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# Browse the Web, Enter a Contract... Arbitrate? The Enforceability of Mandatory Binding Arbitration Provisions in Consumer Browsewrap Contracts

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# Browse the Web, Enter a Contract... Arbitrate? The Enforceability of Mandatory Binding Arbitration Provisions in Consumer Browsewrap Contracts

## **Abstract**

Businesses commonly post “Terms and Conditions” on their website, even though they are not required to do so. When enforceable, these terms can be an effective risk management tool. Generally, website terms and conditions state that users of the website are bound by such terms just by their use of the website, without further action. However, this requires that the users be on notice that they are agreeing to the terms. Requiring some form of affirmative action to acknowledge notice of the terms is the best way to assure that an online contract will be enforceable. The United States Court of Appeals for the Ninth Circuit in August 2014 ruled in *Nguyen v. Barnes & Noble, Inc.*, that an arbitration provision contained in the “Terms of Use” of the Barnes & Noble website was not enforceable because the online consumer was not provided sufficient notice of those terms and therefore could not have assented.<sup>[1]</sup> The enforceability of mandatory binding arbitration provisions in browsewrap contracts is an emerging topic in contract law. The *Nguyen v. Barnes & Noble* decision should serve as a reminder to businesses that, to be enforceable, an arbitration provision in an online contract still requires a meeting of the minds.

[1] *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1180 (9th Cir. 2014).

## **Cover Page Footnote**

The Faculty Mentor for this paper is Jay Nadlman, Legal Studies, Paralegal.

The United States Court of Appeals for the Ninth Circuit in August 2014 ruled in *Nguyen v. Barnes & Noble, Inc.*, that an arbitration provision contained in the “Terms of Use” of the Barnes & Noble website was not enforceable because the online consumer was not provided sufficient notice of those terms and therefore could not have assented.<sup>1</sup> In *Nguyen*, the plaintiff filed a class action lawsuit after Barnes & Noble canceled his online order for two tablet computers due to unexpectedly high demand. Barnes & Noble attempted to have the case dismissed based on the arbitration provision in its Terms of Use, available via a hyperlink in the bottom corner of every page of the Barnes & Noble website. The district court denied Barnes & Noble’s motion, finding that the parties never entered into the agreement that contained the arbitration clause.<sup>2</sup> The appellate court agreed that the plaintiff did not have actual or constructive notice of the terms, so the terms were unenforceable.<sup>3</sup>

The Ninth Circuit relied on the landmark Second Circuit case *Specht v. Netscape Communications Corp.*<sup>4</sup> In that opinion, written in 2012 by then-District Judge Sonia Sotomayor, the court found that for the terms and conditions of an online contract to be enforceable, those terms must be presented to the consumer in a conspicuous manner and the consumer must clearly agree to those terms. Judge Sotomayor wrote that: “Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.”<sup>5</sup>

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<sup>1</sup> *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1180 (9th Cir. 2014).

<sup>2</sup> *Nguyen v. Barnes & Noble, Inc.*, 8:12-CV-0812-JST RNB, 2012 WL 3711081 (C.D. Cal. Aug. 28, 2012) aff’d, 763 F.3d 1171 (9th Cir. 2014).

<sup>3</sup> 763 F.3d at 1180.

<sup>4</sup> *Specht v. Netscape Comm. Corp.*, 306 F.3d 17 (2d Cir. 2002).

<sup>5</sup> 306 F.3d at 35.

The enforceability of mandatory binding arbitration provisions in consumer browsewrap contracts is an emerging legal topic. The term “browsewrap” denotes an online contract in which terms and conditions are posted on a website, typically accessible via a hyperlink at the bottom of the page. Generally, courts enforce arbitration provisions in disputes between businesses.<sup>6</sup> Enforceability rulings are mixed, however, when a business’s arbitration provision is disputed by a consumer. This exploration of the enforceability of browsewrap arbitration agreements will begin by discussing online Terms of Use as electronic contracts of adhesion. Next, this analysis will consider how browsewrap contracts are evaluated by courts under basic contract law, focusing on the issues of notice and assent, and the defenses of unconscionability and illusory terms. A brief discussion of why mandatory binding arbitration is at issue in many browsewrap court cases is also included. Finally, following the guidance provided by recent case law, this analysis will conclude with an overview of the key characteristics of an enforceable browsewrap agreement.

### **Online Terms of Use are Contracts**

Online terms of use are contracts, generally as enforceable as paper contracts. Due to several factors, including the distance between the parties in online transactions and, often, the lack of any bargaining between the parties as to the terms of the contract, online electronic contracts, like standard-form paper contracts, can be contracts of adhesion. Adhesive contracts, whether online or on paper, are characterized by unequal bargaining power between the parties, where the contract is drafted by a business and imposed upon a consumer who has no

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<sup>6</sup> 763 F.3d at 1180.

opportunity to negotiate terms and often no alternatives other than to forgo the product or service.<sup>7</sup>

Electronic contracts of adhesion are generally categorized as clickwrap, shrinkwrap, or browsewrap. A clickwrap agreement involves a consumer's assent to the terms of an Internet transaction by clicking on an "I accept" or "I agree" box. Reading the terms is irrelevant. If the box is not clicked, the transaction will not be completed. "The clear trend of the courts is to enforce clickwrap agreements, applying traditional contract principles to their analysis."<sup>8</sup>

A shrinkwrap contract is inserted into a product package, often software. The act of opening the product constitutes assent. This also applies to downloading software directly from the Internet where assent is implied by the use of the program. "Like the clickwrap agreement, courts have generally favored enforcement of shrinkwrap agreements."<sup>9</sup>

Browsewrap refers to terms and conditions that are posted on a website, typically accessible via a hyperlink at the bottom of the page. Browsewrap agreements do not require users to affirmatively manifest consent. The user is deemed to have consented if she continues on the website after having had notice of the terms.<sup>10</sup> As defined by the *Nguyen* court:

[I]n a pure-form browsewrap agreement, the website will contain a notice that – by merely using the services of, obtaining information from, or initiating applications within the website – the user is agreeing to and is bound by the site's terms of service. Thus, by visiting the website – something that the user has already done – the user agrees to the Terms of Use not listed on the site itself but available only by clicking a hyperlink. The defining feature of browsewrap agreements is that the user can continue to use the website or its services without visiting the page hosting the browsewrap agreement or even knowing that such a webpage exists. (Internal quotations and citations omitted.)<sup>11</sup>

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<sup>7</sup> Cornell University Law School, *Legal Information Institute: Contract of Adhesion*, [http://www.law.cornell.edu/wex/adhesion\\_contract\\_contract\\_of\\_adhesion](http://www.law.cornell.edu/wex/adhesion_contract_contract_of_adhesion), last visited October 31, 2014.

<sup>8</sup> Pamela Tepper, *The Law of Contracts and the Uniform Commercial Code* at 422-423 (2d ed. 2011).

<sup>9</sup> *Id.* at 424.

<sup>10</sup> Nancy S. Kim, *Wrap Contracts* at 41 (2013).

<sup>11</sup> 763 F.3d at 1176.

Another type of agreement seen in recent court cases is a hybrid of the browsewrap and clickwrap.

Courts have also been confronted with hybrid arrangements, in which the customer must take affirmative action – pressing a “click” button – but, like a browsewrap agreement, the terms being accepted do not appear on the same screen as the accept button, but are available with the use of hyperlink. Under this hybrid arrangement, the customer is told that consequences will necessarily flow from his assenting click and also is placed on notice of how or where to obtain a full understanding of those consequences.<sup>12</sup>

Because the consumer presented with a hybrid agreement must take the affirmative action of clicking before being allowed to continue with the purchase or use of the website, these types of online contracts are also generally enforced by courts, as was the case in *Vernon v. Qwest*, 857 F. Supp. 2d 1135, 1150 (D. Colo. 2012).

### **Applicable Statutory Law**

Browsewrap, clickwrap and shrinkwrap contracts are potentially as enforceable as paper-based contracts. Both the federal Electronic Signature in Global and National Commerce Act (E-SIGN) passed in 2000,<sup>13</sup> and the Uniform Electronic Transactions Act (UETA),<sup>14</sup> promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and adopted by 47 states, provide that electronically signed contracts cannot be denied effect because they are in electronic form or delivered electronically.<sup>15</sup> While both E-SIGN and UETA strive to put electronic contracts on equal legal footing with paper ones, “the drafters stressed that . . . once these media are recognized the existing substantive rules of contract law should govern most questions.”<sup>16</sup>

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<sup>12</sup> *Vernon v. Qwest Communications Intern., Inc.*, 857 F. Supp. 2d 1135, 1150 (D. Colo. 2012).

<sup>13</sup> 15 U.S.C.A. § 7001 (West).

<sup>14</sup> Full text of the UETA can be found at <http://www.uniformlaws.org/ActSummary.aspx?title=Electronic%20Transactions%20Act>.

<sup>15</sup> Kathleen Mercer Reed & Henry R. Cheeseman, *Contract Law for Paralegals* 256 (2009).

<sup>16</sup> Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 Rutgers L. Rev. 1308, 1340 (2005).

There is currently no other federal statutory law that governs electronic contracts of adhesion. The Uniform Computer Information Transactions Act (UCITA) is a proposed state contract law developed to create a clear and uniform set of rules to govern such areas as software licensing, online access, and other transactions in computer information.<sup>17</sup> It is intended to bring the same uniformity and certainty to the rules that apply to information technology transactions that the Uniform Commercial Code (UCC) does for the sale of goods. UCITA has become one of the most controversial uniform commercial laws. In the opinion of critics, led by consumer groups, Attorneys General of several states, and library associations, it considerably weakens consumer protections and unduly favors software producers. Because of this opposition, UCITA has only been passed in Virginia and Maryland.<sup>18</sup>

### **Basics of Contract Law**

Since there are no applicable federal statutes and few state statutes specifically governing browsewrap contracts, courts apply a mixture of common law contract law and Article 2 of the UCC, which prescribes a set of uniform rules for the creation and enforcement of contracts for the sale of goods.<sup>19</sup>

The black letter definition of “contract” is “a promise, or set of promises that the law will enforce.” It is a basic rule of contract law that in order for a contract to be formed, the parties to the contract must reach a meeting of the minds. Because a contract is a consensual relationship, both parties to the contract must agree to be bound. One party must make an offer and the other party must accept it. No rules mandate the form of assent . . . . A handshake, a nod of the head or any other conduct recognizing the existence of a contract will suffice. Inaction, however, is generally held not to indicate assent to contractual terms.<sup>20</sup>

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<sup>17</sup> The full text of the Uniform Computer Information Transactions Act (UCITA) can be found at [http://www.uniformlaws.org/shared/docs/computer\\_information\\_transactions/ucita600c.pdf](http://www.uniformlaws.org/shared/docs/computer_information_transactions/ucita600c.pdf).

<sup>18</sup> UCITA Online, *A Commercial Code for the Information Age?* Ucitaonline.com, last visited October 31, 2014.

<sup>19</sup> Reed at 8.

<sup>20</sup> Moringiello, *supra*, at 1311.

The common law follows an objective theory of contracts that relies on the reasonable person standard. “Would a hypothetical reasonable person conclude that the parties intended to create a contract after considering (1) the words and conduct of the parties and (2) the surrounding circumstances? . . . Under the objective theory of contracts, the subjective intent of a party to enter into a contract is irrelevant.”<sup>21</sup> A consumer enters into a contract online upon completion of the steps specified for acceptance, regardless of the subjective intent of the consumer.

Another integral component of the objective theory of contracts is the duty to read the contract. Under this doctrine, an offeree, the consumer in the case of a typical browsewrap agreement, is presumed to have read the terms of the agreement offered by the drafter. The duty to read is analogous to the assumption of risk doctrine in tort law: “A buyer who could have read but did not assumes the risk of being bound by any unfavorable terms.”<sup>22</sup> The offeror, however, has no duty to explain the offered terms. Courts only impose a duty to explain the fact that contract terms exist.<sup>23</sup>

While the same law of contracts is applied to both paper and electronic contracts, it is important to note the potential impact of the differences between paper and electronic contracts. The primary difference is in a consumer’s perception of the form of the contract. Lengthy, multipage paper contracts are typically reserved for the purchase of a home or a car lease agreement. Online, however, “a customer may be deemed to have assented to a thirty-page document simply by visiting a website.”<sup>24</sup> The online format also affects what terms – and how

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<sup>21</sup> Reed at 10.

<sup>22</sup> Ian Ayres & Alan Schwartz, *The No Reading Problem in Consumer Contract Law*, 66 Stan. L. Rev. 545, 548 (2014).

<sup>23</sup> Moringiello, *supra*, at 1312.

<sup>24</sup> Kim at 59.



many – can be included in the contract. “Digital terms are weightless and adding additional terms does not affect the cost of the agreement.”<sup>25</sup>

Also unique in the discussion of courts deciding browsewrap cases is the level of computer literacy of the parties. The Court in *Hubbert v. Dell* in 2005 opined that “[c]ommon sense dictates that because the plaintiffs were purchasing computers online, they were not novices when using computers. A person using a computer quickly learns that more information is available by clicking on a blue hyperlink.”<sup>26</sup> The more recent *Nguyen v. Barnes & Noble* court, however, felt that “[g]iven the breadth of the range of technological savvy of online purchasers, consumers cannot be expected to ferret out hyperlinks to terms and conditions to which they have no reason to suspect they will be bound.”<sup>27</sup> As terms of use become widely recognized, it is possible that courts will find that every Internet user should know that the use of any website is conditioned by terms of use.<sup>28</sup>

### **At Issue in Electronic Contracts: Notice and Assent**

The basics of contract law identify four requirements for a valid contract: offer, acceptance, intent, and consideration. Since wrap contracts do not require a handwritten signature to clearly indicate awareness and acceptance of terms, notice and manifestation of assent are the two main issues found in the case law.

Notice can be either actual or constructive. Actual notice means that the user actually saw and read the terms prior to giving assent. Constructive notice arises in those cases where the offeree claims that she did not see the terms, but she was given notice of the terms and a reasonable opportunity to read the terms. Constructive notice means that the terms were

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<sup>25</sup> *Id.* at 58.

<sup>26</sup> 835 NE 2d at 121.

<sup>27</sup> 763 F.3d at 1179.

<sup>28</sup> Moringiello, *supra*, at 1349.

presented under circumstances where a reasonably prudent offeree would have known about the terms. As stated in *Nguyen*, “[b]ecause no affirmative action is required by the website user to agree to the terms of a contract other than his or her use of the website, the determination of the validity of the browsewrap contract depends on whether the user has actual or constructive knowledge of a website’s terms and conditions.”<sup>29</sup>

In wrap contract cases, courts tend to focus on the visibility of terms and wording that indicates that the terms are meant to be legally binding. Notice of terms need not be presented alongside the terms themselves; terms accessible via hyperlink have been deemed to provide effective notice as long as the hyperlink is clearly labeled and prominently placed. By contrast, effective notice in the offline world must be presented alongside the terms themselves. Online, “the burden on adherents then is much greater – not only do they have to read the fine print, they have to track it down. Because the terms don’t necessarily accompany the notice, there are often more of them.”<sup>30</sup>

In addition to notice, to form a contract under the common law the offeree had to affirmatively assent to the terms of the offer. There are two ways that an offeree can assent under the developing wrap contract doctrine. The offeree can act affirmatively by clicking on an icon that indicates acceptance. But, the offeree can also manifest assent by failing to actively reject the terms of the offered wrap contract.<sup>31</sup> This, too, is in contrast to a paper contract, where inaction “is generally held not to indicate assent to contractual terms.”<sup>32</sup>

The requirement of assent seems to be subsumed in wrap contract cases with the issue of notice. “In other words, the manifestation of consent requirement has been swallowed up by

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<sup>29</sup> 763 F.3d at 1176.

<sup>30</sup> Kim at 127.

<sup>31</sup> Kim at 127.

<sup>32</sup> Moringiello, *supra*, at 1311.

notice so that if the drafter can show notice, the nondrafting party [consumer] will be deemed to have assented to the wrap contract.”<sup>33</sup> This meshing of the issues of notice and assent in browsewrap contracts is illustrated in the discussion of the *Nguyen* court:

But where, as here, 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 . . . Whether a user has inquiry notice of a browsewrap agreement, in turn, depends on the design and content of the website and the agreement’s webpage. [Internal quotations and citations omitted].<sup>34</sup>

Again, while the issues of notice and assent garner discussion by the court in cases involving consumers, this is typically not true of cases between two businesses. Between businesses, courts are much more likely to enforce even passive browsewrap agreements.<sup>35</sup>

### **Unconscionable and Illusory Defenses**

A review of case law reveals two main defenses for consumers in the enforceability of arbitration provisions found in browsewrap agreements: unconscionability and illusory terms. The doctrine of unconscionability encompasses substantive and procedural unconscionability. An analysis of substantive unconscionability determines if terms are overly harsh or one-sided. Procedural unconscionability focuses on unfair surprise. Regarding online contracts, this typically concerns whether terms are hidden in a document. To invalidate contract terms, some measure of both procedural and substantive unconscionability must be found.<sup>36</sup>

The Court’s opinion in *Tompkins v. 23andMe, Inc.*, discussed the unconscionability analysis and the requirement that evidence of both procedural and substantive unconscionability must be found. The analysis begins with establishing if the contract is one of adhesion. If it is,

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<sup>33</sup> Kim at 128.

<sup>34</sup> 763 F.3d at 1177.

<sup>35</sup> 763 F.3d at 1180.

<sup>36</sup> Juliet M. Moringiello & William L. Reynolds, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting*, 72 Md. L. Rev. 452, 455-456.

the court next determines if there are other factors which may render the contract unenforceable due to unconscionability.

The procedural element of unconscionability . . . focuses on two factors: oppression and surprise. Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms.<sup>37</sup>

The Terms of Service were accessible on the 23andMe website via a hyperlink. The arbitration provision was at the very end of the terms as a subparagraph to the final section titled “Miscellaneous.” The Court found this to be procedurally unconscionable. However, the arbitration provision must also be substantively unconscionable to be deemed unenforceable.

Substantive unconscionability arises when a provision is so overly harsh or one-sided that it falls outside the reasonable expectations of the non-drafting party . . . It is not enough that the terms are slightly one-sided or confer more benefits on a particular party; a substantive unconscionable term must be so unreasonable and one-sided as to shock the conscience.<sup>38</sup>

While the arbitration provision in the 23andMe Terms of Service was found to be procedurally defective, the plaintiffs did not meet their burden of proof with regard to substantive unconscionability.<sup>39</sup> The plaintiffs’ primary argument for substantive unconscionability was that 23andMe’s forum selection for mandatory binding arbitration was San Francisco. The court found that precedent had been well established, however, that “requiring arbitration at the location of a defendant’s principal place of business” is enforceable.<sup>40</sup>

Browsewrap contracts may also be found to be illusory and unenforceable. A contract that provides that one of the parties has to perform only if he or she chooses to do so is an

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<sup>37</sup> *Tompkins v. 23andMe, Inc.*, No. 2903752, 2014 WL (N.D. Cal. 2014).

<sup>38</sup> *Tompkins*, 2014 WL, at \* 59.

<sup>39</sup> *Id.* at 67.

<sup>40</sup> *Id.* at 60.

illusory contract. The Terms of Use in *In re Zappos.com Inc., Customer Data Security Breach Litigation* were found to be illusory.

Here, the Terms of Use gives Zappos the right to change the Terms of Use, including the Arbitration Clause, at any time without notice to the consumer . . . Zappos is free at any time to require a consumer to arbitrate and/or litigate anywhere it sees fit, while consumers are required to submit to arbitration in Las Vegas, Nevada. Because the Terms of Use bind consumers to arbitration while leaving Zappos free to litigate or arbitrate wherever it sees fit, there exists no mutuality of obligation. We join those other federal courts that find such arbitration agreements illusory and therefore unenforceable.<sup>41</sup>

Such modification at-will provisions are prevalent in browsewrap contracts. In the realm of paper contracts, an agreement to modify the contract must satisfy all the criteria required for an original valid contract, including offer, acceptance, and consideration. In the world of electronic contracts, however, many Terms of Use agreements contain unilateral modification clauses that would allow for the modification of the contract without going through the steps required for a valid original contract, going so far as to reserve no obligation to even inform consumer that changes have occurred.<sup>42</sup> “Surely no rational consumer intends to give knowing assent to anything the service provider deems to impose now or in the future without notice.”<sup>43</sup>

### **Mandatory Binding Arbitration**

Unilateral modification provisions, as described above, are not the only terms that catch consumers by surprise in electronic contracts. Also included in a typical browsewrap contract is a provision that consumers must settle any disputes through mandatory binding arbitration. All of the cases discussed to this point have involved a dispute regarding an arbitration clause. Arbitration clauses have been the main source of appellate cases discussing online contracts. As

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<sup>41</sup> *In re: Zappos.com, Inc., Customer Data Security Breach Litigation*, 893 F. Supp. 2d 1058, pinpoint (D. Nev. 2012).

<sup>42</sup> Cheryl B. Preston & Eli W. McCann, *Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse*, 26 *BYU J. Pub. L.* 1, 23.

<sup>43</sup> *Id.* at 25.

Moringiello & Reynolds have observed, “Arbitration clauses are not unique to consumer electronic contracts, but there would probably be very little case law on the enforceability of electronic contract terms in their absence.”<sup>44</sup>

Passed in 1925, the Federal Arbitration Act (FAA) was intended to ensure agreements to arbitrate are valid and enforceable. As with many areas of law, there is a balance between the power of the federal legislation and state law. “Whether or not the parties have agreed to arbitrate is a question of state contract law. While the FAA preempts state law that treats arbitration agreements differently from any other contracts, it also preserves general principles of state contract law as rules of decision on whether the parties have entered into an agreement to arbitrate.”<sup>45</sup>

The Court in *Van Tassell v. United Marketing Group, LLC*, set forth the legal standards applicable to motions to compel arbitration.

Arbitration is strictly a matter of consent, and thus is a way to resolve those disputes – *and only those disputes* – that the parties have agreed to submit to arbitration . . . [T]he party seeking to compel arbitration must establish that the parties’ arbitration agreement was validly formed, covers the dispute in question, and is legally enforceable.<sup>46</sup>

By requiring mandatory binding arbitration in a forum convenient to the contracting website, “potential plaintiffs are shepherded into arbitration agreements that they cannot easily challenge.”<sup>47</sup> In *Taking Contracts Private: The Quiet Revolution in Contract Law*, Charles L. Knapp enumerates many negative aspects of mandatory binding arbitration forced upon consumers, including cost. “Two disputants with equally deep pockets may gladly pay the cost

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<sup>44</sup> Juliet M. Moringiello & William L. Reynolds, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting*, 72 Md. L. Rev. 452, 457.

<sup>45</sup> *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 119 (2<sup>nd</sup> Cir. 2012)

<sup>46</sup> *Van Tassell v. United Mktng. Grp., LLC*, 795 F. Supp. 2d 770, 786 (N. D. Ill. 2011).

<sup>47</sup> Michelle Garcia, *Browsewrap: A Unique Solution to the Slippery Slope of the Clickwrap Conundrum*, 36 Campbell L. Rev. 31, 41.

of arbitrators' fees as a trade-off for speedier resolution of their dispute . . . . But where the claimant is an individual buyer of goods or services . . . the cost of arbitrators' fees may be prohibitive."<sup>48</sup>

In addition, many arbitration provisions expressly limit class action suits. "Class actions are a tool to strengthen consumers bargaining power against a corporation because an individual consumer may not have the time or resources to bring an action."<sup>49</sup> In *Vernon v. Qwest*, the court explained the Supreme Court's ruling that disallows class-wide arbitration. The explanation began by observing that the FAA allows parties to limit with whom they will arbitrate. Choosing to arbitrate with a class of individuals, rather than one party, would "sacrifice the informality of arbitration and inevitably make the process slower, more costly, and more likely to generate procedural morass than final judgment." In addition, "lawyers would have little incentive . . . to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process."<sup>50</sup>

### **Characteristics of Enforceable Browsewrap Contracts**

Based on the existing case law, what does an enforceable arbitration agreement in a browsewrap contract look like? As the Ninth Circuit recently ruled in *Nguyen v. Barnes & Noble*, the appearance of a website relying on a browsewrap agreement that includes an arbitration provision is important. "[T]he conspicuousness and placement of the 'Terms of Use' hyperlink, other notices given to users of the terms of use, and the website's general design all

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<sup>48</sup> 71 Fordham L. Rev. 761, 782 (2002).

<sup>49</sup> Citizen Advocacy Center, *Consumer Guide to Mandatory Arbitration Clauses*, citizenadvocacy.org, last visited November 1, 2014.

<sup>50</sup> 857 F. Supp. 2d at 1143.

contribute to whether a reasonably prudent user would have inquiry notice of a browsewrap agreement.”<sup>51</sup>

Notice of the existence of terms and conditions to which a consumer will be bound should be conspicuous. Case law describes conspicuousness as a statement that is clearly visible on the screen - without scrolling - that prompts consumers to view the terms and conditions. In *Hines v. Overstock.com, Inc.*, the court ruled that there was insufficient notice. The plaintiff returned a vacuum cleaner that she had ordered from the online closeout retailer, incurring a restocking fee. Defendant Overstock.com claimed that when an individual accesses the website, he or she accepts the company’s terms and conditions, which include a provision that any and all disputes must be arbitrated in Salt Lake City, Utah. Because the website did not prompt her to review the terms and conditions, and because the link to the terms and conditions was not prominently displayed, the court found that Hines lacked requisite notice.

[S]he was never advised of the Terms and Conditions and could not even see the link to them without scrolling down to the bottom of the screen – an action that was not required to effectuate her purchase. Notably, unlike other cases where courts have upheld browsewrap agreement, the notice that “Entering this Site will constitute your acceptance of these Terms and Conditions” was only available within the Terms and Conditions.<sup>52</sup>

The Court further remarked, “Very little is required to form a contract nowadays – but this alone does not suffice.”<sup>53</sup>

In *Hubbert v. Dell Corp.*, the court found that the consumer was provided with conspicuous notice. “[O]n three of defendant’s Web pages that the plaintiffs completed to make their purchases, the following statement appeared: ‘All sales are subject to Dell’s Term[s] and Conditions of Sale.’ This statement would place a reasonable person on notice that there were

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<sup>51</sup> 763 F.3d at 1177.

<sup>52</sup> *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 369 (E. D. N. Y. 2009).

<sup>53</sup> *Id.*



terms and conditions attached to the purchase.” The “Term[s] and Conditions of Sale” were labeled as such and accessible via a blue hyperlink.<sup>54</sup> The Court compared the existence of blue hyperlinks to turning multiple pages of a paper contract.<sup>55</sup>

The general website design at issue in *Van Tassell v. United Marketing Group*,<sup>56</sup> on the other hand, did not provide conspicuous notice. Here, multiple steps would have been required to find the terms, accessible via a hyperlink entitled “Customer Service.” The plaintiff successfully completed her online catalog purchase without knowledge that terms existed.

This multi-step process to find the Conditions of Use is especially problematic because ChefsCatalog.com lacks any reference to the existence of the Conditions of Use or that they are binding on all users of the website outside of the Conditions of Use themselves . . . This does not mean that the lack of a warning or reference to the terms at check out or elsewhere on a webpage makes a browsewrap contract *per se* unenforceable . . . While Internet users are bound by the terms of a website for which they have reasonable notice, Van Tassell’s failure to scour the website for the Conditions of Use she had no notice existed does not constitute assent.<sup>57</sup>

A different rule has been applied to websites containing browsewrap contracts. Courts have found that sufficient notice exists if there is a hyperlink labeled “Terms of Use” visibly placed on the screen without scrolling. Under those circumstances, consumers do not need to click the link to be bound.<sup>58</sup> The *Nguyen* court provides the following “definition” of enforceable browsewrap agreements:

Where the link to a website’s terms of use are buried at the bottom of the page or tucked away in obscure corners of the website where users are unlikely to see it, courts have refused to enforce the browsewrap agreement . . . On the other hand, where the website contains an explicit textual notice that continued use will act as a manifestation of the user’s intent to be bound, courts have been more amenable to enforcing browsewrap agreements . . . In short, the conspicuousness and placement of the ‘Terms of Use’ hyperlink, other notices given to users of the

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<sup>54</sup> *Hubbert v. Dell Corp.*, 835 NE 2d 113, 121 (Ill. App. Ct. 2005).

<sup>55</sup> *Id.*

<sup>56</sup> 795 F. Supp. 2d at 792.

<sup>57</sup> 795 F. Supp. 2d at 792.

<sup>58</sup> Kim at 107-108.

terms of use, and the website's general design all contribute to whether a reasonably prudent user would have inquiry notice of a browsewrap agreement . . . [W]here 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 on – without more – is insufficient to give rise to constructive notice.<sup>59</sup>

### **Conclusion**

Businesses commonly post “Terms and Conditions” on their website, even though they are not required to do so. When enforceable, these terms can be an effective risk management tool. Generally, website terms and conditions state that users of the website are bound by such terms just by their use of the website, without further action. However, this requires that the users be on notice that they are agreeing to the terms. Requiring some form of affirmative action to acknowledge notice of the terms is the best way to assure that an online contract will be enforceable. The enforceability of mandatory binding arbitration provisions in browsewrap contracts is an emerging topic in contract law. The *Nguyen v. Barnes & Noble* decision should serve as a reminder to businesses that, to be enforceable, an arbitration provision in an online contract still requires a meeting of the minds.

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<sup>59</sup> 763 F.3d at 1179