

ELECTRONIC ASSENT TO ONLINE CONTRACTS: DO COURTS CONSISTENTLY ENFORCE CLICKWRAP AGREEMENTS?

A contract is no less a contract simply because it is entered into via a computer.¹

I. INTRODUCTION

Imagine you are registering for Internet access through an Internet service provider (ISP). During the online registration process, an agreement appears in a popup window on your screen. To complete the registration, the ISP requires that you scroll to the bottom of the agreement and click the "I Agree" button. Once you agree, the ISP will grant you Internet access. The agreement, if printed, would consist of thirteen pages, including, somewhere in those thirteen pages, a forum-selection clause requiring all claims arising out of the agreement to be filed in Virginia, a state that bans non-statutory class action lawsuits. Wanting the service, you quickly scroll to the bottom and agree. The clickwrap agreement² is complete. The service, however, is much slower than expected, and you encounter numerous delays. If you choose to sue the ISP, are you bound by the entire thirteen-page agreement? Further, would the forum-selection clause prohibit you from filing a class action suit with other dissatisfied users in your home state?³

Imagine a similar circumstance in which you are registering for services with a company that facilitates online transactions by transferring money from online buyers to online sellers. The service provider requires you to open and to fund an account with it for use in making purchases. Again, an agreement appears in a popup window, requiring you to click the "I Agree" button before using the service. The agreement consists of eleven sections, totaling twenty-five printed pages, including a clause giving the service provider unilateral power to freeze your account and withhold your monies during a dispute. Again, you quickly scroll to the bottom and click the "I Agree" button because you want to buy a product immediately. A dispute subsequently develops over a transaction. You now want to terminate the agreement, but the service provider will not return your deposited money. Are you bound by the online agreement that effectively gives the service provider exclusive access to your money until the dispute is resolved months later?⁴

¹ *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007, 1011 (D.C. 2002).

² A clickwrap agreement is defined *infra* Part II.A.

³ These facts come from *Forrest*, 805 A.2d at 1009-10.

⁴ These facts come from *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1166-70 (N.D. Cal. 2002).

The above scenarios are the facts of two recently decided cases concerning the enforceability of clickwrap agreements: *Forrest v. Verizon Communications, Inc.*⁵ and *Comb v. PayPal, Inc.*⁶ While these cases were decided one day apart, one court enforced the clickwrap agreement, while the other did not. The court in *Forrest* held that the online agreement, including the forum-selection clause, was enforceable. Therefore, under this clause and regardless of the residence of the user, all disputes related to the online contract must be resolved in Virginia, where consumer class action lawsuits are barred.⁷ The court in *Comb*, however, would not enforce the online agreement and denied the service provider's motion to compel individual arbitration of the dispute under the agreement. The court found that the online contract was unconscionable⁸ because it substantially favored the service provider.⁹

These conflicting decisions raise the question of whether online vendors and consumers are bound by clickwrap agreements. The answer to this question becomes increasingly important as millions of Americans use ISPs and other online services everyday. Many of these consumers have agreed to the terms of clickwrap agreements, possibly without realizing they may have entered into a contract. To engage confidently in online commerce, both vendors and consumers need a higher degree of certainty concerning the enforceability of clickwrap agreements.

Part II of this note describes the common law of contract-formation and the enforceability of contracts of adhesion, which are foundational in deciding whether clickwrap agreements are enforceable. Part III analyzes case law that directly affects clickwrap agreements, discussing cases on both sides of the issue. Finally, in Part IV, this note concludes that clickwrap agreements are prima facie valid, making them enforceable against both online vendors and consumers.

II. BACKGROUND OF CONTRACT FORMATION AND CONTRACTS OF ADHESION

The contracts at issue in both *Forrest* and *Comb* are commonly called clickwrap agreements. A clickwrap agreement must be distinguished from two similar computer-related agreements, shrinkwrap and browswrap agreements. While these agreements differ,

⁵ *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007 (D.C. 2002).

⁶ *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002).

⁷ *Forrest*, 805 A.2d at 1008-09, 1011.

⁸ *Comb*, 218 F. Supp. 2d at 1177. The *Comb* court did not decide whether the service provider's unilateral changes to the user agreement that were made without notifying the user would be enforceable against a consumer who only agreed to the original online contract. Stephanie Francis Cahill, *Sealed With a Click: Two Courts Differ on Enforceability of "Clickwrap" Agreements*, 1 No. 36 A.B.A. J. E-Report 3 (Sept. 20, 2002), at <http://www.abanet.org/journal/ereport/s20click.html>.

⁹ *Comb*, 218 F. Supp. 2d at 1175.

the central issue is the same: whether the consumer manifested the necessary assent to make a valid and enforceable contract.¹⁰

A. Definitions and Law

“A ‘clickwrap agreement’ allows the consumer to manifest its assent to the terms of a contract by ‘clicking’ on an acceptance button on the website. If the consumer does not agree to the contract terms, the website will not accept the consumer’s order.”¹¹ The terms of the agreement are displayed on the consumer’s computer screen and are available to be read before clicking on the acceptance button. Therefore, if the consumer accepts, he makes an explicit manifestation of assent to the contract’s terms. Accepting the terms of the online agreement is a prerequisite to completing the order for goods or services. Clickwrap agreements are often used on websites that permit users to download software¹² and to purchase online services.¹³

In a shrinkwrap agreement, by comparison, the consumer’s manifestation of assent to the contract’s terms is somewhat less explicit. Here, items such as software are sold in cellophane “shrinkwrap” with a visible notice stating the license agreement is enclosed. The shrinkwrap agreement becomes effective when the consumer tears open the shrinkwrapped package.¹⁴

The browsewrap agreement is different from the previous agreements, operating on the consumer’s implied manifestation of assent. “Browsewrap agreements appear in the form of a hyperlink¹⁵ on the vendor’s website. Unlike clickwrap agreements, the terms of a browsewrap agreement are not displayed on the computer screen unless

¹⁰ This note primarily addresses the enforceability of clickwrap agreements. Shrinkwrap agreements are also addressed because they were used before clickwrap agreements were developed. The precedent regarding shrinkwrap agreements is also useful to an analysis of clickwrap agreements. Browsewrap agreements are mentioned primarily to distinguish them from the other two types of agreements.

¹¹ *Stomp, Inc. v. NeatO, L.L.C.*, 61 F. Supp. 2d 1074, 1080 n.11 (C.D. Cal. 1999).

¹² *Id.*

¹³ See, e.g., *i.LAN Sys., Inc. v. NetScout Serv. Level Corp.*, 183 F. Supp. 2d 328, 330 (D. Mass. 2002) (addressing clickwrap agreements contained in the purchased software); *Decker v. Circus Circus Hotel*, 49 F. Supp. 2d 743, 748 (D.N.J. 1999) (addressing clickwrap agreements used when making hotel reservations over the Internet); *Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 702 (Cal. Ct. App. 2001) (addressing clickwrap agreements related to online access provided by an ISP).

¹⁴ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996).

¹⁵ A hyperlink is “an element in an electronic document that links to another place in the same document or to an entirely different document. Typically, you click on the hyperlink to follow the link.” PHILLIP E. MARGOLIS, *COMPUTER AND INTERNET DICTIONARY* 264 (3d ed. 1999). Hyperlinks are essential to the World Wide Web. *Id.*

the user clicks on the hyperlink.”¹⁶ Therefore, in a browsewrap agreement, a consumer is able to download and to use software without manifesting *any* assent to the agreement’s terms and without acknowledging the formation of a contract.¹⁷

Mutual assent is a necessary element to form a contract.¹⁸ In software licensing and online service contracts, mutual assent looks different from the traditional signatures that evidence mutual assent on a written contract, but it is still required to form a binding contract. Mutual assent continues to be “the bedrock of any agreement to which the law will give force.”¹⁹

B. Law and Precedent That Provide a Foundation for Enforcing Clickwrap Agreements

1. Contracts of Adhesion

In a clickwrap agreement, the consumer is supposed to read the agreement²⁰ that appears on his screen and either accept or reject it. The consumer possesses no power to bargain for contract terms. He either accepts the service provider’s terms as stated in the online agreement or rejects them, and his decision affects his ability to purchase the goods or services. A clickwrap agreement, therefore, is a contract of adhesion.

Contracts of adhesion are contracts in which the terms are completely defined by one party and the other party has no bargaining power.²¹ Contracts of adhesion are usually offered to the consumer on a standardized form.²² “The process of entering into a contract of adhesion ‘. . . is not one of haggle or cooperative process’” but one of take it or leave

¹⁶ Kaustuv M. Das, Note, *Forum-Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the “Reasonably Communicated” Test*, 77 WASH. L. REV. 481, 482 (2002) (citing *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 588 (S.D.N.Y. 2001)).

¹⁷ *Specht*, 150 F. Supp. 2d at 595.

¹⁸ 17 C.J.S. *Contracts* § 2 (1999) (“[T]he elements of a contract include offer and acceptance, consideration, and mutual assent to terms essential to the formation of a contract.”).

¹⁹ *Specht*, 150 F. Supp. 2d at 596.

²⁰ “[B]asic contract law establishes a duty to read the contract; it is no defense to say ‘I did not read what I was signing.’” The duty to read applies to contracts of adhesion, like clickwrap agreements, in which one party has significantly more bargaining power than another party. *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1292 (7th Cir. 1989). The duty to read the contract is also enforced when manifestation of assent to a contract is given by means other than a written signature (i.e., when manifestation of assent to a clickwrap agreement is given by clicking the “I Agree” button). See Das, *supra* note 16, at 485 (citing JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 9.41 (4th ed. 1998)).

²¹ ARTHUR L. CORBIN, *CORBIN ON CONTRACTS* § 1.4 (Joseph M. Perillo ed., rev. ed. 1993).

²² *Id.*

it.²³ Contracts of adhesion tend to be one-sided, favoring the drafter.²⁴ Consequently, courts under the doctrine of unconscionability require substantive fairness in such contracts.²⁵

Contracts of adhesion, however, are not inherently bad or immoral. Parties often agree to terms, even though they could not bargain for them. Additionally, because there are many advantages to their use, contracts of adhesion are commonly used in routine transactions (e.g., insurance policies).²⁶ In fact, contracts of adhesion “are essential to the functioning of the economy.”²⁷ Hence, clickwrap agreements should not be struck down simply because they are contracts of adhesion.

2. Precedent

The United States Supreme Court has confirmed that “freely negotiated private . . . agreement[s], unaffected by fraud, undue influence, or overweening bargaining power, . . . should be given full effect.”²⁸ Therefore, the Court concluded in *The Bremen v. Zapata Off-Shore Co.* that forum-selection clauses in negotiated contracts are prima facie valid unless enforcement would be unreasonable under the circumstances.²⁹ As noted above, clickwrap agreements are not “freely negotiated,” which raises the question of whether the terms in clickwrap agreements, including forum-selection clauses, are enforceable.

To answer this question, it is necessary to understand the existing precedent concerning the enforceability of contracts of adhesion. Two cases predominate. In 1991, the United States Supreme Court addressed contracts of adhesion related to the purchase of passenger cruise ship tickets in *Carnival Cruise Lines, Inc. v. Shute*.³⁰ In 1996, the Seventh Circuit in *ProCD, Inc. v. Zeidenberg* used the Court’s analysis from *Carnival* to hold that shrinkwrap agreements, an example of a contract of adhesion, are enforceable.³¹ This precedent and its related legal reasoning are critical to the analysis of clickwrap agreements.³²

²³ *Id.* (citing Arthur Leff, *Contract as a Thing*, 19 AM. U. L. REV. 131, 143 (1970)).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13 (1972).

²⁹ *Id.* at 10.

³⁰ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

³¹ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996).

³² *See, e.g.*, *i.LAN Sys., Inc. v. NetScout Serv. Level Corp.*, 183 F. Supp. 2d 328, 337 (D. Mass. 2002) (citing *ProCD*, 86 F.3d 1447, which relied on *Carnival*, 499 U.S. 585); *Stomp, Inc. v. NeatO, L.L.C.*, 61 F. Supp. 2d 1074, 1078 n.8 (C.D. Cal. 1999) (citing *ProCD*, 86 F.3d at 1451); *Decker v. Circus Circus Hotel*, 49 F. Supp. 2d 743, 748 (D.N.J. 1999) (citing *Carnival*, 499 U.S. 585).

In *Carnival*, the Shutes, through a travel agent, purchased and paid for passenger tickets on Carnival Cruise Line.³³ The tickets were later sent to the Shutes and included terms and conditions not disclosed to them.³⁴ Carnival included a statement on the face of the tickets stating that the tickets were subject to the attached terms and conditions.³⁵ The terms stated that all disputes concerning the tickets “shall be litigated . . . in the State of Florida,” and that acceptance of the tickets meant the passengers accepted and agreed to all terms and conditions.³⁶

Mrs. Shute was injured during the cruise and sued Carnival in the United States District Court for the Western District of Washington, in violation of the contract’s terms.³⁷ The Supreme Court found that the Shutes’ ticket purchase was a routine transaction, substantially the same as all other passage tickets purchased by other travelers from Carnival or other cruise lines.³⁸ Accordingly, the Court said it would be “entirely unreasonable” for the Shutes or any other passengers to negotiate for terms, such as a forum-selection clause.³⁹ The Court determined the passage ticket was a “form contract[,] the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line.”⁴⁰ The Court upheld the passage contract and its forum-selection clause, even though it was a contract of adhesion.⁴¹ While the forum-selection clause restricted where the lawsuit could be filed, it did not eliminate their substantive “right to ‘a trial by [a] court of competent jurisdiction.’”⁴²

While the Supreme Court in *Carnival* enforced a contract of adhesion when it existed in a routine consumer purchase, the Court of Appeals for the Seventh Circuit enforced a contract of adhesion when it was in the form of a shrinkwrap agreement. *ProCD* is “the leading case on shrinkwrap agreements.”⁴³ In this case, ProCD enclosed a license agreement in every box of software it sold to consumers.⁴⁴ On every box, ProCD declared the use of the software was restricted as stated in the

³³ *Carnival*, 499 U.S. at 587.

³⁴ *Id.* at 587-88.

³⁵ *Id.* at 587.

³⁶ *Id.* at 587-88.

³⁷ *Id.* at 588.

³⁸ *Id.* at 593.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 595 (stating, however, that forum selection clauses are subject to judicial review for fundamental fairness).

⁴² *Id.* at 596 (quoting 46 U.S.C. app. § 183(c) (2001)).

⁴³ *i.LAN Sys., Inc. v. NetScout Serv. Level Corp.*, 183 F. Supp. 2d 328, 337 (D. Mass. 2002).

⁴⁴ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996).

enclosed license.⁴⁵ The license limited the use of the software to non-commercial uses.⁴⁶ Zeidenberg purchased ProCD's software from a retail outlet.⁴⁷ The software was packaged in a box that contained not only the license agreement but also the restrictive warning on the face of the box.⁴⁸ He ignored the shrinkwrap license agreement, which was included in a printed manual and which appeared on the screen every time he ran the software.⁴⁹ Zeidenberg then resold information that was included in the software in violation of the shrinkwrap agreement.⁵⁰

The *ProCD* court concluded that these software license agreements should be treated like ordinary contracts for the sale of goods, and therefore governed by the common law of contracts and the Uniform Commercial Code (UCC).⁵¹ The court stated, "Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike."⁵² Standard contracts prepared by the vendor for transactions in which payment occurs before the terms are fully communicated are commonplace.⁵³ For example, such "pay now, terms later" transactions occur every day when consumers purchase insurance, airline tickets, concert tickets, warranted consumer goods, and prescription and non-prescription drugs that contain package inserts providing warnings and other information.⁵⁴ The *ProCD* court concluded that purchases of software subject to a shrinkwrap agreement, where the consumer pays for the item before opening the shrinkwrap and reading the terms, are similar to these commonly accepted "pay now, terms later" transactions.⁵⁵ Under the UCC, the buyer under a contract of adhesion may reject the terms and return the goods after he has had the opportunity to make a detailed review of the terms.⁵⁶ Therefore, because Zeidenberg had the opportunity to read the agreement and return the software if he did not accept the terms, the shrinkwrap agreement was enforceable under the UCC.⁵⁷

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 1451.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 1451-52.

⁵⁶ *Id.* at 1452-53.

⁵⁷ *Id.*

From these precedents, two conclusions are obvious. First, the United States Supreme Court will uphold a contract of adhesion when it is reasonable that terms are non-negotiable. Second, at least one United States Court of Appeals has established that shrinkwrap agreements, which are similar to clickwrap agreements, are enforceable.

III. CLICKWRAP AGREEMENTS AND THE COURTS

Various federal and state courts have addressed the enforceability of clickwrap agreements. Similar to the differing results in *Forrest*⁵⁸ and *Comb*,⁵⁹ some have upheld clickwrap agreements while others have not. Examining several of these cases reveals common legal principles or trends used by the courts.

A. Clickwrap Agreements Enforced

1. *Forrest v. Verizon Communications, Inc.*

In *Forrest*, the District of Columbia Court of Appeals upheld a clickwrap agreement that forced the assenting consumer to resolve all disputes under the contract in Virginia.⁶⁰ The court held that the terms of the agreement were reasonably communicated to the consumer, making enforcement reasonable.⁶¹

The terms were reasonably communicated to the consumer for the following reasons: (1) the type size and appearance of the terms in question were consistent with the terms as a whole;⁶² (2) the consumer had an opportunity to read the contract on his computer screen before assenting to all of its terms;⁶³ and (3) Verizon had no duty to inform the consumer that the class action remedy was lacking in Virginia.⁶⁴

The court concluded that enforcement was reasonable⁶⁵ because *Forrest* could still have his day in court even if it were in Virginia.⁶⁶ *Forrest's* complaint was really about his loss of the class action remedy

⁵⁸ *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007 (D.C. 2002) (upholding a clickwrap agreement in which the consumer had adequate notice of the terms and enforcement of the terms was otherwise reasonable).

⁵⁹ *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002) (striking down a clickwrap agreement because it was procedurally and substantively unconscionable).

⁶⁰ *Forrest*, 805 A.2d at 1008-09.

⁶¹ *Id.* at 1008, 1011.

⁶² *Id.* at 1010.

⁶³ *Id.* at 1010-11.

⁶⁴ *Id.* at 1011 (stating that service providers have no duty to inform customers "of every procedural nuance" of the forum jurisdiction and that the absence of one particular remedy in a foreign jurisdiction is only one possible consequence of a forum selection clause).

⁶⁵ See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (requiring that forum selection clauses be reasonable under the circumstances to be enforced).

⁶⁶ *Forrest*, 805 A.2d 1007.

in Virginia, which concerned the choice of law and not the inconvenience of going to another jurisdiction to seek a remedy.⁶⁷ The court said that the unreasonableness exception to the enforcement of forum-selection clauses is dependent on the inconvenience of the designated forum and not on the choice of law.⁶⁸ Therefore, Forrest's loss of the class action remedy was not critical in determining whether enforcement of the clickwrap agreement was reasonable.⁶⁹ It was not inconvenient for Forrest, who lived in the District of Columbia, to cross the Potomac River to have his day in court in Virginia.⁷⁰

In a footnote, but useful in the overall analysis of the enforceability of clickwrap agreements, the court stated two more reasons to enforce these agreements.⁷¹ First, enforcement supports freedom of contract.⁷² Second, enforcement supports nationwide and worldwide commerce.⁷³

2. Other Cases

In *Hughes v. McMenamon*, the United States District Court for the District of Massachusetts held that forum selection clauses in a clickwrap agreement are enforceable.⁷⁴ This case concerned a typical subscriber contract with America Online, in which the consumer agreed that Virginia was the exclusive jurisdiction for any claim or dispute under the contract.⁷⁵ The court relied on the rule from the United States Supreme Court's decision in *The Bremen*, in which the Court held that forum-selection clauses are prima facie valid unless enforcement would be unreasonable under the circumstances.⁷⁶ In *The Bremen*, the forum-selection clause was enforceable because it was included in a "freely negotiated" contract.⁷⁷ In *Hughes*, while the terms of the clickwrap agreement were not "freely negotiated," the court still held the forum-

⁶⁷ *Id.* at 1012-13.

⁶⁸ *Id.* at 1012 (citing *Gen. Elec. Co. v. G. Siempelkamp GmbH & Co.*, 809 F. Supp. 1306, 1314 (S.D. Ohio 1993), *aff'd*, 29 F.3d 1095 (6th Cir. 1994)).

⁶⁹ *See id.*

⁷⁰ *Id.* This statement by the court, however, opens the door for other consumers to claim it is inconvenient to have to go beyond a commuting distance or to a non-neighboring jurisdiction to litigate their claim. Hence, these consumers would assert that enforcement of a forum selection clause in these instances would be unreasonable.

⁷¹ *Id.* at 1013 n.13 (citing *Paul Bus. Sys., Inc. v. Canon U.S.A., Inc.*, 397 S.E.2d 804, 807 (Va. 1990)).

⁷² *Id.*

⁷³ *See id.*

⁷⁴ *Hughes v. McMenamon*, 204 F. Supp. 2d 178, 181 (D. Mass. 2002).

⁷⁵ *Id.* at 180.

⁷⁶ *Id.*; *see also* *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (establishing forum-selection clauses are prima facie valid unless enforcement would be unreasonable).

⁷⁷ *The Bremen*, 407 U.S. at 12-13.

selection clause to be prima facie valid.⁷⁸ The consumer freely agreed to the terms of the agreement, making enforcement reasonable, so his claims were subject to the exclusive forum-selection clause.⁷⁹ The court also noted that other courts enforced clickwrap agreements.⁸⁰

A few months earlier, in *i.LAN Systems, Inc. v. NetScout Service Level Corp.*, the United States District Court for the District of Massachusetts held that clickwrap agreements are enforceable.⁸¹ In this case, i.LAN purchased software from NetScout, loaded it on its computers, and agreed to the clickwrap agreement included in the software.⁸² The court, however, recognized that it was not clear what law should be applied to clickwrap agreements, because “software licenses exist in a legislative void.”⁸³ Either Massachusetts’s common law or the UCC, as adopted by Massachusetts, could apply.⁸⁴ The court concluded that Article 2 of the UCC should be applied, although Article 2 does not technically apply to software licensing agreements.⁸⁵ Under UCC § 2-204, “i.LAN manifested assent to the clickwrap license agreement when it clicked on the box stating ‘I agree,’ so the agreement is enforceable.”⁸⁶ The court relied on the theory behind the decision of the *ProCD* court to justify its decision to enforce clickwrap agreements.⁸⁷ If courts accept the consumer’s assent in a shrinkwrap agreement, the more explicit assent of clicking “I Agree” in a clickwrap agreement should also be accepted.⁸⁸ The court held that “clickwrap license agreements are an appropriate way to form contracts.”⁸⁹ Under UCC § 1-102, this approach also promotes the underlying purpose of the UCC, which includes “the

⁷⁸ *Hughes*, 204 F. Supp. 2d at 181.

⁷⁹ *Id.*

⁸⁰ *Id.* (citing *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 532 (N.J. Super. Ct. App. Div. 1999)); see also *Celmins v. Am. Online, Inc.*, 748 So. 2d 1041, 1041-42 (Fla. Dist. Ct. App. 1999).

⁸¹ *i.LAN Sys., Inc. v. NetScout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338-39 (D. Mass. 2002).

⁸² *Id.* at 330.

⁸³ *Id.* at 331-32.

⁸⁴ *Id.* at 331.

⁸⁵ *Id.* at 331-32 (stating Article 2 relates to the purchase of goods and purchasing software is not a transaction in which title transfers to the buyer but one in which the buyer only acquires a license to use the software).

⁸⁶ *Id.* at 336 (citing *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 591-96 (S.D.N.Y. 2001)).

⁸⁷ *Id.* at 338 (citing *1-A Equip. Co. v. ICode, Inc.*, No. 0057CV467, 2000 WL 33281687, at *2 (Mass. Dist. Ct. Nov. 17, 2000) (accepting the Seventh Circuit’s reasoning that “money now, terms later” transactions have value for both buyers and sellers and routinely occur in many industries, including the software industry)).

⁸⁸ *Id.*

⁸⁹ *Id.*

continued expansion of commercial practices through custom, usage and agreement of the parties.”⁹⁰

In *Stomp, Inc. v. NeatO, L.L.C.*, the court stated that a clickwrap agreement that includes a choice of venue clause will be enforceable if the consumer manifested assent.⁹¹ The court had to decide whether it had personal jurisdiction over a non-California company that conducted transactions in California via the Internet.⁹² In dictum, the court stated that a broad exercise of personal jurisdiction over defendants who engage in commerce via the Internet might have a devastating effect on small businesses.⁹³ The court noted the federal policy “to promote the Internet as a tool for communication and trade.”⁹⁴ In order to foster this public policy objective, it is reasonable for an online vendor to include a choice of venue clause in its clickwrap agreement, and such clauses would be enforceable against consumers who manifest assent to the terms before purchasing the good or service.⁹⁵

In another personal jurisdiction case, a federal district court in *Decker v. Circus Circus Hotel* enforced the forum-selection clause in a clickwrap agreement.⁹⁶ In this case, the New Jersey consumer agreed to the Las Vegas hotel’s forum-selection clause when he made hotel reservations via the Internet.⁹⁷ Relying on the United States Supreme Court’s decision and reasoning in *Carnival*, the court held this non-negotiated, yet accepted, forum-selection clause in a clickwrap agreement should be enforced.⁹⁸ The Supreme Court in *Carnival* explained the public policy benefits of upholding such a non-negotiated clause as follows:

[A] clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum

⁹⁰ *Id.* Note that states are statutorily facilitating online commerce in several ways. For example, the Uniform Computer Information Transactions Act (UCITA) encourages online commerce. Virginia is one of two states that have adopted UCITA. The purpose of UCITA is to “(1) support and facilitate the realization of the full potential of computer information transactions; (2) clarify the law governing computer information transactions; (3) enable expanding commercial practice in computer information transactions . . . ; [and] (4) promote uniformity of the law . . . among the States. . . .” VA. CODE ANN. § 59.1-501.6(a) (Michie 2002).

⁹¹ *Stomp, Inc. v. NeatO, L.L.C.*, 61 F. Supp. 2d 1074, 1080-81 (C.D. Cal. 1999).

⁹² *Id.* at 1075-76.

⁹³ *Id.* at 1080.

⁹⁴ *Id.* at 1081 (citing, among others, *Reno v. ACLU*, 521 U.S. 844 (1997)).

⁹⁵ *Id.* at 1080-81 (citing *Groff v. Am. Online, Inc.*, No. PC 97-0331, 1998 WL 307001 (R.I. Super. Ct. May 27, 1998)).

⁹⁶ *Decker v. Circus Circus Hotel*, 49 F. Supp. 2d 743, 748 (D.N.J. 1999).

⁹⁷ *Id.*

⁹⁸ *Id.*

and conserving judicial resources that otherwise would be devoted to deciding those motions. Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.⁹⁹

Another federal district court in *Hotmail Corp. v. Van\$ Money Pie, Inc.* held that a violation of Hotmail's online service agreement by a subscriber was a breach of contract by the subscriber.¹⁰⁰ Hotmail subscribers had to agree to the terms of the clickwrap agreement to use the service, and Hotmail could enforce the terms against those consenting subscribers.¹⁰¹

A New Jersey state court in *Caspi v. Microsoft Network, L.L.C.* enforced a clickwrap agreement for online computer service with Microsoft Network (MSN), an ISP.¹⁰² The court dismissed the consumer's claim, which was filed in New Jersey, because the forum-selection clause required all actions arising under the contract be filed in King County, Washington.¹⁰³ The court noted that MSN prompted prospective subscribers "to view multiple computer screens of information, including a membership agreement" before contract formation.¹⁰⁴ The agreement was "in a scrollable window next to blocks providing the choices 'I Agree' and 'I Don't Agree.'"¹⁰⁵ Subscribers could assent by clicking "I Agree" at any time while scrolling through the agreement.¹⁰⁶

The *Caspi* court also relied on the precedent from *Carnival* to enforce the forum-selection clause in the clickwrap agreement.¹⁰⁷ The court described the similarities between passenger cruise ship tickets and clickwrap agreements as follows:

⁹⁹ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-94 (1991) (citation omitted).

¹⁰⁰ *Hotmail Corp. v. Van\$ Money Pie, Inc.*, No. C-98 JW PVT ENE, C98-20064JW, 1998 WL 388389, at *7 (N.D. Cal. Apr. 16, 1998); see also Peter Brown, *Validity of Clickwrap Licenses*, 717 P.L.I./PAT. 45, 55 (2002).

¹⁰¹ *Hotmail Corp.*, 1998 WL 388389, at *2.

¹⁰² *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 529 (N.J. Super. Ct. App. Div. 1999).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 530.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* Note that the prospective subscriber could assent to the contract by clicking "I Agree" without scrolling to the bottom of the agreement. Many clickwrap agreements put the "I Agree" and "I Don't Agree" buttons at the end of the agreement so the prospective subscriber must, at least, scroll through the entire agreement. Regardless of the position of the "I Agree" button, the Superior Court of New Jersey, Appellate Division, upheld the clickwrap agreement because the subscriber assented to the terms of the contract by clicking "I Agree." *Id.* at 532.

¹⁰⁷ *Id.* at 530.

In *Carnival*, cruise ship passengers were held to a forum selection clause which appeared in their travel contract. The clause enforced in *Carnival* was very similar in nature to the clause in question here, the primary difference being that the *Carnival* clause was placed in small print in a travel contract while the clause in the case *sub judice* was placed on-line on scrolled computer screens.¹⁰⁸

The *Caspi* court recognized that forum selection clauses are prima facie valid and stated that it will uphold these clauses unless “(1) the clause is a result of fraud or ‘overweening’ bargaining power; (2) enforcement would violate the strong public policy of New Jersey; or (3) enforcement would seriously inconvenience trial.”¹⁰⁹

The *Caspi* court also stated that enforceability depends on the consumer receiving adequate notice of the forum-selection clause.¹¹⁰ Again, the court used *Carnival* as its precedent.¹¹¹ In its decision in *Carnival*, the Court implied sufficient notice was required before the forum-selection clause in the passenger ticket could be enforced.¹¹² Notice was the second issue the Court addressed, but was quickly bypassed because the Shutes “conceded that they had notice of the forum-selection provision.”¹¹³ The *Caspi* court found no significant difference between the electronic medium in *Caspi* and printed medium in *Carnival*.¹¹⁴ The *Caspi* court noted the passengers in *Carnival* could have studied the terms before purchasing the cruise tickets.¹¹⁵ Likewise, the plaintiffs in *Caspi* could have spent as much time as needed studying the terms presented to them on their computer screens.¹¹⁶ The court also concluded that MSN did not hide the clause in small type or through other deceptive means.¹¹⁷ The court found the clause was in the same format as most other clauses in the contract and was the first item in the last paragraph.¹¹⁸ The court did note that a few paragraphs, other than the paragraph containing the forum-selection clause, were presented in uppercase letters, but it “discern[ed] nothing about the style or mode of presentation, or the placement of the provision, that can be taken as a basis for concluding that the forum selection clause was proffered

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (citing *Wilfred MacDonald, Inc. v. Cushman, Inc.*, 606 A.2d 407 (N.J. Super. Ct. App. Div. 1992)).

¹¹⁰ *Id.* at 532.

¹¹¹ *Id.*

¹¹² See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590 (1991).

¹¹³ *Id.*

¹¹⁴ *Caspi*, 732 A.2d at 532.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See *id.*

¹¹⁸ *Id.*

unfairly, or with a design to conceal or de-emphasize its provisions.”¹¹⁹ Because MSN did not hide the forum-selection clause, the interests of commerce and good public policy required the court to find that the prospective subscribers to MSN had adequate notice of the contract’s terms.¹²⁰ Reasonable notice is a question of law for the court to decide, and the *Caspi* court decided the prospective MSN subscribers were given reasonable notice of the agreement’s terms even though the terms were distributed through an electronic medium in a scrollable window.¹²¹

3. Lessons Learned

Based on the above cases, many federal and state courts enforce clickwrap agreements. Although there are no United States Supreme Court or United States Court of Appeals decisions enforcing clickwrap agreements, the courts that have enforced them relied on precedent established by these higher courts.¹²² Primarily, clickwrap agreements have been enforced because the consumer has manifested assent to the terms of the agreement by clicking the “I Agree” button. The prospective consumer does need to be given reasonable notice of the contract terms, but as long as the vendor does not hide those terms, courts are likely to find reasonable notice was given.¹²³ Once the contract has been formed, violation of the terms of the agreement may be treated as a breach of contract.¹²⁴

Courts have justified their enforcement of clickwrap agreements by stating that enforcement accomplishes important federal and state public policy objectives and increases economic and judicial efficiency. Enforcing clickwrap agreements encourages commercial expansion,¹²⁵ protects small businesses, and promotes the Internet as a valuable vehicle for conducting business.¹²⁶ Regarding efficiency, the Supreme Court has stated that contract clauses, even if they are non-negotiable, prevent confusion regarding jurisdictional disputes, reduce the litigants’

¹¹⁹ *Id.*

¹²⁰ *See id.*

¹²¹ *Id.* at 532-33.

¹²² *See, e.g., i.LAN Sys., Inc. v. NetScout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002) (advocating the theory supporting the enforcement of shrinkwrap agreements as stated by the United States Court of Appeals for the Seventh Circuit); *Decker v. Circus Circus Hotel*, 49 F. Supp. 2d 743, 748 (D.N.J. 1999) (relying on precedent established by the United States Supreme Court).

¹²³ *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590 (1991); *Caspi*, 732 A.2d at 532-33.

¹²⁴ *See Hotmail Corp. v. Van\$ Money Pie, Inc.*, No. C-98 JW PVT ENE, C98-20064 JW, 1998 WL 388389, at *7 (N.D. Cal. Apr. 16, 1998).

¹²⁵ *i.LAN Sys. Inc.*, 183 F. Supp. 2d at 338.

¹²⁶ *Stomp, Inc. v. NeatO, L.L.C.*, 61 F. Supp. 2d 1074, 1080-81 (C.D. Cal. 1999).

pretrial court costs and time, conserve judicial resources, and result in a lower cost of goods and services to consumers.¹²⁷

To be sure, a body of case law enforcing clickwrap agreements is developing based on higher court precedent.¹²⁸ The *Caspi* court's discussion of the similarities between clickwrap agreements and contracts related to passenger cruise ship tickets, which the United States Supreme Court has enforced, provides additional support for the enforceability of clickwrap agreements.¹²⁹

B. Clickwrap Agreements Not Enforced

1. Comb v. PayPal, Inc.

In *Comb*, a federal district court did not enforce a clickwrap agreement because the agreement's one-sidedness was unconscionable.¹³⁰ Unconscionability is a defense to contracts; therefore, it may be used to prevent the enforcement of certain terms of a contract.¹³¹ The court in *Comb* held that the clickwrap agreement between PayPal and Comb was both procedurally and substantively unconscionable; both are required to find that a contract is unconscionable.¹³² PayPal did encourage every prospective customer to read the agreement carefully and did inform each one that clicking "I Agree" would create a binding contract with respect to all the terms included in the agreement.¹³³ The court, however, still found the agreement unconscionable.

Procedural unconscionability requires unequal bargaining power between the parties and obscure contractual terms.¹³⁴ Although the court stated that "[a] contract or clause is procedurally unconscionable if it is a contract of adhesion,"¹³⁵ it noted that "the availability of alternative

¹²⁷ *Carnival*, 499 U.S. at 593-94; see also *Decker*, 49 F. Supp. 2d at 748.

¹²⁸ Other than the lack of precedent by higher courts concerning the enforceability of clickwrap agreements, the only problem identified in the above cases is the question of what law applies to these software license agreements. See *i.LAN Sys. Inc.*, 183 F. Supp. 2d at 331-32 (stating that "software licenses exist in a legislative void" and, although the federal district court applied the UCC, that the purchase of a software license is not truly a purchase of a good under the UCC).

¹²⁹ See *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 530, 532 (N.J. Super. Ct. App. Div. 1999) (stating that terms placed in small print on a passenger ticket and terms placed in a scrollable window on a computer screen are "very similar" and that there is "no significant distinction" between the sufficiency of notice of contract terms given via printed versus electronic mediums).

¹³⁰ *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1175 (N.D. Cal. 2002).

¹³¹ *Id.* at 1172.

¹³² *Id.* at 1172-77.

¹³³ *Id.* at 1169.

¹³⁴ *Id.* at 1172-73.

¹³⁵ *Id.* at 1172.

sources is enough to defeat a showing of procedural unconscionability.”¹³⁶ Therefore, based on this court’s reasoning, all clickwrap agreements would be procedurally unconscionable, unless the service provider could demonstrate that the unsophisticated consumer knew of alternative suppliers of the goods or services.¹³⁷ The take it or leave it nature of the PayPal agreement evidenced the unequal bargaining power between PayPal and Comb, which made it procedurally unconscionable.¹³⁸ In this instance, however, the mere showing of the availability of an alternative service did not defeat the procedural unconscionability because Comb, who was not a sophisticated purchaser of online services, may not have known about an alternative source.¹³⁹

Substantive unconscionability exists when the harshness or one-sidedness of the transaction “shock[s] the conscience.”¹⁴⁰ The PayPal agreement was substantively unconscionable for the following reasons: (1) the agreement gave all power regarding dispute resolution to PayPal without demonstrating a legitimate business reason for this one-sidedness;¹⁴¹ (2) the prohibition against consolidating claims meant customers with small claims were left “without an effective method of redress”;¹⁴² (3) the high cost of individual arbitration discouraged consumers with small damages from pursuing justice;¹⁴³ and (4) the designation of Santa Clara County, California, which was PayPal’s “backyard,” as the jurisdiction in which arbitration would be conducted, was unreasonable given that PayPal serves millions of customers across the United States.¹⁴⁴ In *Comb*, the court found a high degree of substantive unconscionability.

2. Other Cases

As seen in *Comb*, enforcement of clickwrap agreements is not universal. In *Specht v. Netscape Communications Corp.*, a case with complicated facts, the United States Court of Appeals for the Second Circuit did not enforce an arbitration clause in a subsidiary clickwrap

¹³⁶ *Id.* at 1172-73.

¹³⁷ *See id.* The mere existence of procedural unconscionability does not mean the clickwrap agreement as a whole will be found to be unconscionable. A high degree of substantive unconscionability (i.e., harshness and one-sidedness) may be necessary to make the agreement as a whole unconscionable. *See id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1172.

¹⁴¹ *Id.* at 1173-75 (quoting *Blake v. Ecker*, 113 Cal. Rptr. 2d 422, 433 (Cal. Ct. App. 2001)).

¹⁴² *Id.* at 1175-76 (quoting *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 862 (Cal. Ct. App. 2002)).

¹⁴³ *Id.* at 1176.

¹⁴⁴ *Id.* at 1176-77.

agreement to which the plaintiffs clearly assented.¹⁴⁵ The plaintiffs' claim, that the software vendor inappropriately used the software to eavesdrop on the users, was not based on the clickwrap agreement, but on a prior and separate browsewrap agreement¹⁴⁶ to which they had not manifested assent.¹⁴⁷

In this case, most of the plaintiffs downloaded software called SmartDownload, which was subject to the prior and separate browsewrap agreement, from a Netscape webpage.¹⁴⁸ Netscape invited the plaintiffs to download the software merely by clicking on a "Download" button.¹⁴⁹ No clickwrap agreement accompanied this download.¹⁵⁰ During the process of downloading SmartDownload, the plaintiffs also downloaded Netscape's Communicator.¹⁵¹ Communicator was subject to the subsidiary clickwrap agreement, which included the arbitration clause that the defendants were attempting to enforce.¹⁵² Communicator's clickwrap agreement did not mention SmartDownload, but did include a merger or integration clause stating the agreement contained the entire understanding between the parties.¹⁵³ The court held that the plaintiffs' claim regarding the SmartDownload software was collateral to the Communicator clickwrap agreement.¹⁵⁴ Therefore, while the Communicator agreement was valid and enforceable, it was not relevant to the SmartDownload claim.¹⁵⁵

¹⁴⁵ *Specht v. Netscape Communications, Corp.*, 306 F.3d 17, 20 (2d Cir. 2002).

¹⁴⁶ *Id.* at 23, 24, 35. SmartDownload was subject to a license agreement, but the existence of that agreement would have only been made known to a user if he had scrolled down to the next screen. If the user had scrolled down to the next screen, he still would have seen only a hyperlink that would have taken him to the SmartDownload license agreement. The court refused to enforce this browsewrap agreement. It stated:

[P]laintiffs' downloading of SmartDownload did not constitute acceptance of defendants' license terms. 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. We hold that a reasonably prudent offeree in plaintiffs' position would not have known or learned, prior to acting on the invitation to download, of the reference to SmartDownload's license terms hidden below the "Download" button on the next screen.

Id. at 35.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 22.

¹⁴⁹ *Id.* at 23.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 22. The plaintiffs downloaded both software programs because SmartDownload was supposed to enhance the functioning of Communicator.

¹⁵² *Id.*

¹⁵³ *Id.* at 22, 36.

¹⁵⁴ *Id.* at 36.

¹⁵⁵ *See id.* at 22, 36.

In another case, *SoftMan Products Co. v. Adobe Systems, Inc.*, a federal district court concluded a clickwrap agreement was not enforceable against a retailer of software who did not install the software and, hence, did not assent to the terms of the agreement.¹⁵⁶ In this case, Adobe, a software developer, claimed SoftMan, a software distributor and retailer, was distributing unauthorized Adobe software by unbundling it and selling individual pieces to consumers.¹⁵⁷

Adobe distributes software under license agreements with its distributors.¹⁵⁸ Under the license agreement, a distributor violates the license agreement by unbundling the software and selling individual pieces; however, SoftMan had no such licensing agreement with Adobe.¹⁵⁹ Adobe, therefore, alleged that SoftMan had violated the end user license agreement (EULA), a clickwrap agreement¹⁶⁰ that also prevents unbundling and reselling individual pieces of Adobe software.¹⁶¹ Although the box containing the Adobe software “clearly indicate[d] that use is subject to the consumer’s agreement to the terms contained in [the] EULA inside,” for consumers to be bound, they must agree to the clickwrap agreement as part of the software’s installation process.¹⁶²

As a retailer, SoftMan had no need to install the Adobe software and never agreed to the EULA.¹⁶³ In this situation, only the consumer, who would install Adobe software, would assent to the EULA, not the retailer.¹⁶⁴ The court found “SoftMan [was] not bound by the EULA because it . . . never loaded the software, and therefore never assented to its terms of use.”¹⁶⁵

¹⁵⁶ *SoftMan Prods. Co. v. Adobe Sys., Inc.*, 171 F. Supp. 2d 1075, 1087-88 (C.D. Cal. 2001).

¹⁵⁷ *Id.* at 1080.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1082.

¹⁶⁰ *Id.* at 1087. The court refers to the EULA as a shrinkwrap agreement presumably because notice of a software license agreement was written on the box containing Adobe software. No hard copy of the license agreement, however, was included in the box. The Adobe software prompted each consumer to agree to the contract terms during the installation process. The court said, “Reading a notice on a box is not equivalent to the degree of assent that occurs when the software is loaded onto the computer and the consumer is asked to agree to the terms of the license.” *Id.* The EULA is closer to a clickwrap agreement than a shrinkwrap agreement. The actual characterization of the agreement, however, is not critical for the purposes of this note. The key point in the analysis of this case is that SoftMan did not assent to the license agreement by clicking “I Agree” and, therefore, could not be held to the terms of the agreement.

¹⁶¹ *Id.* at 1082.

¹⁶² *Id.* at 1087.

¹⁶³ *See id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1088.

In *America Online, Inc. v. Superior Court*, a California court of appeals held a clickwrap agreement unenforceable because, by substantially impairing the rights of a California consumer, the agreement was against California public policy.¹⁶⁶ The California consumer sued America Online (AOL) when AOL continued monthly charges to his credit card after the consumer notified AOL he had canceled his subscription.¹⁶⁷

The AOL clickwrap agreement included both forum-selection and choice of law clauses designating Virginia as the applicable forum and source of law for resolving disputes.¹⁶⁸ The California court agreed with *The Bremen* and *Carnival* that forum-selection clauses are contractually valid unless enforcement would be unreasonable.¹⁶⁹ To support the validity of forum-selection clauses, the court cited “one’s free right to contract” and the economic advantages of such a clause.¹⁷⁰ The court stated, however, that not all forum-selection clauses are enforceable.¹⁷¹ A valid forum-selection clause must (1) be entered into freely and voluntarily, (2) have a “logical nexus to one of the parties or the dispute,” and (3) not substantially impair the legal rights of California consumers in a way that violates California public policy.¹⁷² The applicable California public policy came from the California Consumers Legal Remedies Act, which is construed liberally “to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.”¹⁷³ In 1971, the Supreme Court of California stated it is “of the utmost priority in contemporary society” to protect consumers from deceptive business practices.¹⁷⁴ Class action lawsuits, as opposed to individual actions, are a necessary means to accomplish this important California public policy objective.¹⁷⁵

The importance of this public policy is highlighted by the court’s refusal in *America Online* to enforce the clickwrap agreement that prevented such a class action remedy.¹⁷⁶ The court concluded that making a California consumer seek justice in Virginia, a state that does

¹⁶⁶ *Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 702 (Cal. Ct. App. 2001).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 701-02.

¹⁶⁹ *Id.* at 707.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 707-08.

¹⁷³ *Id.* at 710.

¹⁷⁴ *Id.* at 712 (quoting *Vasquez v. Superior Court*, 484 P.2d 964, 968 (Cal. 1971)).

¹⁷⁵ *Id.*; see also *Vasquez*, 484 P.2d at 968-69.

¹⁷⁶ *Am. Online, Inc.*, 108 Cal. Rptr. 2d at 702.

not allow non-statutory class action suits, limited the remedies available to the California consumer.¹⁷⁷ This limitation is a substantial impairment of his legal rights and, hence, is a violation of California public policy.¹⁷⁸

In *Williams v. America Online, Inc.*, a Massachusetts state court held the forum-selection clause of a clickwrap agreement did not apply because the harm to the consumer occurred before the consumer's acceptance of the terms of the agreement and the harm would have occurred even if the consumer had not accepted the terms.¹⁷⁹ The court recognized the general validity of forum-selection clauses,¹⁸⁰ but followed the Supreme Judicial Court of Massachusetts by noting that "forum selection clause[s] did not apply to harm which occurred before the parties entered into a contractual relationship."¹⁸¹ In this case, AOL changed the consumer's computer configuration at the beginning of the installation process, which was before the consumer either saw or assented to the terms of the clickwrap agreement.¹⁸² Hence, the consumer's claim was not subject to the terms of the clickwrap agreement because the harm occurred before the consumer assented to the terms of the agreement.¹⁸³ Similar to the California court's ruling in the case described immediately above, the Massachusetts court also said enforcing AOL's forum-selection clause violated Massachusetts's public policy by forcing individual Massachusetts consumers with a small amount of damages to seek justice in another state.¹⁸⁴ The court said an individual consumer with only a few hundred dollars in damages "should not have to pursue AOL in Virginia."¹⁸⁵

3. Lessons Learned

Two lessons arise from the cases in which courts did not enforce the terms of clickwrap agreements. One lesson does not diminish the enforceability of clickwrap agreements at all, while the other seriously affects their enforceability based on the circumstances.

¹⁷⁷ *Id.* The California court also referred to other provisions of Virginia law that substantially diminish the rights of a California citizen. The court said, "[N]either punitive damages, nor enhanced remedies for disabled and senior citizens are recoverable under Virginia's law." *Id.* at 712.

¹⁷⁸ *Id.* at 702.

¹⁷⁹ *Williams v. Am. Online, Inc.*, No. 00-0962, 2001 WL 135825, at *1 (Mass. Super. Ct. Feb. 5, 2001).

¹⁸⁰ *Id.* at *2 (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991)).

¹⁸¹ *Williams*, 2001 WL 135825, at *1 (citing *Jacobson v. Mailboxes Etc. U.S.A., Inc.*, 646 N.E.2d 741 (Mass. 1995) (applying California law)).

¹⁸² *Id.* at **2-3.

¹⁸³ *See id.*

¹⁸⁴ *Id.* at *3.

¹⁸⁵ *Id.*

First, three courts did not enforce the applicable clickwrap agreements because the agreements were collateral to the related claims.¹⁸⁶ In *Specht*, a software program caused the harm while the consumer was not even aware that the software came subject to restrictive terms.¹⁸⁷ The consumer had agreed to the terms of a clickwrap agreement for another software program distributed by the same vendor, but that clickwrap agreement did not apply to the software that caused the harm.¹⁸⁸ In *SoftMan*, the court recognized the clickwrap agreement applied to consumers, but not to retailers.¹⁸⁹ The retailer, therefore, was not bound by a clickwrap agreement he never saw or accepted.¹⁹⁰ In *Williams*, the harm to the consumer was caused before any contractual relationship was established by the clickwrap agreement.¹⁹¹ In seeking redress for the harm, the consumer was not limited by the terms of a subsequent clickwrap agreement.¹⁹² In all these instances, courts did not enforce the clickwrap agreements only because the claims related to events wholly outside of the agreements. The clickwrap agreements, however, remained valid and enforceable.

Second, a federal district court in California held a clickwrap agreement unenforceable because it was unconscionable,¹⁹³ and two state courts held certain clickwrap agreements unenforceable as they violated the states' public policies.¹⁹⁴ In the federal district court case, the terms were too one-sided against the consumer to enforce them.¹⁹⁵ In California, a clickwrap agreement violated public policy when enforcement substantially impaired a citizen's legal rights (e.g., by eliminating the class action remedy and other remedies that protect consumers from deceptive business practices).¹⁹⁶ In Massachusetts, a clickwrap agreement violated public policy when it prevented a consumer with a small amount of damages from seeking justice in Massachusetts.¹⁹⁷ Unconscionability and violations of public policy seem to be the only reasons courts do not enforce clickwrap agreements.

¹⁸⁶ See *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002); *SoftMan Prods. Co. v. Adobe Sys., Inc.*, 171 F. Supp. 2d 1075 (C.D. Cal. 2001); *Williams*, 2001 WL 135825.

¹⁸⁷ *Specht*, 306 F.3d at 23.

¹⁸⁸ *Id.* at 22.

¹⁸⁹ *SoftMan*, 171 F. Supp. 2d at 1087.

¹⁹⁰ *Id.* at 1088.

¹⁹¹ *Williams*, 2001 WL 135825, at *2.

¹⁹² *Id.* at **2-3.

¹⁹³ *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1175 (N.D. Cal. 2002).

¹⁹⁴ See *Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 702 (Cal. Ct. App. 2001); *Williams*, 2001 WL 135825.

¹⁹⁵ *Comb*, 218 F. Supp. 2d at 1175.

¹⁹⁶ *Am. Online, Inc.*, 108 Cal. Rptr. 2d at 712.

¹⁹⁷ *Williams*, 2001 WL 135825, at *3.

IV. CONCLUSION

The apparent conflict in the *Forrest*¹⁹⁸ and *Comb*¹⁹⁹ decisions gave rise to this note. The question, therefore, is whether these two decisions are, in fact, conflicting. On one hand, *Forrest* enforced a forum-selection clause in a clickwrap agreement,²⁰⁰ while *Comb* held the designation of one forum to resolve all disputes for a nationwide customer base was unconscionable.²⁰¹ On the other hand, both courts applied basic contract law to the agreements.²⁰² Different decisions under different circumstances are to be expected.

The better view of this apparent conflict is that clickwrap agreements are prima facie valid when the user clicks "I Agree."²⁰³ Online vendors and consumers are generally bound by clickwraps.²⁰⁴ This general enforceability fosters online commerce by allowing both parties to properly arrange their online business affairs.²⁰⁵

To invalidate a clickwrap agreement or a term therein, the opponent of the agreement must prove at least one term of the agreement either violates state public policy or is unconscionable.²⁰⁶ These exceptions to general enforceability depend on a few factors including the jurisdiction in which the case is heard²⁰⁷ and other individual circumstances concerning the agreement and the parties.²⁰⁸

¹⁹⁸ *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007 (D.C. 2002).

¹⁹⁹ *Comb*, 218 F. Supp. 2d 1165.

²⁰⁰ *Forrest*, 805 A.2d at 1008-09.

²⁰¹ *Comb*, 218 F. Supp. 2d at 1176-77.

²⁰² See *id.* at 1172 (using procedural and substantive unconscionability to determine the validity of a clickwrap agreement); *Forrest*, 805 A.2d at 1010-11, 1013 (using "reasonably communicated," "adequate notice," and "right to cancel" as factors in determining mutual assent to a clickwrap agreement).

²⁰³ Cf. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (holding that forum-selection clauses "are prima facie valid and should be enforced" unless enforcement would be unreasonable).

²⁰⁴ See, e.g., *Hughes v. McMemon*, 204 F. Supp. 2d 178, 181 (D. Mass 2002); *Stomp, Inc. v. NeatO, L.L.C.*, 61 F. Supp. 2d 1074, 1080-81 (C. D. Cal. 1999).

²⁰⁵ See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996) (stating that known contractual terms are "essential to the efficient functioning of markets").

²⁰⁶ See, e.g., *Comb*, 218 F. Supp. 2d at 1177 (holding the clickwrap agreement unconscionable); *Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 702 (Cal. Ct. App. 2001) (holding that the clickwrap agreement violated California public policy).

²⁰⁷ See, e.g., *Am. Online, Inc.*, 108 Cal. Rptr. 2d at 702 (using California public policy and the California Consumers Legal Remedies Act to find the clickwrap agreement unenforceable); *Williams v. Am. Online, Inc.*, No. 00-0962, 2001 WL 135825, at *3 (Mass. Super. Ct. Feb. 8, 2001) (using Massachusetts's public policy to invalidate a clickwrap agreement).

²⁰⁸ See, e.g., *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007, 1012 (D.C. 2002) (stating that it is not inconvenient for a Washington, D.C. resident to cross the Potomac River to seek justice in Virginia); *Williams*, 2001 WL 135825, at *3 (stating it is

When considering the enforceability of clickwraps, several items should be kept in mind. First, a body of precedent has developed supporting the enforceability of such agreements.²⁰⁹ Except for litigation in the state courts of California and Massachusetts²¹⁰ and the existence of unusual circumstances,²¹¹ clickwrap agreements are likely to be upheld if the consumer has the opportunity to read it²¹² before assenting.²¹³

Second, the primary support for enforcing contracts of adhesion comes from the United States Supreme Court in *Carnival*.²¹⁴ In this case, the Court said a person's right to trial is not abridged merely because a contract of adhesion designates a forum outside of his jurisdiction.²¹⁵ In *Carnival*, the consumers had to travel across the continental United States from Washington to Florida to receive their day in court, yet the Court determined this was an acceptable term.²¹⁶ This is important because in all of the cases in which a clickwrap agreement was not enforced, the fact that the consumer had to travel to a different forum was a significant factor in that court's decision not to enforce the agreement.²¹⁷ The United States Supreme Court's broad view of the acceptability of forum-selection clauses bodes well for the long-term enforceability of clickwrap agreements.

unreasonable for a Massachusetts citizen who incurred a small amount of damages to travel to Virginia to seek justice).

²⁰⁹ See Richard Rayman & Peter Brown, *Clarifying the Rules for Clickwrap and Browsewrap Agreements*, 228 N.Y.L.J., Nov. 14, 2002, at 3; see also *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (holding contracts for passenger cruise ship tickets are enforceable even though the disputed terms of the contract were non-negotiable and unknown to the plaintiff until after he had purchased the ticket); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (holding that forum-selection clauses are prima facie valid); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (holding that shrinkwrap agreements are enforceable).

²¹⁰ See *supra* notes 206-207.

²¹¹ See *supra* note 208.

²¹² See Das, *supra* note 16, at 484-86.

²¹³ See Brown, *supra* note 100, at 57.

²¹⁴ See *Carnival*, 499 U.S. at 593-95.

²¹⁵ *Id.* at 596.

²¹⁶ *Id.* at 588, 596.

²¹⁷ See *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1177 (N.D. Cal. 2002) (requiring one forum when there is a nationwide customer base is unreasonable, especially when the selected forum state is in the "backyard" of the party who possesses all of the bargaining power); *Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr, 2d 699, 708 (Cal. Ct. App. 2001) (going to a different forum state would impair the plaintiff's rights); *Williams v. Am. Online, Inc.*, No. 00-0962, 2001 WL 135825, at *3 (Mass. Super. Ct. Feb. 8, 2001) (going to Virginia to seek justice is unreasonable for a Massachusetts citizen who incurred a small amount of damages).

Third, clickwrap agreements should be treated like an ordinary contract.²¹⁸ “A contract is no less a contract simply because it is entered into via a computer.”²¹⁹ In *ProCD*, the Seventh Circuit upheld a shrinkwrap agreement under basic contract law.²²⁰ Based on that theory, clickwrap agreements should be easier to uphold.²²¹ Mutual assent is needed to form a contract,²²² and such assent is more explicit in a clickwrap situation than in a shrinkwrap situation.²²³ Clicking “I Agree” to a clickwrap’s terms when the consumer has had the opportunity to read the terms is better evidence of assent than when a consumer tears open a shrinkwrapped box of software without the opportunity to first read the enclosed license agreement. Under ordinary contract law, mutual assent to a clickwrap by clicking “I Agree” is obvious.

Fourth, public policy is a double-edged sword for, or shield to, depending on the one’s perspective, the enforceability of clickwrap agreements. Courts in two states have found forum-selection clauses in such agreements to be in violation of those states’ public policies.²²⁴ One such policy is to protect the states’ citizens from unfair business practices that impair their rights.²²⁵ On the other hand, some courts have upheld clickwrap agreements in support of a party’s right to enter freely into contracts, to promote the Internet as a tool for commerce, to create such an efficient system that sellers will offer their products to consumers at lower prices, and to achieve judicial economy.²²⁶ Therefore, courts, juries, lawyers, parties, and legislators can use public policy either to support or to oppose clickwrap agreements.

Fifth, contracts of adhesion have long been commonplace in many industries.²²⁷ They are necessary in our economy.²²⁸ The mere fact that a clickwrap agreement is a contract of adhesion is no reason to hold it unenforceable.

Certainty concerning the enforceability of each clickwrap agreement would lead to greater efficiency in commercial activities. Both online buyers and sellers would benefit. Although clickwrap agreements are prima facie valid, their validity may be challenged. The degree of desired

²¹⁸ Cf. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996) (treating software license agreements as ordinary contracts).

²¹⁹ *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007, 1011 (D.C. 2002).

²²⁰ *ProCD*, 86 F.3d at 1450.

²²¹ See *id.* at 1450-53.

²²² See *supra* note 18.

²²³ See *supra* notes 11, 14 and accompanying text.

²²⁴ See *supra* notes 194-197 and accompanying text.

²²⁵ *Id.*

²²⁶ See *supra* notes 125-127 and accompanying text.

²²⁷ See *supra* notes 53-54 and accompanying text.

²²⁸ CORBIN, *supra* note 21, § 1.4.

certainty when using these agreements, therefore, does not currently exist. One thing is certain, though. The use of clickwrap agreements will continue to proliferate in the expanding, global Internet economy.

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