and conditions and “clickwrap” denotes active acceptance of terms and conditions. We mean by “active acceptance of terms and conditions” that websites require the user to click “I agree” or some other express manifestation of assent to the terms and conditions, even when the terms and conditions are not displayed on the same webpage as the page requiring assent to terms and conditions. We mean by “passive acceptance of terms and conditions” those websites that permit the user to complete the transaction without actively accepting the terms and conditions.

The distinction between browsewrap and clickwrap can be blurred depending on the design of the website. For example, a warning that entering into the transaction constitutes agreement to the terms and conditions may be placed so close to the “place your order” button and in such large type that it may have the same effect as a “clickwrap” site that requires the consumer to click on an “accept terms and conditions” button, especially

³¹ Meyer v. Kalanick, 200 F. Supp. 3d 408, 410 (S.D.N.Y. 2016).

³² *Id.* at 410-11; *see also* Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403 (2d Cir. 2004) (the making of contracts over the internet “has not fundamentally changed the principles of contract.”).

³³ *See, e.g.*, Fagerstrom v. Amazon.com, Inc., 141 F. Supp. 3d 1051, 1069 (S.D. Cal. 2015) (“assent to a website’s terms and conditions is governed by whether the website provides ‘reasonable notice’ to the customer of the terms and conditions.”).

³⁴ *See, e.g.*, Van Tassel v. United Mktg. Group LLP, 795 F. Supp. 2d 770, (N.D. Ill. 2011) (holding that there was no valid agreement to arbitrate between a website operator and user where the absence of any reference to the conditions of use is coupled with the multi-step process to locate the conditions of use).

³⁵ Specht v. Netscape Commc’ns. Corp., 306 F.3d 17, 31 (2d Cir. 2002).

³⁶ *See, e.g.*, Fteja v. Facebook, Inc., 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012) (Courts routinely enforce arbitration clauses in online consumer agreements, regardless of whether the consumer has actually read the clause, in cases involving clickwrap). *But see* Nguyen v. Barnes & Noble, Inc., 763 F.3d 1171, 1178-79 (9th Cir. 2014) (less frequent in cases involving browsewrap).

if, in both cases, the terms and conditions may only be accessed by a hyperlink.³⁷ In that regard, where “there is no evidence that the website user had actual knowledge of the agreement, the validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract.”³⁸

Courts generally find constructive notice where the clickwrap-type site includes a scrollable box with the terms and conditions on the same webpage as the acceptance box.³⁹ Courts have been “willing to find the requisite notice for constructive assent . . . where the user is required to affirmatively acknowledge the agreement before proceeding with use of the website” even when the terms and conditions can only be displayed by clicking on a hyperlink.⁴⁰

The seminal Second Circuit case of *Specht v. Netscape*⁴¹ is an example of where the court distinguishes clickwrap from browsewrap and found insufficient indicia of constructive notice to bind the user to the arbitration agreement included in a “browsewrap” dispute resolution section of the terms and conditions. In *Specht*, users of the Netscape browser service faced a “clickwrap”-type site when downloading the browser and a “browsewrap”-type site when downloading an add-on piece of software. When downloading the browser, the user was required to actively accept the terms and conditions of the license for use, which appeared in a scrollable box on screen. The court did not question the validity of the arbitration agreement included in the browser terms and conditions. However, there was no requirement to actively accept the license terms and conditions for the separate add-on software. Instead, to learn that there were terms and conditions, the user would have to look further on the Netscape webpage because the link to the terms and conditions was not visible where the user was asked to click on the download button. The court found that the arbitration clause in the terms and conditions was not binding:

We are not persuaded that a reasonably prudent offeree in these circumstances would have known of the existence of license terms. Plaintiffs were responding to an offer that did not carry an immediately visible notice of the existence of license terms or require unambiguous manifestation of assent to those terms. Thus, plaintiffs' “apparent manifestation of ... consent” was to terms “contained in a document whose

³⁷ Compare Appendix 5 (Best Buy) with Appendix 6 (Nest).

³⁸ *Nguyen*, 763 F.3d at 1177.

³⁹ See *Hancock v. American Telephone & Telegraph Co.*, 701 F.3d 1248, 1258 (10th Cir. 2012); *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1163 (9th Cir. 2012); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 841 (S.D.N.Y. 2012); *Tompkins v. 23andMe, Inc.*, 2014 WL 2903752, at *1,*6 (N.D. Cal. 2014).

⁴⁰ *Nguyen*, 763 F.3d at 176; *Fagerstrom v. Amazon.com, Inc.*, 141 F. Supp. 3d 1051, 1069 (S.D. Cal. 2015) (arbitration clause enforced in browsewrap agreement where a clear statement that the transaction would be subject to hyperlinked terms and conditions appeared immediately above the “place order” button on the website).

⁴¹ *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17 (2d Cir. 2002).

contractual nature [was] not obvious.”⁴²

The *Specht* court determined that in online transactions, “a consumer's clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms.”⁴³

The enforceability of browsewrap-type transactions was at issue in the Ninth Circuit case of *Nguyen v. Barnes & Noble, Inc.*⁴⁴ In *Nguyen*, the website user attempted to purchase a tablet computer from Barnes & Noble, Inc. When the transaction was rejected, the customer brought an action in court for compensation. Barnes & Noble, relying on an arbitration clause in the on line terms and conditions, filed an application to compel arbitration of the dispute. In this case, a hyperlink to the terms and conditions was posted on every page of the website. However, the customer’s assent to the terms and conditions was not required to conclude the online transaction. Further, the customer was not required at any time to click on the terms and conditions hyperlink. There was no evidence that the customer had actual knowledge of the terms and conditions or had clicked on the terms and conditions hyperlink. Based on these facts, the *Nguyen* court determined there were insufficient indicia to support constructive knowledge of the terms and conditions.

The Ninth Circuit distinguished browsewrap from clickwrap as follows:

Were there any evidence in the record that Nguyen had actual notice of the Terms of Use or was required to affirmatively acknowledge the Terms of Use before completing his online purchase, the outcome of this case might be different. Indeed, courts have consistently enforced browsewrap agreements where the user had actual notice of the agreement.⁴⁵

The court further explained that

[c]ourts have also been more willing to find the requisite notice for constructive assent where the browsewrap agreement resembles a clickwrap agreement—that is, where the user is required to affirmatively acknowledge the agreement before proceeding with use of the website.

Finally, the *Nguyen* court held,

where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click

⁴² *Specht*, 306 F.3d at 31 (internal citation omitted).

⁴³ *Id.*

⁴⁴ *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171 (9th Cir. 2014).

⁴⁵ *Id.* at 1175.

on—without more—is insufficient to give rise to constructive notice. While failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract [internal citation omitted] the onus must be on website owners to put users on notice of the terms to which they wish to bind consumers.⁴⁶

The basic principle for online transactions, as expressed by the *Specht* court, is that

[c]larity and conspicuousness of arbitration terms are important in securing informed assent. “If a party wishes to bind in writing another to an agreement to arbitrate future disputes, such purpose should be accomplished in a way that each party to the arrangement will fully and clearly comprehend that the agreement to arbitrate exists and binds the parties thereto.”⁴⁷

Notwithstanding the principle of clarity and conspicuousness, both *Specht* and *Nguyen*, which rejected two browsewrap-type arbitration clauses, suggest that consumers will be bound to arbitration clauses included in clickwrap-type transactions even when the terms and conditions are available only by hyperlink and only after scrolling through numerous terms and conditions. However, based on our empirical research, discussed below, we question whether there is a practical difference between the two types of websites except where the clickwrap-type website includes an on-screen arbitration warning on the same page as the agreement to accept terms and conditions and without having to scroll through numerous other terms and conditions.

III. PART 2: A REVIEW OF TERMS AND CONDITIONS OF 200 WEBSITES SELLING CONSUMER PRODUCTS AND SERVICES

After reviewing the state of the law on enforcement of arbitration in online transactions, we designed and carried out a review of consumer websites to determine (1) how prevalent online arbitration is in the context of online consumer transactions and (2) whether the clickwrap/browsewrap enforceability distinction makes sense.

A. *How the website review was conducted*

The goal of our review was to gather information from a broad range of websites directed at consumers. To identify websites, our team reviewed lists of popular websites,⁴⁸

⁴⁶ *Nguyen*, 763 F.3d at 1178-79.

⁴⁷ *Specht*, 306 F.3d at 30 (quoting *Commercial Factors Corp. v. Kurtzman Bros.*, 131 Cal. App. 2d 133, 134-135, 280 P.2d 146, 147-48 (1955)).

⁴⁸ See e.g., *The Moz Top 500*, MOZ, <https://moz.com/top500> (last visited Feb. 27, 2017); *Top Sites in the United States*, ALEXA, <http://www.alexa.com/topsites/countries/US> (last visited Feb. 27, 2017).

lists of popular retail websites,⁴⁹ and the website activities of our team members themselves. We created a template to record information for each website we reviewed. The template was designed to capture key contract formation information, especially about formation of an agreement to arbitrate disputes.

For those websites that included arbitration in their terms and conditions, we gathered information about the way the consumer was required to accept the terms and conditions of the transaction, including how the consumer could learn that arbitration was included in the terms and conditions. We identified whether the consumer was required to actively or passively accept terms and conditions before concluding an online transaction and how the consumer could review the required terms and conditions of the transaction, whether by clicking on a “terms and conditions” hyperlink, reviewing the terms in a scrollable box on screen, or a combination of the two methods. We also recorded how many “clicks” were required for a consumer to gain on screen access to the arbitration clause in the terms and conditions.

In addition to information regarding contract formation and access to terms and conditions, we recorded some basic information about the dispute resolution clauses that included arbitration. We recorded whether consumers were prohibited from any form of action other than individual actions, whether access to the courts was barred, and whether there were venue restrictions for the arbitrations required in the terms and conditions.

In all, we reviewed 200 websites. Attached as Appendix 1 is the template we used, which has been filled in with the results of our review. We have included the main website address for each online provider of goods and services rather than the web address for each page reviewed.

B. Summary results of the website review

We found that 47.5% of the 200 websites we reviewed included binding arbitration in their terms and conditions. The prevalence of arbitration in online consumer contracts is consistent with two previous studies on this general topic. A study conducted by the Consumer Financial Protection Bureau found that “in the credit card market, card issuers representing more than half of all credit card debt have arbitration clauses – impacting as many as 80 million consumers. In the checking account market, banks representing 44 percent of insured deposits have arbitration clauses.”⁵⁰ In a study of the contract practices of twenty-six major companies, 75% were found to have arbitration clauses in their consumer contracts.⁵¹

⁴⁹ E.g., *Top 100 Retailers 2016*, NATIONAL RETAIL FEDERATION, <https://nrf.com/resources/annual-retailer-lists/top-100-retailers> (last visited Feb. 27, 2017).

⁵⁰ *CFPB Study Finds That Arbitration Agreements Limit Relief for Consumers*, CONSUMER FINANCIAL PROTECTION BUREAU (Mar. 10, 2015), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers>.

⁵¹ Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J. L. REFORM 871, 883 tbl. 2 (2008).

We draw two conclusions from this finding. First, based on the total e-commerce transactions in 2016 determined by the Census Bureau, it is likely that about \$200 billion in transactions per year are covered by online consumer arbitration clauses for customers in the United States.⁵² Although this represents a substantial use of arbitration in online transactions, it is worth noting that about half the websites do not include arbitration in their terms and conditions.

Second, because the existence of arbitration clauses in online terms and conditions represents about half the websites, without reviewing the actual terms and conditions on a particular website or in the absence of an onscreen warning about arbitration on a particular website, a consumer would have no principled way to guess whether disputes regarding the consumer's online transaction are intended to be resolved in binding arbitration rather than in the courts.

For those websites that included arbitration in their terms and conditions, 88% used passive acceptance as their means to bind consumers to these terms and conditions. By "passive acceptance" we mean that the consumer can complete the transaction without having to actively check a box accepting the terms and conditions of the transaction. Passive acceptance may come in various forms. On the Best Buy website, immediately above the "place your order" box is a statement that "by placing your order, you agree to our Conditions of Use."⁵³ The TJ Maxx website has a button for "place order" but does not include a statement near that button about agreeing to the terms and conditions of use. Instead, the user must click on a hyperlink ("terms") at the bottom of the webpage to learn that by placing the order the consumer is bound by the terms and conditions.⁵⁴ These forms of "passive acceptance" are included in the definition of browsewrap-type agreements.

The remaining 12% of the websites used some form of "active acceptance" of the terms and conditions. The consumer must click a box that says something to the effect of "by checking this box and clicking 'complete purchase' below, you agree to the terms and conditions of sale, confirm that all information provided is correct, and acknowledge that your credit card will be charged."⁵⁵ In this example, the "terms and conditions" are accessed via a hyperlink that leads the consumer to a scrollable box containing the terms and conditions.⁵⁶ A second type of active acceptance is where the webpage includes a scrollable box with the terms and conditions. Before completing the transaction, the consumer must check a box at the bottom of the scrollable box that says something to the effect of "I agree."⁵⁷ In the case of the Steam® gaming website, a warning appears at the top of the scrollable box that the terms and conditions include binding arbitration. For

⁵² This estimated amount represents about 45% of the total value of online transactions.

⁵³ See Appendix 5.

⁵⁴ See Appendix 3.

⁵⁵ See Appendix 6 (Nest).

⁵⁶ See Appendix 7 (screen shots of Nest terms and conditions).

⁵⁷ See Appendix 8 (Steam subscriber agreement).

virtually all the websites, however, the consumer must engage in extensive scrolling to locate the actual dispute resolution clause. Regardless of which method of active acceptance is used, we refer to these websites as clickwrap-type websites.⁵⁸

It is beyond the scope of this article to reach a conclusion as to why online retailers overwhelmingly decide to use browsewrap-type websites. However, assuming these retailers understand that enforcing terms and conditions on browsewrap sites is substantially more difficult than for clickwrap sites, we suspect there are countervailing commercial reasons to prefer browsewrap-type sites. Given the numbers of websites that have moved towards “one-click” purchasing, we expect that transaction simplification and speed are at the root of the decision to employ browsewrap-type sites to sell products and services to consumers.

Although we have noted the overall prevalence of browsewrap-type websites, there is significant variability by industry. Browsewrap-type websites are more common for websites that engage in the sale of consumer products. Clickwrap-type websites are more common for websites that sell software, hardware, and online gaming.

Regardless of whether websites use browsewrap or clickwrap, we found that arbitration agreements were typically difficult to locate. In 22% of the websites, consumers were required make two or more clicks on hyperlinks to get to a page with the text of the arbitration clause.⁵⁹ Although one website we reviewed included a warning about the existence of an arbitration clause in the location where the consumer clicks acceptance of the terms and conditions, in all other cases, a consumer was required to engage in extensive scrolling to know whether an arbitration clause existed.

For websites that require the consumer to click on multiple hyperlinks and then scroll through a myriad of terms and conditions before arriving at the dispute resolution clause, it is hard to understand how that meets a requirement for conspicuousness. Indeed, under those conditions, it is hard not to label these arbitration clauses as the equivalent of hidden fine print in paper contracts.

Even for those websites that require only one click to get the terms and conditions on screen, due to the virtually universal requirement to engage in extensive scrolling to learn whether the transaction includes binding arbitration as a part of the terms and conditions, we question whether the dispute resolution clause is sufficiently conspicuous to justify a finding of constructive notice of its terms.

C. Key features of the online arbitration clauses

When reviewing the dispute resolution clauses that included arbitration we noted four things. First, almost all arbitration clauses explicitly barred collective or class actions and required the consumer to engage in an individual action only. This ban on collective

⁵⁸ We note above in our discussion of case law that there is some variability in how the terms browsewrap and clickwrap are used. For our purposes, we equate passive acceptance to browsewrap and active acceptance of either kind to clickwrap. These terms derive from “shrinkwrap” agreements, which were commonly used when consumers were required to open boxes that included software. Permission to use the software was conditioned on agreement to the license included in the package.

⁵⁹ See Appendix 9 (Statistical Analysis).

and class actions follows from the Supreme Court's decision in *AT&T v. Concepcion*, in which the Court declared that the Federal Arbitration Act preempts state laws that prohibit class action bars in consumer arbitration clauses.⁶⁰ There is little doubt that this feature is the driving factor behind inclusion of arbitration in the terms and conditions. As noted in the 26-company study referenced above, the same major corporations that require arbitration with consumers typically do not require arbitration in their other commercial relationships, where collective or class actions are very unlikely.⁶¹

This fear of consumer collective or class actions appears to drive about half the online providers to include individual arbitration and a ban on class actions in their terms and conditions. However, a nearly equal percentage of online providers apparently did not find the risk of collective or class actions to be sufficient to warrant inclusion of individual arbitration and a ban on class actions in their terms and conditions. Given the notoriety of the Supreme Court's decision in *AT&T v. Concepcion*, we conclude that those online retailers who determined not to include arbitration in their terms and conditions had countervailing considerations that made arbitration unattractive. We are considering a follow up survey of retailers to try to understand why retailers choose to include or exclude arbitration from their terms and conditions.

Second, to make sure their imposition of arbitration survives scrutiny, all but one of the online arbitration clauses expressly provided for or incorporated by reference arbitration rules that require (1) the online provider to pay for all costs of arbitration except for an initial filing fee that is in approximately the same amount as an individual would be required to pay to commence court proceedings and (2) venue of the arbitration to either be by telephone or in the location where the consumer resides.⁶² These provisions seek to assure procedural fairness in the arbitration process.

In some cases, an online provider of goods and services attempted to impose conditions on the consumer that could be challenged as unconscionable. For example, of the 95 online retailers who included arbitration clauses in their terms and conditions, 28 attempted to impose a single venue for the arbitration regardless of the consumer's residence.⁶³ However, in virtually all cases, the retailer also incorporated either the AAA or the JAMS consumer arbitration rules into the arbitration clause.⁶⁴ The practical consequence of this is to negate the retailer's choice of venue if that venue puts an undue burden on the consumer.⁶⁵ In the same manner, the AAA and the JAMS consumer protocols protect the consumer from other one-sided arbitration provisions.

⁶⁰ See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011).

⁶¹ Eisenberg et al., *supra* note 52, at 883 tbl. 2.

⁶² See Appendix 1; Appendix 9.

⁶³ See Appendix 1.

⁶⁴ *Id.*

⁶⁵ See *JAMS Policy on Consumer Arbitration Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness*, JUDICIAL AND MEDIATION SERVICES at 3 (July 15, 2009), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer_Min_Std-2009.pdf (“The consumer must have the right to an in-person hearing in his or her hometown area”); *Consumer Due*

Third, many dispute resolution clauses that required arbitration and prohibited access to the courts also permitted small claims court actions exception as an alternative to arbitration, but only if pursued on an individual basis.⁶⁶ This provision is consistent with what appears to be the key point of the consumer arbitration clause – to prohibit collective or class actions.

Fourth, most clauses do not expressly provide for awarding attorneys’ fees to the prevailing party.⁶⁷ Although this feature is neutral on its face, it favors the online provider of goods and services. Absent a statutory award of attorneys’ fees, consumers generally cannot afford representation for low dollar claims, nor would it make economic sense to pay more for attorney’s fees than could be recovered in the case. Consumer attorneys generally will not take small dollar claims on contingency, unless they can proceed by way of class action to aggregate claims. On the other hand, the online provider of goods and services almost always will be represented by counsel. This feature also implicates a criticism of consumer arbitration that businesses and their attorneys, as repeat players in arbitration, will have an advantage before arbitrators who may favor them because arbitrators depend on repeat appointments for continued arbitration fees.⁶⁸ Although this issue has been raised, no court has yet declared consumer arbitration clauses per se unconscionable due to the possibility of the repeat player effect.⁶⁹

D. Information collected regarding the prevalence of arbitration for in-store transactions for retailers that have both brick and mortar outlets and website sales

In addition to the website review, we conducted a mini survey of a portion of those websites that also have in store sales of goods and services (so called, “brick and mortar” outlets).⁷⁰ We gathered receipts from a sampling of in-store transactions to identify which in-store transactions included arbitration as a part of their terms and conditions. In all, we

Process Protocol, AMERICAN ARBITRATION ASSOCIATION at Principle 7, https://adr.org/aaa/ShowPDF?doc=ADRSTG_005014 (“In the case of face-to-face proceedings, the proceedings should be conducted at a location which is reasonably convenient to both parties with due consideration of their ability to travel and other pertinent circumstances. If the parties are unable to agree on a location, the determination should be made by the Independent ADR Institution or by the Neutral.”).

⁶⁶ See Appendix 1.

⁶⁷ See Appendix 1.

⁶⁸ See Thomas J. Crane, *Arbitration Favors the Repeat Player*, SAN ANTONIO EMPLOYMENT LAW BLOG (Apr. 6, 2016), <http://www.sanantonioemploymentlawblog.com/2016/04/articles/contracts/arbitration-favors-the-repeat-player>; Lisa B. Amsler, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL 189, 190 (1998), <https://ssrn.com/abstract=1324411>.

⁶⁹ See *Mercuro v. Superior Court*, 96 Cal. App. 4th 167 (2002) (“We too are not prepared to say without more evidence the “repeat player effect” is enough to render an agreement unconscionable.”); *Sandquist v. Lebo Automotive, Inc.*, 1 Cal. 5th 233, 259 (2016).

⁷⁰ See Appendix 2.

reviewed sales receipts for 28 retailers that had both a brick and mortar and online presence. The only information we gathered from the in-store sales receipts was whether the in-store sales transaction included an arbitration clause. The results of our survey appear in Appendix 2, which reflects the identity of the retailer, whether the in-store sales receipt included an arbitration clause, and whether that retailer's website terms and conditions include an arbitration clause.⁷¹

Our selection of retailers for this part of the study was specific to consumer goods. We are aware of other studies that have examined the prevalence of arbitration for particular industries or compared consumer contracts with non-consumer contracts for major companies.⁷² We accept that in certain industries, e.g., financial and telecommunications, it is likely that both online and in-store sales may include arbitration agreements for consumer transactions. Accordingly, there may be no mismatch or no significant mismatch for those kinds of transactions. Our survey was designed to capture the broader consumer experience in the purchase of goods.

E. Results of the website and brick and mortar review

The results of the brick and mortar sales receipt survey for businesses that sell consumer goods were that none of the 28 retailers included arbitration as part of the terms and conditions listed on their sales receipts.⁷³ This compared to 46% of those same retailers, who included arbitration clauses in their online terms and conditions. Due to the breadth of the online arbitration clauses, some of the online terms and conditions purport to bind consumers to arbitration for disputes arising out of in-store sales where there was no arbitration agreement at the time of in-store purchase.

For example, the in-store sales receipt for TJ Maxx provides only for restrictions on the ability to get a refund: "Refunds within 30 days with receipt. Store credit only with gift receipt. Other restrictions may apply."⁷⁴

In contrast, the online terms and conditions for TJ Maxx are extensive.⁷⁵ Towards the end of a long series of terms and conditions is a full webpage concerning dispute

⁷¹ We are aware that many brick-and-mortar retailers post some terms and conditions (e.g., return policies) near the sales register to supplement the terms and conditions on the sales receipts. We also are aware that consumers receive sales receipts after concluding the transaction so that receipts are not directly comparable to the browsewrap and clickwrap-type websites discussed in this article. We do not take a position on whether the terms and conditions included in sales receipts are enforceable. We have made the comparison between sales receipt terms and conditions and website terms and conditions to show the likely mismatch between such terms and conditions.

⁷² *CFPB Study Finds That Arbitration Agreements Limit Relief for Consumers*, CONSUMER FINANCIAL PROTECTION BUREAU (Mar. 10, 2015), <http://www.consumerfinance.gov/about-us/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers>; Eisenberg et al., *supra* note 52 at 883 tbl 2.

⁷³ See Appendix 2.

⁷⁴ See Appendix 10.

⁷⁵ See *Terms of Use*, TJ MAXX, <http://tjmaxx.tjx.com/store/jump/topic/find-help/legal/2400080#termsofuse> (last visited Mar. 22, 2017).

resolution and arbitration. The scope of the arbitration clause is as follows: “You and the TJX Businesses [defined elsewhere to include the TJ Maxx brick and mortar outlets] agree that we will resolve any disputes between us through binding and final arbitration instead of through court proceedings.”⁷⁶

This broad scope arbitration clause, if enforceable, would include disputes regarding transactions at TJ Maxx brick and mortar stores even though the in-store sales receipt did not include any such arbitration requirement. Further, we saw no information that in-store consumers were informed that if they also used the TJ Maxx website to purchase goods, they were agreeing to arbitrating disputes regarding in-store purchases.

Although we have cited the TJ Maxx online terms and conditions as a specific example of an online arbitration clause that is broad enough to include disputes concerning in-store transactions where there was no arbitration clause on the in-store sales receipt, we identified other retailers with the same issue.⁷⁷

We draw three basic conclusions from this in-store survey. First, there is an obvious mismatch between whether retailers of goods require arbitration as part of in-store sales transactions and whether those same retailers require arbitration as part of their online sales transactions. Second, this mismatch in terms and conditions may influence expectations regarding dispute resolution for those consumers who use both in-store and online means of distribution. Third, unless a consumer who uses both brick and mortar and online means of distribution carefully reads the online dispute resolution provisions, the consumer will not know that by entering into the online transaction the consumer may be agreeing also to resolve disputes regarding in-store transactions in arbitration.

In our view, the mismatch between the in-store and online experience makes it more reasonable that online retailers with arbitration clauses in their terms and conditions be required to provide robust notice to the consumer of the existence of binding arbitration. Without robust notice, it is hard to see how a reasonable consumer could be charged with constructive notice of the arbitration clause for retailers who have a mismatch between in-store terms and conditions and online terms and conditions.

F. Previous studies regarding whether consumers read terms and conditions on websites

As noted above, an important issue when determining whether a consumer is bound by an arbitration clause in an online transaction is whether the consumer had actual or constructive notice of the terms and conditions of the transaction. As also noted above, terms and conditions typically are made available to the consumer by hyperlink, scrollable box, or a combination of the two. We were interested, therefore, in whether consumers click on the terms and conditions hyperlinks or scroll through the scrollable boxes to review the terms and conditions.

We did not ourselves conduct a study of this issue. Instead, we relied on three prior studies to reach a conclusion on this. The most extensive study done to date surveyed online

⁷⁶ See Appendix 4.

⁷⁷ See Appendix 1.

software purchase and freeware transactions for over 90,000 U.S. households in 2007.⁷⁸ The survey found that .08% of the users accessed the end user license web page for software retailers and .22% accessed the end user license web page for freeware providers. Those who accessed the end user license web pages did not stay on the page long enough to read the terms and conditions. The survey found that the average length of time individuals remained on the page was just over 60 seconds, with half the users spending less than 30 seconds on the page and more than 90% spending less than two minutes on the page. The study concluded that virtually no one accesses end user license web pages and even those who do access the pages do not read the terms and conditions. This study is especially interesting because, as noted above, software providers tend to have more clickwrap agreements and nonetheless customers do not read the terms and conditions.

The conclusions of the software purchaser survey are consistent with our everyday experience. Few of us click on the terms and conditions. Indeed, as an April Fool's Day joke, in 2010, Gamestation included in its terms and conditions the following:

By placing an order via this web site on the first day of the fourth month of the year 2010 Anno Domini, you agree to grant Us a non transferable option to claim, for now and for ever more, your immortal soul. Should We wish to exercise this option, you agree to surrender your immortal soul, and any claim you may have on it, within 5 (five) working days of receiving written notification from gamestation.co.uk or one of its duly authorised minions. We reserve the right to serve such notice in 6 (six) foot high letters of fire, however we can accept no liability for any loss or damage caused by such an act.⁷⁹

Of the 7,500 customers who made a purchase that day, none clicked on and viewed the terms and conditions. Had they done so, they would have been entitled to a small reward (£2.5) for being vigilant. One can imagine in the gaming world, if even one user had located the financial reward available for reviewing the terms and conditions word would have travelled fast, and Gamestation would have found its April Fool's Day joke to be a very expensive proposition.

Even when the seller includes the end user license in a scrollable box on the web page where the purchase is made, purchasers virtually never read the terms and conditions. One study of 2,500 users found that the users spent a median time of six seconds on the license page, not enough time to read the terms and conditions.⁸⁰

Based on these three studies (we include the Gamestation April Fool's Day joke as an empirical study for users of that website), we conclude that virtually no one clicks on the terms and conditions hyperlink and virtually no one reads through the terms and conditions in scrollable boxes. This second conclusion is of increased significance because,

⁷⁸ Yannis Bakos, Florencia Marotta-Wurgler, & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 THE JOURNAL OF LEGAL STUDIES 1, 10 (2014).

⁷⁹ *Nobody reads terms and conditions: it's official*, OUT-LAW.COM, (Apr. 19, 2010), <http://www.out-law.com/page-10929>

⁸⁰ Jeff Sauro, *Do Users Read License Agreements?*, MEASURINGU (Jan. 11, 2011), <http://www.measuringu.com/blog/eula.php>.

whether viewable by hyperlink or scrollable box, almost uniformly the dispute resolution clauses are located towards the end of the terms and conditions requiring extensive scrolling to get to them. As noted above, 22% of the websites with arbitration clauses in their terms and conditions require multiple clicks to get to the arbitration clause. We saw only one website where the consumer was warned up front without looking through the terms that the terms and conditions include arbitration. It is hard to understand how, under these circumstances, arbitration clauses could be considered “conspicuous”.

G. Conclusions of our Review

Our review of websites with arbitration clauses, in-store transactions for retailers with brick and mortar outlets and online sales, and prior studies on whether online consumers review terms and conditions has led us to three basic conclusions regarding the quality of notice provided to consumers. First, the prior studies on whether consumers review online terms and conditions establish that actual notice of the arbitration clause in a set of online terms and conditions is the very rare exception. Instead, for purposes of contract formation, online providers of goods and services must rely on constructive notice.

There are two basic types of constructive notice used by online providers of goods and services to notify consumers that they must resolve disputes through binding arbitration. Passive notice (browsewrap), where the consumer is not required to actively accept terms and conditions before concluding the transaction, is less robust than active notice (clickwrap), at least with respect to informing the consumer that there are terms and conditions associated with the on-line transaction.

With regard to clickwrap websites, the websites that show the terms and conditions on the same screen where the consumer is required to click a box accepting the terms and conditions provide more robust notice than the websites that require the consumer to click on a box accepting terms and conditions, but the terms and conditions are only available by hyperlink. The more robust notice certainly provides the consumer with reasonable notice that there are terms and conditions associated with the transaction. However, notification that there are terms and conditions associated with the transaction does not let the consumer know whether there is a separable arbitration agreement included within those terms and conditions.

Based on the studies showing that consumers do not click on terms and conditions and do not scroll through on-screen boxes that include the terms and conditions, we see no fundamental difference between the quality of notice provided in browsewrap and clickwrap websites regarding the existence of an arbitration requirement, except where the clickwrap terms and conditions include the arbitration warning in the same location as the requirement to accept the terms and conditions. This follows from the fact that regardless of whether a consumer is required to actively accept terms and conditions, consumers do not go through the further work to click on the terms and conditions hyperlink or to scroll through extensive terms and conditions to reach the dispute resolution clause. We therefore conclude that clickwrap websites, where the terms and conditions appear in a scrollable box that includes a statement at the beginning warning the consumer about binding arbitration, provides substantially more robust notice than clickwrap websites where the consumer must scroll through myriad terms and conditions before learning of the arbitration clause.

We further conclude that for those types of consumer transactions where (1) there is a mismatch between whether in-store sales require arbitration and whether online sales require arbitration and (2) consumers using those sites purchase goods or services from the retailer both at the retailer's brick and mortar outlet and online, there is a reasonable risk of consumer confusion as to whether disputes regarding goods and services purchased from these retailers are subject to binding arbitration. Such potential confusion affects whether the online notice method is sufficiently robust to impose constructive notice on the consumer that transactions with that retailer are properly subject to binding arbitration.

In the end, what is unsatisfactory about the current state of the law on enforcement of online arbitration clauses is that courts find it is sufficient to put a consumer on constructive notice of arbitration if the consumer must actively accept terms and conditions even though (1) the arbitration clause is hard to find in that it is hidden behind a hyperlink and preceded by myriad terms and conditions in a scrollable box, and (2) virtually no one goes through the effort of searching out the terms and conditions or scrolling through the box before completing the purchase. For a paper transaction, the arbitration clause must be conspicuous. For an online transaction, the consumer is supposed to go on a treasure hunt to find it.