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### Online and "As Is"

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#### Recommended Citation

Colin P. Marks, Online and "As Is," 45 Pepp. L. R. 1 (2018).

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# Online and “As Is”

Colin P. Marks\*

## *Abstract*

*Online retail is a multi-billion-dollar industry in the United States. Consumers enjoy the ease with which they can browse, click, and order goods from the comfort of their own homes. Though it may come as no surprise to most lawyers, retailers are taking advantage of online transactions by attaching additional terms and conditions that one would not normally find in-store. Some of these conditions are logical limitations on the use of the retailers’ websites, but others go much further, limiting consumers’ rights in ways that would surprise many shoppers. In particular, many online retailers use these terms to limit implied warranties, sell goods “as is,” limit remedies, and add a host of other limitations. This article does not discuss the effects of online terms and conditions, but rather explores a very basic question: How prevalent are certain terms and conditions? While these terms and conditions might seem to be ever-present in online transactions, there have been few attempts thus far to empirically record the frequency of their use in retail transactions involving goods. This article remedies the situation by exploring the mode by which consumers assent, the prevalence of warranty and liability limitation clauses, and the prevalence of other common clauses used by the largest retailers in the United States.*

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\* Professor of Law, St. Mary’s University School of Law. This article has been presented at the Association of American Law Schools 2017 Annual Meeting, the ABA Business Law Section Annual Meeting, the International Conference on Contracts, and Mercer University School of Law, and has benefitted from comments received at these forums. I would like to thank and acknowledge the hard work and contributions of my research assistants Tapash Agarwal, Jared Anderson, Kwenje Banda, Connor Colemere, Kimberly Graves, Juan Hernandez, Randall Ordonez, Reid Renken, and David Thomas in collecting data, researching, and writing this article. I would also like to thank my wife Jill, daughter Savannah, and son George for their love and support.

TABLE OF CONTENTS

|      |  |    |
|------|--|----|
| I.   | INTRODUCTION .....   | 2  |
| II.  | CONTRACT FORMATION IN THE ELECTRONIC AGE .....                               | 5  |
|      | A. <i>How Consumers Bind Themselves to Online Terms and Conditions</i> ..... | 5  |
|      | B. <i>A Primer on Warranty and Liability Limitation Clauses</i> .....        | 12 |
|      | 1. Warranties .....  | 13 |
|      | 2. Buyer’s Remedies .....  | 16 |
|      | 3. How to Limit Warranties and Remedies Under the U.C.C. ....                | 18 |
|      | C. <i>Other Common Terms and Conditions</i> .....                            | 25 |
| III. | A STUDY OF THE LARGEST RETAILERS .....                                       | 29 |
|      | A. <i>Scope of Study</i> .....   | 29 |
|      | B. <i>Methodology</i> .....  | 30 |
|      | C. <i>Results</i> .....  | 37 |
|      | 1. Overall Results by Category .....   | 37 |
|      | a. <i>Form of Assent</i> .....   | 37 |
|      | b. <i>Warranty disclaimers</i> .....   | 38 |
|      | c. <i>Remaining Categories</i> .....   | 39 |
|      | 2. Manufacturers Versus Retailers .....                                      | 44 |
|      | 3. Breakdown by Industry .....   | 46 |
| IV.  | CONCLUSION .....   | 48 |
|      | APPENDIX A: LIST OF RETAILERS STUDIED .....                                  | 50 |

I. INTRODUCTION

Online shopping has grown to become the preferred method of buying goods for much of the American public.<sup>1</sup> In 2015 alone, an estimated \$342 billion was spent buying goods online.<sup>2</sup> The ease with which consumers can browse and pay for goods is no doubt a primary reason for the popularity of online shopping, but this modern technological convenience comes with a cost

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1. See Rebecca DeNale & Deanna Weidenhamer, U.S. Census Bureau, Press Release, *Quarterly Retail E-Commerce Sales, 4th Quarter 2015*, U.S. CENSUS BUREAU NEWS 1 (Feb. 17, 2016, 10:00 AM), <https://www2.census.gov/retail/releases/historical/ecommm/15q4.pdf>.

2. *Id.*

to which most consumers do not pay attention—terms and conditions.<sup>3</sup>

It will come as no surprise to most lawyers that retailers are taking advantage of online transactions by attaching additional terms and conditions that consumers would not normally find in-store.<sup>4</sup> Some of these conditions are logical limitations on the use of retailers’ websites, but others go much further, limiting consumers’ rights in a way that would surprise many shoppers.<sup>5</sup> In particular, many online retailers use these terms to limit implied warranties, sell goods “as is,” limit remedies, and add a host of other limitations.<sup>6</sup>

Many commentators have criticized the use of such online terms, arguing that the terms impose undue burdens on consumers, who do not truly consent to them.<sup>7</sup> Others defend such use as simply the market at work.<sup>8</sup> Even if most consumers do not read the terms and conditions, the egregious ones will eventually come to light through social media and other outlets.<sup>9</sup> The argument goes that if consumers find such terms undesirable, they will shop elsewhere.<sup>10</sup> This article does not discuss the effects of online terms and conditions, but rather explores a very basic question: How prevalent are such terms

3. See *infra* note 24–33 and accompanying text.

4. See *infra* Section III.C.

5. See *infra* Section III.C.

6. See *infra* Section III.C.

7. See, e.g., Paul J. Morrow, *Cyberlaw: The Unconscionability / Unenforceability of Contracts (Shrink-wrap, Clickwrap, and Browse-wrap) on the Internet: A Multijurisdictional Analysis Showing the Need for Oversight*, 11 PITT. J. TECH. L. & POL’Y 1, 28 (2011) (criticizing browsewrap and clickwrap agreements and arguing for a return to “a rational common law system” of contract law, in which no contract arises without mutual assent between the parties). For a discussion on mandatory disclosure and the negative effects on consumers, see generally Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2011).

8. See, e.g., Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, in *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* 3, 5 (Omri Ben-Shahar ed. 2007) (suggesting that one-sided contracts even the playing field between sellers with a “sunk cost” in reputation and non-repeat buyers with “no sunk cost in reputation” and, therefore, no incentive to “deal fairly with the seller”); see also *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 993 (7th Cir. 2008) (Easterbrook, C.J.) (“As long as the market is competitive, sellers must adopt terms that buyers find acceptable; onerous terms just lead to lower prices. If buyers prefer juries, then an agreement waiving a jury comes with a lower price to compensate buyers for the loss. . . . As long as the price is negotiable and the customer may shop elsewhere, consumer protection comes from competition rather than judicial intervention.” (citations omitted)).

9. See, e.g., Seth Stevenson, *By Clicking on This Article, You Agree to . . .*, SLATE (Nov. 17, 2014, 7:00 AM), [http://www.slate.com/articles/technology/technology/2014/11/end\\_user\\_license\\_agreements\\_does\\_it\\_matter\\_that\\_we\\_dont\\_read\\_the\\_fine\\_print.html](http://www.slate.com/articles/technology/technology/2014/11/end_user_license_agreements_does_it_matter_that_we_dont_read_the_fine_print.html) (discussing Pinterest’s terms and conditions).

10. See Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883,

and conditions?<sup>11</sup>

While these terms and conditions may seem to be ever-present in online transactions, there have been few attempts thus far to empirically record the frequency of their use in retail transactions involving goods.<sup>12</sup> This article remedies the situation by exploring the ways in which consumers assent, the prevalence of warranty and liability limitation clauses, and the prevalence of other common clauses used by the largest retailers in the United States.<sup>13</sup> Part II provides an overview of contract formation in the online context; discusses online warranties, remedies, and limitations on them under the Uniform Commercial Code (U.C.C.); and concludes with a brief review of other clauses that make their way into online terms and conditions.<sup>14</sup> Part III explores how retailers are attempting to bind consumers and discusses the prevalence of certain standard clauses, broken down by industry.<sup>15</sup> Part IV then briefly reflects upon the effect such clauses have on consumers.<sup>16</sup>

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891 (2014) (suggesting that, despite consumers’ “state of ignorance” concerning transaction terms, consumers “can and often do [make satisfying choices] . . . by relying on various cues: advice, ratings, indexes, reputation, and their own experience”); see also *IFC Credit Corp.*, 512 F.3d at 993. But see Nancy Kim, *Clicking and Cringing*, 86 OR. L. REV. 797, 825 n.90 (2008) (“To the claim that standard form contracts are unconscionable, it is often the response that consumers are free to shop elsewhere for better terms. In reality, consumers are unlikely to compare several different multipage agreements for reasons exhaustively discussed elsewhere.”). For an alternate view of online contracting, including an argument that consideration is key to determining legitimacy, and review of the decline of consumer regard for contracts as a direct result of their ubiquity, see generally Nancy S. Kim, *Contract’s Adaptation and the Online Bargain*, 79 U. CIN. L. REV. 1327, 1369 (2011), which notes, among other things, that “[t]he contracting of everything has conditioned society not to take seriously the contracting of anything.”

11. See *infra* Section III.C.1.

12. One notable exception is a 2008 essay appearing in the *Columbia Law Review*, which studied the top 500 online retailers, but was not limited to retailers selling goods. See Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 993–98 (2008) (explaining the parameters of the dataset); see also Robert A. Hillman & Ibrahim Barakat, *Warranties and Disclaimers in the Electronic Age*, 11 YALE J.L. & TECH. 1, 5 (2009) (limiting its dataset to software sales).

13. See *infra* Parts II–III.

14. See *infra* Part II.

15. See *infra* Part III.

16. See *infra* Part IV.

## II. CONTRACT FORMATION IN THE ELECTRONIC AGE

A. *How Consumers Bind Themselves to Online Terms and Conditions*

When a consumer walks into a brick-and-mortar retail store and buys a good, the law typically presumes that the advertised price is merely a solicitation.<sup>17</sup> It is the consumer who makes the offer to buy the good at the advertised price when he or she brings the good to the check-out clerk.<sup>18</sup> Once payment is tendered, the sale is complete.<sup>19</sup> However, a number of courts have broken from this model and, under what is known as a “rolling contract,”<sup>20</sup> held that additional terms and conditions, located inside the good’s packaging and unseen by consumers, can still be binding.<sup>21</sup> Under this theory, it is the vendor who makes the offer by presenting the terms and conditions—

17. See RESTATEMENT (SECOND) OF CONTRACTS § 26 cmt. b (AM. LAW INST. 1981) (“Advertisements of goods by display, sign, handbill, newspaper, radio or television are not ordinarily intended or understood as offers to sell.”); 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 2.4 (Joseph M. Perillo ed., Mathew Bender & Co. rev. ed. 2013) (“Usually, neither the advertiser nor the reader of the notice understands that the reader is empowered to close the deal without further expression by the advertiser. Such advertisements are understood to be mere requests to consider and examine and negotiate; and no one can reasonably regard them otherwise unless the circumstances are exceptional and the words used are very plain and clear.”); see also *Ford Motor Credit Co. v. Russell*, 519 N.W.2d 460, 463 (Minn. Ct. App. 1994) (“Generally, if goods are advertised for sale at a certain price, it is not an offer and no contract is formed; such an advertisement is merely an invitation to bargain rather than an offer.”).

18. See *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1340 (D. Kan. 2000) (“In typical consumer transactions, the purchaser is the offeror, and the vendor is the offeree.”); U.C.C. § 2-206(1) (AM. LAW INST. & UNIF. LAW COMM’N 2012) (“Unless otherwise unambiguously indicated by the language or circumstances[,] . . . an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.”).

19. See RESTATEMENT (SECOND) OF CONTRACTS § 19(1) (AM. LAW INST. 1981) (“The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.”); see also *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996) (“[A] contract can be, and often is, formed simply by paying the price and walking out of the store.”).

20. See Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 681 (“[Rolling contracts] essentially permit parties to reach agreement over basic terms, such as price and quantity, but leave until a later time, usually simultaneous with the delivery or first use of the goods, the presentation of additional terms that the buyer can accept, often by simply using the good, or reject, by returning it.”).

21. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148–50 (7th Cir. 1997) (discussing *ProCD* and holding that the terms included in a computer’s packaging were accepted by the consumer when the consumer kept and used the computer beyond the specified thirty-day return period); *ProCD*, 86 F.3d at 1452 (7th Cir. 1996) (“A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance.”).

such as warranties and arbitration clauses—in the box, to which the consumer may accept by keeping the good, or reject by returning it.<sup>22</sup> Not all courts agree with this approach, however, and many commentators have criticized it.<sup>23</sup>

Online transactions largely avoid this scenario, because vendors can make their terms and conditions available before transactions are consummated.<sup>24</sup> The duty to read assumes that parties to a contract have read and understood the terms and conditions in the contract.<sup>25</sup> This is a bedrock principle of the objective theory of contract formation and is applied no differently in electronic contracts.<sup>26</sup> However, before the duty to read arises, the parties must

22. See *ProCD, Inc.*, 86 F.3d at 1452 (“ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure. . . . [T]he UCC permits contracts to be formed in [various] ways.”); Eric A. Posner, Essay, *ProCD v. Zeidenberg and Cognitive Overload in Contractual Bargaining*, 77 U. CHI. L. REV. 1181, 1184 (“In fact, according to Judge Easterbrook, acceptance did not take place until Zeidenberg used the software. The reason is that the ‘offer’ was not ‘you may have the product if you pay now,’ but ‘you may have the product if you pay now and use it later.’”).

23. See, e.g., *Klocek*, 104 F. Supp. 2d at 1339 (“The Court is not persuaded that Kansas or Missouri courts would follow the Seventh Circuit reasoning in *Hill* and *ProCD*. In each case the Seventh Circuit concluded without support that UCC § 2-207 was irrelevant because the cases involved only one written form. This conclusion is not supported by the statute or by Kansas or Missouri law.” (citations omitted)); see also Nancy S. Kim, *Situational Duress and the Aberrance of Electronic Contracts*, 89 CHI.-KENT L. REV. 265, 282 (2014) (“In the ‘rolling contract’ situation, the consumer has already purchased the product and the payment of money creates an expectation and ownership interest. The company’s act of imposing additional terms after purchase is even more unreasonable and wrongful when one considers the sheer volume of subsequent terms. A study conducted by Professor James Gibson found that buying a computer required ‘agreeing’ to an average of 25 binding contracts totaling 74,897 contractual terms, the majority of which were available only after purchase.”).

24. See *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1198–99 (C.D. Cal. 2006) (providing an example of an online order from 2001 in which “[t]he Agreement was available for [the consumer’s] review . . . before, while, and after” the purchase).

25. See *Rossi v. Douglas*, 100 A.2d 3, 7 (Md. 1953) (binding a party to a contract in a case where the party “reads it, or, without reading it or having it read to him, signs it”); Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 548–49 (2014) (“Contract law addresses the no-reading problem with the duty to read doctrine. Under this doctrine, parties are taken to agree to terms that they had the opportunity to read before signing. The doctrine ‘creates a *conclusive presumption*, except as against fraud, that the signer read, understood, and assented to [the] terms.’” (alteration and emphasis in original) (quoting *Fivey v. Pa. R.*, 52 A. 472, 473 (N.J. 1902))).

26. See Ayres & Schwartz, *supra* note 25, at 549 (“The [duty-to-read] presumption has long been justified as a necessary attribute of contracting regimes grounded in both efficiency and equity. For example, in *Lewis v. Great Western Railway*, the Court of Exchequer unanimously rejected counsel’s argument that the plaintiff should not be bound to unread terms of the contract: ‘It would be absurd to say that this document, which is partly in writing and partly in print, and which was filled up, signed, and made sensible by the plaintiff, was not binding upon him.’” (quoting *Lewis v. Great W. Ry.*,

be aware of the existence of the terms and conditions.<sup>27</sup> This is not to say that the parties must actually read the terms, but only that they must be made aware of them so as to be put on “inquiry notice.”<sup>28</sup> In the world of online contracts, the key question is whether the design of the website puts the purchaser on reasonable notice that the terms exist.<sup>29</sup> The most typical way in which retailers make consumers aware of terms and conditions is through “browsewrap” agreements.<sup>30</sup> Browsewrap agreements are website notices indicating 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.”<sup>31</sup> Browsewrap agreements tend to be passive in nature, as there is no need to acknowledge the agreement by clicking separately before continuing with a purchase.<sup>32</sup> Links to the underlying terms and conditions are not always easy to find, however, and thus many such links have been attacked as not giving consumers fair notice of their existence.<sup>33</sup>

(1860) 157 Eng. Rep. 1427 (L.R. Exch.) 1430 (Bramwell B.); 5 H. & N. 867, 874).

27. See *Hirsch v. Citibank, N.A.*, 542 Fed. App’x. 35, 37 (2d Cir. 2013) (“While ‘[i]t is true that a party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing[,] . . . [a]n exception to this general rule exists when the writing does not appear to be a contract and the terms are not called to the attention of the recipient. In such a case no contract is formed with respect to the undisclosed term[s].’” (first three alterations in original) (quoting *Specht v. Netscape Comm’ns Corp.*, 306 F.3d 17, 30 (2d Cir. 2002))); *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 124 (2d Cir. 2012) (opining that the “duty to read” as applied to “terms delivered after a contracting relationship has been initiated do not nullify the requirement that a consumer be on notice of the existence of a term before he or she can be legally held to have assented to it”); see also *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014) (“[T]he validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract.” (citing *Specht*, 306 F.3d at 30–31)); *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 393–94 (E.D.N.Y. 2015) (identifying, as a general principal, that online terms of use are only enforceable if evidence is produced establishing that the buyer had notice of the terms).

28. See *Specht*, 306 F.3d at 30 n.14 (2d Cir. 2002) (“‘Inquiry notice’ is ‘actual notice of circumstances sufficient to put a prudent man upon inquiry.’” (quoting *Cal. State Auto. Ass’n Inter-Ins. Bureau v. Barrett Garages, Inc.*, 64 Cal. Rptr. 699, 703 (Cal. Ct. App. 1967))).

29. See *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1034 (7th Cir. 2016) (“[W]e might ask whether the web pages presented to the consumer adequately communicate all the terms and conditions of the agreement, and whether the circumstances support the assumption that the purchaser receives reasonable notice of those terms.”).

30. See *Mann & Siebeneicher*, *supra* note 12, at 998 (finding, in an empirical study of 500 online vendors, that 88% used browsewrap).

31. *United States v. Drew*, 259 F.R.D. 449, 462 n.22 (C.D. Cal. 2009).

32. See *Berkson*, 97 F. Supp. 3d at 395 (E.D.N.Y. 2015) (noting the “passive nature” of browsewrap agreements); see also *Ayres & Schwartz*, *supra* note 25, at 548 (defining *browsewrap* as that which allows “buyers to purchase without seeing a prominent hyperlink to the underlying terms”).

33. See, e.g., *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1178–79 (9th Cir. 2014) (“[W]here



*Specht v. Netscape Communications Corp.* provides an oft-cited example of how a website’s presentation of a contract’s online terms and conditions can fail to put a reasonable consumer on inquiry notice.<sup>34</sup> In *Specht*, plaintiffs downloaded “free” software from Netscape’s website.<sup>35</sup> Unbeknownst to the plaintiffs, the software transmitted to Netscape “private information about plaintiffs’ downloading of files from the Internet.”<sup>36</sup> The plaintiffs sued for violations of the federal Electronic Communications Privacy Act and the Computer Fraud and Abuse Act.<sup>37</sup> Netscape moved to compel arbitration, claiming that the plaintiffs agreed to the terms of the license agreement when they downloaded the software and that one of those terms included an arbitration provision.<sup>38</sup> The plaintiffs claimed that they should not be bound by the license agreement, as it was not located near the “download” button on the visible screen, but rather in text that was visible only if they scrolled down the webpage.<sup>39</sup>

The district court agreed with the plaintiffs, and Netscape appealed.<sup>40</sup> On appeal, the Second Circuit refused to enforce the arbitration provision.<sup>41</sup> Relying upon the “reasonably prudent offeree” standard, the court held that, due to the fact that the hyperlink was submerged on the webpage, the plaintiffs were not put on constructive notice of the license’s terms.<sup>42</sup> The court summarized its holding, stating:

We conclude that in circumstances such as these, where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms. The SmartDownload webpage screen “was

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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 might click on—without more—is insufficient to give rise to constructive notice.”)

34. *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 32 (2d Cir. 2002).

35. *Id.* at 20.

36. *Id.* at 21.

37. *Id.*

38. *Id.* at 25.

39. *Id.* at 23–25.

40. *Id.* at 25.

41. *Id.* at 40.

42. *Id.* at 30–32.

printed in such a manner that it tended to conceal the fact that it was an express acceptance of [Netscape’s] rules and regulations.” Internet users may have, as defendants put it, “as much time as they need[.]” to scroll through multiple screens on a webpage, but there is no reason to assume that viewers will scroll down to subsequent screens simply because screens are there. When products are “free” and users are invited to download them in the absence of reasonably conspicuous notice that they are about to bind themselves to contract terms, the transactional circumstances cannot be fully analogized to those in the paper world of arm’s-length bargaining.<sup>43</sup>

The court went on to distinguish other cases in which online terms and conditions were enforceable, noting that, in those cases, “there was much clearer notice . . . that a user’s act would manifest assent to contract terms.”<sup>44</sup>

The primary problem with the browsewrap hyperlink in *Specht* was that it was submerged below the viewable screen from which a consumer could download the software.<sup>45</sup> Other courts have similarly held that submerged terms are not binding.<sup>46</sup> However, even viewable browsewrap terms have been held unenforceable when the hyperlinks are inconspicuous<sup>47</sup> or fail to

43. *Id.* at 32 (alterations in original) (footnote omitted) (citation omitted) (quoting *Larrus v. First Nat’l Bank*, 266 P.2d 143, 147 (1954)).

44. *Id.* at 33.

45. *See id.* at 32 (concluding that, because the plaintiffs could not reasonably have known about the license terms contained on the submerged screen, there was no manifestation of assent).

46. *See, e.g., Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009) (holding that submerged terms did not provide sufficient notice, since the consumer was required to scroll to the bottom of the screen—an action not required to complete the purchase—to view the terms and conditions), *aff’d*, 380 F. App’x 22 (2d Cir. 2010); *see also Cheryl B. Preston, “Please Note: You Have Waived Everything”: Can Notice Redeem Online Contracts?*, 64 AM. U. L. REV. 535, 547 n.60 (2015) (citing cases).

47. *See Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 396 (E.D.N.Y. 2015) (calling attention to *prominence* as a requirement for putting consumers on notice of browsewrap terms and conditions, and listing numerous district court and appellate cases holding that such terms are invalid if they are inconspicuous); *Long v. Provide Commerce, Inc.*, 200 Cal. Rptr. 3d 117, 126 (Cal. Ct. App. 2016) (describing the browsewrap terms at issue as “simply too inconspicuous to meet [the *Specht*] standard”). In fact, the Ninth Circuit has even held that *conspicuous* hyperlinks can be unenforceable. *See Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1178–79 (9th Cir. 2014) (“[W]e therefore hold that where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice.”).

put the consumer on notice that the purchase is subject to the terms and conditions.<sup>48</sup> To avoid these deficiencies, some companies have taken steps to make their terms and conditions more conspicuous through what have been referred to as “clickwrap,” “scrollwrap,” and “sign-in wrap” agreements.<sup>49</sup>

While browsewrap agreements do not require that website users explicitly assent to terms and conditions, clickwrap agreements require user action.<sup>50</sup> “By requiring a physical manifestation of assent, a user is said to be put on inquiry notice of the terms assented to.”<sup>51</sup> The typical clickwrap agreement comes in the form of a box that users must check before proceeding.<sup>52</sup> By checking the box, the user agrees that he or she has read the terms and conditions and is bound by them.<sup>53</sup> A further variation of the clickwrap agreement is the scrollwrap agreement.<sup>54</sup> While clickwrap agreements require that users

48. See *Lee v. Intelius Inc.*, 737 F.3d 1254, 1261–62 (9th Cir. 2013) (upholding a trial court’s denial of a request to compel arbitration because the defendant failed to provide adequate notice of the arbitration clause to the consumer); *Berkson*, 97 F. Supp. 3d at 395 (“For an internet browsewrap contract to be binding, consumers must have reasonable notice of a company’s ‘terms of use’ and exhibit ‘unambiguous assent’ to those terms.”) (citing *Specht*, 306 F.3d at 35).

49. See generally *Berkson*, 97 F. Supp. 3d at 394–99 (outlining the four different types of online consumer contracts and their respective modes for notifying consumers of terms and conditions). For a discussion on which types of agreements are more likely to be enforced and what companies should do to ensure their agreements are enforced, see Erin Canino, *The Electronic “Sign-In Wrap” Contract: Issues of Notice and Assent, the Average Internet User Standard, and Unconscionability*, 50 U.C. DAVIS L. REV. 535, 539 (2016); Adam Ruttenberg et al., *New York District Court Articulates New Test for Assessing the Validity and Enforceability of Online Agreements*, LEXOLOGY (July 14, 2015), <https://www.lexology.com/library/detail.aspx?g=60ab5224-0664-4418-a4ee-2084b95a4ddb>.

50. See *United States v. Drew*, 259 F.R.D. 449, 462 n.22 (C.D. Cal. 2009) (“Clickwrap agreements require a user to affirmatively click a box on the website acknowledging awareness of and agreement to the terms of service before he or she is allowed to proceed with further utilization of the website.”); see also Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 466 (2006) (highlighting the activity requirement of the “clickwrap” designation—clicking a box—and contending that “every court to consider the issue has held clickwrap licenses enforceable”).

51. *Berkson*, 97 F. Supp. 3d at 397; see *Shacket v. Roger Smith Aircraft Sales, Inc.*, 651 F. Supp. 675, 690 (N.D. Ill. 1986) (“Inquiry notice exists where a person has knowledge of such facts as would lead a fair and prudent person using ordinary care to make further inquiries. Where the person does not take those added steps, he or she is chargeable with knowledge that would have been acquired through diligent inquiry.”); RESTATEMENT (SECOND) OF CONTRACTS, § 19 (AM. LAW INST. 1981) (focusing on the “intent” and “conduct” requirements of contractual assent).

52. See *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012) (defining clickwrap as that which requires the consumer to use a checkbox to indicate assent).

53. See *id.* at 837 (clarifying that clickwrap “requir[es] that the user manifest his or her assent to the terms”).

54. See generally *Berkson*, 97 F. Supp. 3d at 398 (distinguishing scrollwrap agreements, where “a user must view [the terms] because of the nature of the website’s construction and design” and clickwrap agreements, where a user must “click an ‘I agree’ box that appears next to a hyperlink containing

click a box, scrollwrap agreements force users to view the terms and conditions as part of the website’s construction and design.<sup>55</sup> This could come in the form of a pop-up box containing the terms and conditions, with an “I agree” button that users must click before proceeding.<sup>56</sup> Clickwrap and scrollwrap both require that consumers take an active step, and both are generally viewed as being more enforceable than browsewrap agreements.<sup>57</sup> This is not to say that using clickwraps or scrollwraps automatically shields such vendors from reasonable notice arguments.<sup>58</sup> But case law suggests that these agreements are generally enforceable.<sup>59</sup>

A fourth type of online agreement, which appears to be gaining popularity among online vendors, is the sign-in wrap agreement.<sup>60</sup> Sign-in wrap agreements are somewhat similar to browsewrap and clickwrap agreements.<sup>61</sup> Unlike clickwrap agreements, however, sign-in wrap agreements do not require that users click on a box to indicate acceptance of the terms of use before continuing.<sup>62</sup> Instead, the website notifies users “of the existence and applicability of the site’s ‘terms of use’ when proceeding through the website’s sign-

‘terms of use’”).

55. *Id.*

56. *Id.* at 398–99.

57. See Stacy-Ann Elvy, *Contracting in the Age of the Internet of Things: Article 2 of the UCC and Beyond*, 44 HOFSTRA L. REV. 839, 873 n.200 (2016) (“Clickwrap agreements are also referred to as click-through agreements. Scrollwrap agreements are another type of clickwrap agreement.” (citations omitted)); see also *Forrest v. Verizon Commc’ns, Inc.*, 805 A.2d 1007, 1010–11 (D.C. 2002) (“The contract is entered into by the subscriber clicking an ‘Accept’ button below the scroll box. . . . Neither is the use of a ‘scroll box’ in the electronic version that displays only part of the Agreement at any one time inimical to the provision of adequate notice.”).

58. See *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1036 (7th Cir. 2016) (holding that because the text accompanying the “I agree” button did not reference the defendant’s Terms of Service, there was no assent to those terms when the consumer clicked the button, and, as a result, the defendant “undid whatever notice it might have been furnishing in the bold text block” contained in its Terms of Service).

59. See *Preston*, *supra* note 46, at 544 (“Clickwrap agreements are the generally enforceable, standard form contracts that Internet users assent to merely by clicking an ‘I agree’ option.”).

60. See *Selden v. Airbnb, Inc.*, No. 16-CV-00933 (CRC), 2016 WL 6476934, at \*4 (D.D.C. Nov. 1, 2016) (“[M]any internet websites—including Airbnb during the relevant time period—now use ‘sign-in-wraps.’”).

61. See *Cullinane v. Uber Techs., Inc.*, No. CV 14-14750-DPW, 2016 WL 3751652, at \*6 (D. Mass. July 11, 2016) (“In a sign-in wrap, a user is presented with a button or link to view terms of use. It is usually not necessary to view the terms of use in order to use the web service . . .”).

62. *Id.* (“[S]ign-in-wrap agreements do not have an ‘I accept’ box typical of clickwrap agreements. Instead, sign-in-wrap agreements usually contain language to the effect that, by registering for an account, or signing into an account, the user agrees to the terms of service to which she could navigate

in or checkout process.”<sup>63</sup> By giving such notifications, sign-in wrap agreements are not only more explicit than the pure browsewrap, but also retain the efficiency of the browsewrap in that they do not force users to take the extra step of clicking a box before proceeding or navigating a pop-up screen.<sup>64</sup> Sign-in wrap can come in a couple of forms.<sup>65</sup> One form, which Amazon.com requires, forces users to create an account and sign in before shopping.<sup>66</sup> Alternatively, sign-in wrap might simply have a notification next to the “checkout” or “submit” button informing users that, by proceeding, they bind themselves to the retailer’s terms and conditions.<sup>67</sup>

### B. *A Primer on Warranty and Liability Limitation Clauses*

The major focus of this article is to study the prevalence of online terms and conditions in the sale of goods.<sup>68</sup> Article 2 of the U.C.C. has provisions regarding implied warranties and liability limitations that displace the common law.<sup>69</sup> Therefore, a brief explanation of express and implied warranties, applicable remedies, and limitations under the U.C.C. is in order.<sup>70</sup>

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from the sign-in screen.”).

63. *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 399 (E.D.N.Y. 2015).

64. *Resorb Networks, Inc. v. YouNow.com*, 30 N.Y.S.3d 506, 512 (N.Y. Sup. Ct. 2016) (explaining that although YouNow’s website shares characteristics with clickwrap and browsewrap agreements, it “could be characterized as a sign-in-wrap” because the user assents to the terms and conditions during the sign-in process).

65. *See infra* notes 66–67 and accompanying text.

66. *Selden v. Airbnb, Inc.*, No. 16-CV-00933 (CRC), 2016 WL 6476934, at \*4 (D.D.C. Nov. 1, 2016) (“‘Sign-in-wrap’ agreements are those in which a user signs up to use an internet product or service, and the signup screen states that acceptance of a separate agreement is required before the user can access the service. While a link to the separate agreement is provided, users are not required to indicate that they have read the agreement’s terms before signing up.”).

67. *Berkson*, 97 F. Supp. 3d at 401 (describing typical qualities of an enforceable sign-in wrap agreement).

68. *See infra* Part III.

69. *See* U.C.C. § 2-312 to -315 (AM. LAW INST. & UNIF. LAW COMM’N 2012); *see also infra* Sections II.B.1–3.

70. *See infra* Sections II.B.1–3.

## 1. Warranties

There are three warranties that are of primary concern to buyers of goods<sup>71</sup>: express warranties,<sup>72</sup> implied warranties of merchantability,<sup>73</sup> and implied warranties of fitness for a particular purpose.<sup>74</sup> Express warranties are governed by U.C.C. section 2-313(1), which provides that such warranties are created by:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.<sup>75</sup>

With regard to online sales, subsections (1)(a) and (1)(b) are particularly relevant.<sup>76</sup> Subsection (1)(a) covers affirmative representations as to the quality

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71. There is a fourth: the warranty of title and against infringement. See U.C.C. § 2-312 (1), (3). This section provides:

(1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that  
(a) the title conveyed shall be good, and its transfer rightful; and  
(b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

....  
(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

*Id.* Because this section is rarely at issue in the transactions examined in my study, it is not addressed in this paper.

72. *Id.* § 2-313.

73. *Id.* § 2-314.

74. *Id.* § 2-315.

75. *Id.* § 2-313(1).

76. *See id.*

of the goods, as well as warranties and guarantees.<sup>77</sup> Subsection (2) makes clear, however, that use of the words “warranty” and “guarantee” is not necessary, with the caveat that “an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.”<sup>78</sup> Subsection (1)(b) covers description warranties, such as affirmative statements as to the type,<sup>79</sup> dimensions,<sup>80</sup> and specifications<sup>81</sup> of a particular good.<sup>82</sup> Though paragraphs (a), (b), and (c) of subsection (1) require that the affirmation, description, or sample become the “basis of the bargain,”<sup>83</sup> courts have traditionally presumed as much and not required plaintiff buyers to show that they actually relied on the express warranty.<sup>84</sup> Instead, sellers bear the burden of showing that an express warranty was not the basis of the bargain.<sup>85</sup>

In addition to possible express warranties, an implied warranty of merchantability also attaches to every sale of goods by a merchant seller.<sup>86</sup> U.C.C. section 2-314 provides:

77. *Id.* § 2-313(1)(a).

78. *Id.* § 2-313(2).

79. *See* *Select Pork, Inc. v. Babcock Swine, Inc.*, 640 F.2d 147, 149–50 (8th Cir. 1981) (upholding a breach of express warranty claim based on the defendant’s statement to the plaintiff that a pig was of a certain type); *R. Clinton Constr. Co. v. Bryant & Reaves, Inc.*, 442 F. Supp. 838, 845 (N.D. Miss. 1977) (permitting a claim for breach of express warranty where the product did not conform to the seller’s description of the product as a “good, first-class permanent type of antifreeze”).

80. *See* *Edward E. Gillen Co. v. City of Lake Forest*, No. 91 C 183, 1991 WL 171945 at \*3 (N.D. Ill. Sept. 3, 1991) (recognizing the failure of a delivered product to conform to contractually specified dimensions as a basis for breach of express warranty), *aff’d*, 3 F.3d 192 (7th Cir. 1993); *Loris Stavrinidis, Ltd. v. Graphic Equip. World Wide*, No. 79 Civ. 5001 (CBM), 1981 U.S. Dist. LEXIS 9797, at \*18 (S.D.N.Y. Aug. 31, 1981) (affirming liability for breach of express warranty where an item sold to a buyer did not conform to the dimensions listed in the contract).

81. *See* *N. States Power Co. v. ITT Meyer Indus.*, 777 F.2d 405, 412 (8th Cir. 1985) (“[A] separate express warranty was created by the technical specifications.”); *Capital Equip. Enters., Inc. v. N. Pier Terminal Co.*, 254 N.E.2d 542, 545 (Ill. App. Ct. 1969) (affirming a jury verdict that found the defendant liable for breach of express warranty where equipment did not conform to the seller specifications).

82. U.C.C. § 2-313(1)(b).

83. *Id.* § 2-313(1)(a)–(c).

84. *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 10-5, at 457–58 (6th ed. 2010) (addressing the change from “reliance” in the Uniform Sales Act to “basis of the bargain” in the U.C.C. and pointing to both the lack of import assigned to, and the equivocal nature of, the phrase “basis of the bargain”); *see also* U.C.C. § 2-313 cmt. 3 (explaining that proof of reliance is not required if the affirmation is part of a description).

85. *See* U.C.C. § 2-313 cmt. 3 (asserting that removing the affirmation from the bargain “requires clear affirmative proof”).

86. *See infra* note 87 and accompanying text.

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.<sup>87</sup>

This implied warranty is closely tied to the tort of products liability<sup>88</sup> and requires that a plaintiff prove both that the good is not merchantable, as defined in subsections (a)–(f), and that the failure to be merchantable proximately caused the plaintiff’s harm.<sup>89</sup> A full review of each subsection is beyond the scope of this article. By way of example, courts have held that animal feed that made farm animals sick was not fit for its ordinary purpose<sup>90</sup> and that a

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87. U.C.C. § 2-314.

88. See WHITE & SUMMERS, *supra* note 84, § 10-11, at 480–81 (explaining the implied warranty of merchantability, including its elements and relationship to tort liability).

89. *Id.*

90. Duxbury v. Spex Feeds, Inc., 681 N.W.2d 380, 393 (Minn. Ct. App. 2004).



shipment of lumber containing different kinds of plywood and warped plywood was not of even kind and quality.<sup>91</sup>

Finally, the implied warranty of fitness for a particular purpose could also arise in a sale of goods, though this seems less likely in purely online transactions. Section 2-315 provides that if a seller has reason to know of any particular purpose for which a buyer is purchasing goods, and the buyer relies on the seller’s skill or judgment in selecting the goods, then there is an implied warranty “that the goods shall be fit for such purpose.”<sup>92</sup> This implied warranty breaks down into three elements: “(1) [t]he seller must have reason to know the buyer’s particular purpose[;] (2) [t]he seller must have reason to know that the buyer is relying on the seller’s skill or judgment to furnish appropriate goods[; and] (3) [t]he buyer must, in fact, rely upon the seller’s skill or judgment.”<sup>93</sup> Given that courts have held that actual communication between buyer and seller regarding the particular purpose need not occur, this warranty could be available in purely online transactions.<sup>94</sup> It is also possible for a buyer to call a sales representative before purchasing a product online, and thus liability could attach.<sup>95</sup>

## 2. Buyer’s Remedies

Remedies for a seller’s breach of contract come in two basic varieties: remedies for non-performance of the contract (as when a seller fails to deliver

91. *Gulf Trading Corp. v. Nat’l Enters. of St. Croix, Inc.*, 912 F. Supp. 177, 182 (D.V.I. 1996).

92. U.C.C. § 2-315 (AM. LAW INST. & UNIF. LAW COMM’N 2012).

93. *WHITE & SUMMERS*, *supra* note 84, § 10-14, at 496; *accord* *Leal v. Holtvogt*, 702 N.E.2d 1246, 1256 (Ohio Ct. App. 1998).

94. *See In re Rust-Oleum Restore Mktg., Sales Practices & Prod. Liab. Litig.*, 155 F. Supp. 3d 772, 802–03 (N.D. Ill. 2016) (“The buyer need not directly communicate the particular purpose to Rust-Oleum as ‘[a] buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller’s skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended.’” (alteration in original) (quoting U.C.C. § 2-315 cmt. 1)).

95. *See Yossi v. Shapiro*, No. CV095031240S, 2010 Conn. Super. LEXIS 1678, \*18–19 (Conn. Super. Ct. July 1, 2010) (upholding misrepresentation claims in a case in which an online buyer subject to online auction terms contacted the auction enterprise, before the purchase, to inquire about the authenticity of a piece of art); *Groover v. Ogunyemi*, No. 2004-11-349, 2006 WL 2615151, at \*1, \*4 (Del. Ct. Com. Pl. Sept. 5, 2006) (permitting claims to proceed where defendant’s advertisement “on E-Bay [contained] . . . a telephone number, which [Plaintiff] testified calling”), *aff’d*, No. CIV.A. 06A10001JAP, 2009 WL 2415639 (Del. Super. Ct. Aug. 5, 2009). Though neither plaintiff prevailed on a U.C.C. section 2-315 claim specifically, these cases indicate that the possibility clearly exists.

goods, or in a proper case of rejection or revocation of the goods)<sup>96</sup> and remedies for the product’s failure to perform as advertised (such as breach of warranty remedies).<sup>97</sup> In the former situation, the U.C.C. gives buyers essentially two options.<sup>98</sup> Buyers can choose to “cover” by buying a reasonable substitute and suing for the difference in price,<sup>99</sup> or they can choose the “market” measure of damages and recover the “difference between the market price at the time when the buyer learned of the breach and the contract price . . . .”<sup>100</sup> If a buyer chooses to cover, however, the buyer is normally prohibited from also seeking the “market” measure of damages.<sup>101</sup>

Once a buyer accepts goods, the available remedies are governed by section 2-714 of the U.C.C.<sup>102</sup> Subsection 2-714(2) provides, “[t]he measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.”<sup>103</sup> This section is subject to U.C.C. section 2-607, however, which requires that the buyer notify the seller of the breach “within a reasonable time after he discovers or should have discovered any breach,” or be barred from recovery.<sup>104</sup> This requirement is

96. See John A. Sebert, Jr., *Remedies Under Article Two of the Uniform Commercial Code: An Agenda for Review*, 130 U. PA. L. REV. 360, 364–80 (1981) (reviewing remedies for buyers and sellers under the U.C.C. and describing arguments for and against market damages).

97. *Id.* at 365.

98. U.C.C. § 2-711 (providing, inter alia, that an aggrieved buyer may either seek “cover” damages or recover under section 2-713 (“market” measure)).

99. *Id.* § 2-712.

100. *Id.* § 2-713.

101. See *id.* § 2-713 cmt. 5 (“The present section provides a remedy which is completely alternative to cover under the preceding section and applies only when and to the extent that the buyer has not covered.”); see also Sebert, *supra* note 96, at 380–81 (noting that while there is room to debate whether a buyer could seek the market measure after covering, “this interpretation runs counter to the general objective of contract remedies and of the Code—to put the aggrieved party in as good a position, but no better, than he would have been in had the contract been performed. The aggrieved party is fully compensated by a recovery based upon the actual resale or cover price, and there is no justification for increasing the breacher’s damage liability merely because a hypothetical market price is different from the actual resale or cover price.”) (internal citations omitted); David Frisch, *The Compensation Myth and U.C.C. Section 2-713*, 80 BROOK. L. REV. 173, 182–96 (2014) (discussing market and cover damages and challenging two assumptions underlying full compensation rhetoric).

102. U.C.C. § 2-714.

103. *Id.* § 2-714(2).

104. *Id.* § 2-607(3)(a).

meant to encourage settlement and give sellers the opportunity to cure defects.<sup>105</sup>

Importantly, in all of the above remedies sections, buyers are entitled to incidental and consequential damages under section 2-715.<sup>106</sup> Section 2-715 permits recovery of incidental damages such as “expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.”<sup>107</sup> Section 2-715 goes on to describe when consequential damages may be recovered, differentiating injuries to persons or property and pure economic harm.<sup>108</sup> For the latter, a buyer may recover for “any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise.”<sup>109</sup> Thus, for pure economic consequential damages, the buyer must show that the damages were either generally or specifically foreseeable, and also must attempt to mitigate the consequential damages if possible.<sup>110</sup> For injuries to persons or property, the Code does away with any foreseeability or mitigation principle, but does require that the injuries be “proximately” caused by the breach of warranty.<sup>111</sup>

### 3. How to Limit Warranties and Remedies Under the U.C.C.

Given that an implied warranty of merchantability attaches to every merchant sale of goods<sup>112</sup> and that breach of this warranty can lead to consequential damages that are perhaps disproportionate to the value of the good itself, it is understandable why many merchant sellers would seek to disclaim such warranties and liability.<sup>113</sup> The U.C.C. explicitly permits such disclaimers,

105. WHITE & SUMMERS, *supra* note 84, § 12-10, at 564.

106. U.C.C. § 2-715; *see id.* §§ 2-712 to -713 (specifying that additional incidental and consequential damages might be available under section 2-715).

107. *Id.* § 2-715(1).

108. *Id.* § 2-715(2).

109. *Id.* § 2-715(2)(a).

110. WHITE & SUMMERS, *supra* note 84, § 11-4, at 528–30, 535.

111. *Id.* § 11-4, at 537; U.C.C. § 2-715(2)(b).

112. U.C.C. § 2-314.

113. *See* Roy Ryden Anderson, *Of Mack Trucks, Road Bugs, Gilmore and Danzig: Happy Birthday Hadley v. Baxendale*, 11 TEX. WESLEYAN L. REV. 431, 452–53, 452 n.88 (2005).

but with some limitations.<sup>114</sup>

A merchant may disclaim both the implied warranty of merchantability and the warranty of fitness for a particular purpose under section 2-316.<sup>115</sup> Subsection (2) provides:

Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that “There are no warranties which extend beyond the description on the face hereof.”<sup>116</sup>

This provision permits written disclaimers of merchantability, but only if the disclaimer mentions merchantability and is conspicuous.<sup>117</sup> Disclaimers of warranties of fitness must be in writing and must also be conspicuous, but the Code does not specifically require mention of a particular word or phrase, such as “warranty” or “fitness.”<sup>118</sup> Though the Code blesses the phrase “[t]here are no warranties which extend beyond the description on the face hereof,”<sup>119</sup> this phrase would be insufficient to disclaim the warranty of merchantability.<sup>120</sup> Therefore, typical disclaimers usually specifically mention both implied warranties by name.<sup>121</sup>

Subsection (2) requires that written disclaimers be “conspicuous.”<sup>122</sup> This term is defined in section 1-201(b)(10) as follows:

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114. U.C.C. § 2-316.

115. *Id.* Express warranties generally cannot be disclaimed. *See id.* § 2-316(1) (“[N]egation or limitation is inoperative to the extent that such construction is unreasonable.”); *James River Equip. Co. v. Beadle Cty. Equip., Inc.*, 646 N.W.2d 265, 270 (S.D. 2002) (refusing to permit disclaimer of an express warranty by use of an “as is” in contract).

116. U.C.C. § 2-316(2). Subsection (3) expands the manner in which these implied warranties may be disclaimed by providing three alternative disclaimer methods. *See discussion infra* notes 127–31.

117. U.C.C. § 2-316 cmt. 3.

118. *Id.* § 2-316 cmt. 4.

119. *Id.* § 2-316(2).

120. *Id.* § 2-316 cmt. 3.

121. WHITE & SUMMERS, *supra* note 84, § 13-5, at 577–79.

122. U.C.C. § 2-316(2).

(10) “Conspicuous”, with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is “conspicuous” or not is a decision for the court. Conspicuous terms include the following:

(A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

(B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.<sup>123</sup>

Though this section mentions specific ways in which a term can be made conspicuous—such as by using all capital letters in the heading—comment 10 makes clear that other methods may be sufficient and that “the test is whether attention can reasonably be expected to be called to [the term].”<sup>124</sup> Despite the language in section 1-201(b)(10), some courts have held that it is not enough to simply capitalize headings or particular words such as “merchantability” and “fitness for a particular purpose,” as that does not draw attention to the fact that the warranties are disclaimed.<sup>125</sup> In response, some sellers find it prudent to print the entire disclaimer in bold-face capital letters.<sup>126</sup>

Despite the specific language required under section 2-316(2), subsection (3) provides several alternatives that can effectively disclaim implied warranties.<sup>127</sup> Subsection (3)(a), which is the most relevant to online sales of goods, provides: “[n]otwithstanding subsection (2)[,] unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like ‘as is’,

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123. *Id.* § 1-201(b)(10).

124. *Id.* § 1-201 cmt. 10.

125. *E.g.*, *Int’l Harvester Co. v. Pike*, 466 S.W.2d 901, 906–07 (Ark. 1971); *Massey-Ferguson, Inc. v. Utley*, 439 S.W.2d 57, 58–59 (Ky. 1969).

126. *WHITE & SUMMERS*, *supra* note 84, § 13-5, at 581 & n.14 (citing *Parsley v. Monaco Coach Corp.*, 327 F. Supp. 2d 797 (W.D. Mich. 2004) (holding that the conspicuousness requirement was satisfied where bold, capitalized, and contrasting print on the front of the contract referenced capitalized language on the back of the contract)) (noting sellers’ attempts to satisfy the conspicuousness requirement).

127. U.C.C. § 2-316(2).

‘with all faults’ or other language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty.”<sup>128</sup> This would appear to give merchant sellers some leeway in fashioning general disclaimers, but courts have not always looked kindly on what might otherwise appear to be sufficient language.<sup>129</sup> For instance, simply excluding “all warranties express or implied” has been held insufficient to effectively disclaim the implied warranties of merchantability and fitness.<sup>130</sup> Furthermore, many courts have required that “as is” clauses be conspicuous, even though the U.C.C. does not expressly contain such a requirement.<sup>131</sup>

A buyer’s remedies may also be limited under section 2-719(1), which provides that:

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.<sup>132</sup>

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128. *Id.* § 2-316(3)(a).

129. *See infra* notes 130–31 and accompanying text.

130. *Boeing Airplane Co. v. O’Malley*, 329 F.2d 585, 593 (8th Cir. 1964) (“[T]he [fitness] disclaimer may not be merely by use of the clause disclaiming ‘all warranties express or implied.’”); *see Zicari v. Joseph Harris Co.*, 304 N.Y.S.2d 918, 921 (N.Y. App. Div. 1969) (rendering the following language ineffective as applied to the implied warranty of merchantability: “[w]e make no other or further warranty, express or implied”).

131. *WHITE & SUMMERS*, *supra* note 84, § 13–6, at 586 & n.17 (citing *Woodruff v. Clark Cty. Farm Bureau Co-op. Ass’n*, 286 N.E.2d 188, 195–96 (Ind. App. 1972) (requiring that an “as is” disclaimer in the sale of chickens be conspicuous); *Dallas Aerospace, Inc. v. CIS Air Corp.*, No. 00-CV-1657, 2002 WL 31453789, at \*2 (S.D.N.Y. Oct. 31, 2002) (confirming the validity of a bold face “as is” disclaimer in the sale of an airplane engine), *aff’d* 352 F.3d 775 (2d Cir. 2003).

132. U.C.C. § 2-719(1).

Subsection (b)’s statement that the limited remedy “is optional unless [it] is expressly agreed to be exclusive”<sup>133</sup> has caused some courts to hold in favor of buyers in cases in which sellers use sloppy language that does not clearly indicate that a remedy is “exclusive.”<sup>134</sup> However, careful drafting should be sufficient to circumvent this outcome.<sup>135</sup> Also, some courts have held that remedy limitations must be conspicuous, though no such requirement is found in the text of the Code.<sup>136</sup>

Subsection (1) permits remedy limitations, subject to two statutory restrictions.<sup>137</sup> The first is that the exclusive or limited remedy cannot “fail of its essential purpose.”<sup>138</sup> Comment 1 clarifies that “it is of the very essence of a sales contract that at least minimum adequate remedies be available,” and that where circumstances cause an otherwise fair clause “to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of [Article 2].”<sup>139</sup> The most typical scenario in which a remedy limitation clause fails its essential purpose is where the seller fails to effectively repair or replace a defective good in accordance with the limited remedy within a reasonable time period (or sometimes at all),<sup>140</sup> or where the

133. *Id.* § 2-719(1)(b).

134. *See, e.g.*, *Ford Motor Co. v. Reid*, 465 S.W.2d 80, 84–85 (Ark. 1971) (delineating application of “exclusive” language between paragraphs despite clear intent for the language to apply to remedies); *Lincoln Pulp & Paper Co. v. Dravo Corp.*, 436 F. Supp. 262, 276 (D. Me. 1977) (focusing on the U.C.C. requirement that contractual remedies be labeled and agreed to as exclusive if they are to be upheld as such).

135. *See* WHITE & SUMMERS, *supra* note 84, § 13-9, at 599–602 (suggesting methods to avoid the assurance of exclusivity).

136. *See* *Avenell v. Westinghouse Elec. Corp.*, 324 N.E.2d 583, 587 (Ohio App. 1974) (construing section 2-719 to include a requirement that exclusive remedy clauses be made conspicuous); *see also* Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, 15 U.S.C. § 2304(a)(3) (2012) (“[A] warrantor may not exclude or limit consequential damages for breach of any written or implied warranty . . . unless such exclusion or limitation conspicuously appears on the face of the warranty.”); *Sorce v. Naperville Jeep Eagle*, 722 N.E.2d 227, 235 (Ill. App. Ct. 2d Dist. 1999) (clarifying that the Magnuson-Moss Warranty Act permits the “exclusion of consequential damages” if “the exclusion appears conspicuously on the face of the warranty”). *But see* *Boone Valley Coop. Processing Ass’n v. French Oil Mill Mach. Co.*, 383 F. Supp. 606, 612 (D.C. Iowa 1974) (applying the unconscionability standard rather than the conspicuous standard to limitations of remedies clauses).

137. *See infra* notes 138, 146 and accompanying text.

138. U.C.C. § 2-719(2).

139. *Id.* § 2-719 cmt. 1.

140. *See* *Beal v. Gen. Motors Corp.*, 354 F. Supp. 423, 426 (D. Del. 1973) (stripping a remedy exclusion of its effect because the warrantor failed to timely correct the defect); *Mercedes-Benz of N. Am., Inc. v. Dickenson*, 720 S.W.2d 844, 854 (Tex. Ct. App. 1986) (noting that the warranty failed

buyer is unable to tender the goods for repair due to their complete destruction.<sup>141</sup>

Where an exclusive repair or replace clause fails its essential purpose, authorities are split as to whether this entitles an aggrieved buyer to pursue consequential as well as direct damages.<sup>142</sup> Some courts have held that the validity of consequential damages limitations depends on the exclusive remedy and, therefore, if the exclusive remedy fails, the buyer should have access to all other remedies, including consequential damages.<sup>143</sup> Other courts, however, have held that consequential damages limitations should be viewed as *independent* of exclusive remedies, and thus should continue to be barred.<sup>144</sup>

for essential purpose when seller was unable to repair the good in a reasonable time); *Nation Enters., Inc. v. Enersyst, Inc.*, 749 F. Supp. 1506, 1513–14 (N.D. Ill. 1990) (applying Texas law regarding failure of remedy for essential purpose).

141. See *Rudd Constr. Equip. Co. v. Clark Equip. Co.*, 735 F.2d 974, 982 (6th Cir. 1984) (“[T]he ‘repair or replace’ language of the contract failed of its essential purpose, especially since the defective part was small, and the defect resulted in the immediate destruction of the entire tractor shovel.”).

142. See Robert J. Williams, *Getting What You Bargained For: How Courts Might Provide a Coherent Basis for Damages That Arise When Remedies Fail of Their Essential Purpose*, 5 VA. L. & BUS. REV. 131, 135 (2010).

143. See *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 709 (9th Cir. 1990) (upholding the district court’s disregard of a contractual cap on consequential damages in a case where the exclusive remedy had failed its essential purposes); *Ragen Corp. v. Kearney & Trecker Corp.*, 912 F.2d 619, 625 (3d Cir. 1990) (applying Wisconsin law); *Miss. Chem. Corp. v. Dresser-Rand Co.*, 287 F.3d 359, 366–67 (5th Cir. 2002) (applying Mississippi law and permitting consequential damages when a repair or replace remedy failed its essential purpose); *Arabian Agric. Servs. Co. v. Chief Indus., Inc.*, 309 F.3d 479, 485–86 (8th Cir. 2002) (applying Nebraska law); *Webco Indus., Inc. v. Thermatool Corp.*, 278 F.3d 1120, 1131 (10th Cir. 2002) (applying Michigan law); *Soo Line R.R. v. Fruehauf Corp.*, 547 F.2d 1365, 1373 (8th Cir. 1977) (applying Minnesota law); *Caudill Seed & Warehouse Co. v. Prophet 21, Inc.*, 123 F. Supp. 2d 826, 833 (E.D. Pa. 2000) (applying Pennsylvania law); *Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 455 S.E.2d 183, 190–93 (S.C. Ct. App. 1995); *Krupp PM Eng’g, Inc. v. Honeywell, Inc.*, 530 N.W.2d 146, 149 (Mich. Ct. App. 1995); *John Deere Co. v. Hand*, 319 N.W.2d 434, 437 (Neb. 1982) (concluding, in a suit between a farmer and a seller of farm implements, that if “the seller is given a reasonable chance to correct defects and the equipment still fails to function properly, the limited remedy . . . [has] fail[ed] of its essential purpose,” and the plaintiff may recover “provable consequential damages, even though specifically excluded by the written warranty”); *Durfee v. Rod Baxter Imps., Inc.*, 262 N.W.2d 349, 357 (Minn. 1977) (permitting recovery of incidental damages, despite a disclaimer, when an exclusive remedy failed of its essential purpose); *Murray v. Holiday Rambler, Inc.*, 265 N.W.2d 513, 526 (Wis. 1978); *Clark v. Int’l Harvester Co.*, 581 P.2d 784, 802 (Idaho 1978); *Ehlers v. Chrysler Motors Corp.*, 226 N.W.2d 157, 161 (S.D. 1975); see also Williams, *supra* note 142, at 135 (“Most U.S. courts of appeals have determined that when a remedy fails of its essential purpose, consequential damages may be awarded even if the parties had bargained them away in the sales contract.”).

144. See *Am. Elec. Power Co. v. Westinghouse Elec. Corp.*, 418 F. Supp. 435, 457–58 (S.D.N.Y. 1976) (viewing consequential damage exclusion clauses as independent from failure of exclusive remedy clauses); *Waters v. Massey-Ferguson, Inc.*, 775 F.2d 587, 591 (4th Cir. 1985) (separating the



Again, careful drafting could resolve this issue; a seller could add language such as, “In no case shall the buyer be entitled to consequential damages, and such limitation is independent of exclusive repair or replace remedy.”<sup>145</sup>

Subsection (3) also provides that “[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable.”<sup>146</sup> Given that section 2-302 empowers courts to refuse to enforce *any* unconscionable clause or contract,<sup>147</sup> this provision would seem to add little to the Code.<sup>148</sup> However, subsection (3) goes on to distinguish limitations on consequential personal-injury damages from limitations on consequential commercial-loss damages, clarifying that the former are *prima facie* unconscionable, whereas the latter are not.<sup>149</sup> Thus, subsection (3) does two things: first, it explicitly authorizes contractual exclusions of consequential damages, unless the plaintiff first shows that the exclusion is unconscionable; second, it shifts the burden to the seller only in a narrow class of cases involving consumer goods and a limitation on personal injuries.<sup>150</sup>

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consequential damages exclusion from the exclusive remedy clause failure).

145. See Stephen R. Patton, *Enforceability of Limitation of Liability Provisions*, in *COMMERCIAL DAMAGES: A GUIDE TO REMEDIES IN BUSINESS LITIGATION* ch. 9, ¶ 9.03 (Matthew Bender, 2016) (“Whether or not a consequential damage limitation fails when a limited remedy provision also fails depends on a factual determination as to whether the consequential damage limitation is merely part of the limited remedy or, instead, a separate and independent allocation of risk. Careful drafting may avoid this factual question.”); see also *Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102, 1107 (4th Cir. 1980) (“It is difficult to believe that a buyer in an equal bargaining position would accede to accepting such liability [for consequential damages] for a defect caused by the seller. *In the absence of clear intention*, we cannot interpret an agreement as creating such a partial remedy. *Coastal and Laminators could have specifically agreed to limit consequential damages, but they did not.*” (emphasis added)); Richard W. Duesenberg, *Uniform Commercial Code Annual Survey: Sales and Bulk Transfer*, 37 *BUS. LAW.* 949, 962 (1982) (mentioning specificity of contract language as a way to avoid consequential damage liability when sellers use remedy limitation language).

146. U.C.C. § 2-719(3) (AM. LAW INST. & UNIF. LAW COMM’N 2012).

147. *Id.* § 2-302(1).

148. Compare *id.* § 2-719(3) (“Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable.”), with *id.* § 2-302(1) (“If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”).

149. *Id.* § 2-719(3).

150. See WHITE & SUMMERS, *supra* note 84, § 13-11 (explaining the two elements in detail).

### C. Other Common Terms and Conditions

This study includes a review of other clauses—beyond just warranty disclaimers and damage limitation clauses—that, even if not always common, could nonetheless have an important impact on consumers’ rights.<sup>151</sup> This includes clauses that limit the statute of limitations, arbitration clauses, choice of law provisions, forum selection clauses, class action waivers, jury waivers, and nondisparagement clauses.<sup>152</sup>

The statute of limitations for causes of action under the U.C.C. is normally four years.<sup>153</sup> The four-year period generally commences when the breach occurs, which, for a warranty, is usually on tender of delivery of the goods.<sup>154</sup> Under section 2-725, however, parties may shorten this time period.<sup>155</sup> Section 2-725 provides that, “[b]y the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.”<sup>156</sup> Clauses like this one are still subject to general contract defenses, such as unconscionability.<sup>157</sup>

Arbitration clauses deserve special mention, as they are governed by the Federal Arbitration Act (FAA) and have been the subject of multiple Supreme Court decisions.<sup>158</sup> Furthermore, these clauses frequently incorporate many of the other clauses studied.<sup>159</sup> Take, for instance, the following arbitration

151. See *infra* Section III.B.

152. See *infra* Section III.B.

153. U.C.C. § 2-725(1).

154. See *id.* § 2-725(2).

155. *Id.* § 2-725(1).

156. *Id.*

157. See, e.g., *Snyder v. Gallagher Truck Ctr., Inc.*, 453 N.Y.S.2d 826, 827–28 (App. Div. 1982) (holding that section 2-275 applied, after considering whether an agreement to amend the time period for claims was a result of fraud, duress, or misrepresentation); *Capehart v. Heady*, 23 Cal. Rptr. 851, 854 (Cal. Ct. App. 1962) (applying standards of reasonableness and undue advantage to amended limitations in the contract); see also Gregory Crespi, *Agreements to Alter the Limitation Period Imposed by U.C.C. Section 2-725: Some Overlooked Complications*, 46 ST. MARY’S L.J. 199, 207 (2015) (questioning whether unconscionability, reasonableness, or public policy considerations should be applied to section 2-725, and providing a fuller analysis as to the window of negotiation that the statute permits).

158. For a discussion on the history of the FAA and cases involving the Act’s intent and scope, see generally Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265 (2015).

159. See *id.* at 282 (noting a variety of clauses, apart from class action waivers, that are typically included in arbitration clauses, such as “(1) truncated statutes of limitations, (2) damage limitations, (3) anti-injunction clauses, (4) fee-shifting provisions, (5) forum-selection clauses, and (6) non-coordination agreements”).

clause found on Amazon.com:

#### DISPUTES

Any dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com will be resolved by binding arbitration, rather than in court, except that you may assert claims in small claims court if your claims qualify. The [FAA] and federal arbitration law apply to this agreement.

There is no judge or jury in arbitration, and court review of an arbitration award is limited. However, an arbitrator can award on an individual basis the same damages and relief as a court (including injunctive and declaratory relief or statutory damages), and must follow the terms of these Conditions of Use as a court would.

.....

We each agree that any dispute resolution proceedings will be conducted only on an individual basis and not in a class, consolidated or representative action. If for any reason a claim proceeds in court rather than in arbitration we each waive any right to a jury trial. We also both agree that you or we may bring suit in court to enjoin infringement or other misuse of intellectual property rights.

#### APPLICABLE LAW

By using any Amazon Service, you agree that the [FAA], applicable federal law, and the laws of the state of Washington, without regard to principles of conflict of laws, will govern these Conditions of Use and any dispute of any sort that might arise between you and Amazon.<sup>160</sup>

This arbitration provision includes a jury waiver (“There is no judge or jury in arbitration . . .”), class action waiver (“We each agree that any dispute resolution proceedings will be conducted only on an individual basis and not

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160. *Conditions of Use*, AMAZON.COM (May 30, 2017), [https://www.amazon.com/gp/help/customer/display.html/ref=footer\\_cou?ie=UTF8&nodeId=508088](https://www.amazon.com/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=508088) (emphasis omitted).

in a class, consolidated or representative action.”), and a choice of law provision (“[Y]ou agree that the [FAA], applicable federal law, and the laws of the state of Washington, without regard to principles of conflict of laws, will govern these Conditions of Use and any dispute of any sort that might arise between you and Amazon.”).<sup>161</sup> Many of the retailers studied made use of these clauses, as well as forum selection clauses, without including arbitration provisions, but the FAA creates a stronger presumption of enforceability when they are part of an arbitration clause.<sup>162</sup>

The Supreme Court has stated that, in passing the FAA, Congress intended “to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements on the same footing as other contracts.”<sup>163</sup> Though these clauses are open to traditional contract defenses, the Supreme Court has repeatedly upheld arbitration provisions under the FAA.<sup>164</sup> For instance, in *AT&T Mobility LLC v. Concepcion*, the Court held the presence of a provision barring class actions in the arbitration proceeding could not be the basis for an unconscionability ruling.<sup>165</sup> Likewise, in *DIRECTV, Inc. v. Imburgia*, the Court reaffirmed its holding in *Concepcion*, declaring state laws prohibiting class action waivers invalid as a result of preemption by

161. *Id.*

162. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 628 (1985) (“[A]s with any other contract, the parties’ intentions control, but those intentions are generously construed as to issues of arbitrability. There is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights. Some time ago this Court expressed ‘hope for [the Act’s] usefulness both in controversies based on statutes or on standards otherwise created[.]’ . . . . By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.” (second alteration in original) (quoting *Wilko v. Swan*, 364 U.S. 427, 432 (1953)); *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 480 n.2 (5th Cir. 2002) (“Under this modern reading of the FAA, the presumption of enforceability ‘is not diminished when a party bound by an agreement raises a claim founded on statutory rights.’” (quoting *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)); Leslie, *supra* note 158, at 280 (“[A]rbitration agreements have become a safe harbor for otherwise unenforceable class action waivers. Absent the judicial deference to the terms in arbitration agreements, class action waivers would not be protected by *Concepcion*; the *Discover Bank* rule still invalidates class action waivers contained in contracts without arbitration agreements.” (footnote omitted)).

163. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89 (2000) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)).

164. See, e.g., *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 71–72 (2010) (holding that an employment agreement that delegates to an arbitrator the “exclusive authority to resolve any dispute relating to the [Agreement’s] enforceability” is a valid delegation under the FAA).

165. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344–52 (2011).

the FAA.<sup>166</sup>

The last type of clause studied, nondisparagement clauses, may be of limited interest due to recently enacted federal legislation.<sup>167</sup> Generally speaking, nondisparagement clauses restrict individuals from taking any action that negatively impacts an organization, its reputation, products, services, management, or employees.<sup>168</sup> While nondisparagement clauses are usually found in settlement agreements and employment contracts, they do sometimes find their way into the terms and conditions in the sale of goods.<sup>169</sup> However, the Consumer Review Fairness Act, which was signed into law during the final days of 2016, prohibits companies from placing nondisparagement clauses in their contracts or terms of service with consumers.<sup>170</sup> Nonetheless, because this study was completed before passage of the Act, coding was conducted to review the frequency with which these clauses appeared.<sup>171</sup>

166. DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 469 (2015).

167. See Michael Addady, *This Controversial Business Practice May Soon be Outlawed*, FORTUNE (Sept. 13, 2016), <http://fortune.com/2016/09/13/consumer-review-fairness-act/> (reviewing the purported need for such legislation).

168. See Lucille M. Ponte, *Protecting Brand Image or Gaming the System? Consumer “Gag” Contracts in an Age of Crowdsourced Ratings and Reviews*, 7 WM. & MARY BUS. L. REV. 59, 67 (2016) (“[A] nondisparagement clause prevents consumers from making or posting any negative remarks, criticisms, or ridicule about a business, its goods, and/or its services.”).

169. See, e.g., Order Entering Default Judgment, *Palmer v. KlearGear.com*, No. 1:13-cv-00175 (D. Utah 2014), <https://www.scribd.com/document/224430518/Palmer-v-Kleargear-Default-Judgment> (involving a suit in which the plaintiff seller attempted to sue a consumer for \$3,500 in liquidated damages for posting a negative review); see also *Lee v. Makhnevich*, No. 11 Civ. 8665(PAC), 2013 WL 1234829, at \*1 (S.D. N.Y. March 27, 2013) (implicating a nondisparagement clause used in the employment of a dentist’s services); Jamie Herzlich, *New Law Prevents Firms from Punishing Consumers for Bad Reviews*, NEWSDAY (Feb. 12, 2017, 9:07 AM), <http://www.newsday.com/business/columnists/jamie-herzlich/new-law-prevents-firms-from-punishing-consumers-for-bad-reviews-1.13084375> (quoting Professor Eric Goldman from Santa Clara University School of Law, who insists that nondisparagement clauses are not “overly prevalent,” but concedes that the clauses are (or were) “utilized by some businesses”). For a complete discussion of nondisparagement clauses in the consumer context, see Ponte, *supra* note 168, at 59, which “examines the rise of consumer nondisparagement clauses and considers the legality of such agreements under contract, free speech, and intellectual property principles.”

170. Consumer Review Fairness Act of 2016, Pub. L. No. 114–258, 130 Stat. 1355 (to be codified as amended at 15 U.S.C. 45b); see also Herzlich, *supra* note 169 (discussing the new law and attempting to delineate between disparagement and defamation).

171. See *infra* Part III.

## III. A STUDY OF THE LARGEST RETAILERS

Considering the ease with which retailers can attach terms and conditions to online purchases of goods via clickwrap, browsewrap, or sign-in wrap terms, it is not surprising that a number of retailers have started using these devices of contract law to govern a number of aspects of consumer sales.<sup>172</sup> While most consumers would not be surprised to learn that online retailers have return policies, they might be shocked to learn that the goods come with disclaimers of warranties, limitations on liabilities, and sometimes arbitration clauses.<sup>173</sup> One would not typically find these clauses in a brick-and-mortar store, absent special conditions (such as with refurbished goods).<sup>174</sup> Nonetheless, such terms are becoming a common part of the online retail industry,<sup>175</sup> and the remainder of this article describes just how prolific they have already become.<sup>176</sup>

A. *Scope of Study*

Rather than explore the terms and conditions of every online merchant of goods in the United States, this study focuses on the largest retailers, as judged by sales.<sup>177</sup> The study group is limited to retailers that appear on the 2014, 2015, or 2016 list of top retailers, as ranked by the National Retail Federation based on domestic retail sales in dollars.<sup>178</sup> If a retailer appears on any of

172. See generally Kaustuv M. Das, *Forum-Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the “Reasonably Communicated” Test*, 77 WASH. L. REV. 481 (2002) (discussing how companies are using clickwrap and browsewrap to add forum-selection clauses to their agreements).

173. See *Terms and Conditions for Ecommerce Stores*, TERMSFEED (Oct. 23, 2016), <https://termsfeed.com/blog/terms-conditions-ecommerce-stores/>.

174. The typical legal clauses available at a brick-and-mortar store are return policies and product warranties. See *Before You Shop*, USA.GOV, <https://www.use.gov/before-you-shop> (last updated June 21, 2017) (laying out typical policies that consumers should be aware of when shopping). If a brick-and-mortar store uses any disclaimers or limitations, they must be conspicuous to the consumer. See *Businessperson’s Guide to Federal Warranty Law*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/business-center/guidance/businesspersons-guide-federal-warranty-law> (last updated Dec. 2006) (laying out the protocol that stores must follow when disclaiming or limiting any warranties).

175. See *infra* Section III.C.

176. See *infra* Sections III.A–C.

177. See *infra* note 178 and accompanying text.

178. See Kantar Retail, *STORES Top Retailers 2016*, NAT’L RETAIL FED., <https://nrf.com/resource/annual-retailer-lists/top-100-retailers/stores-top-retailers-2016> (last visited Oct. 20, 2017); Kantar Retail, *Top 100 Retailers Chart 2015*, NAT’L RETAIL FED., <https://nrf.com/2015/top100-table> (last visited Oct. 20, 2017); Kantar Retail, *Top 100 Retailers Chart 2014*, NAT’L RETAIL FED.,

these lists, it is included in the study.<sup>179</sup>

Several retailers have subsidiaries that run independent websites.<sup>180</sup> For instance, Kentucky Fried Chicken, Pizza Hut, and Taco Bell are subsidiaries of YUM! Brands.<sup>181</sup> As the goal of this study is to examine the online terms and conditions of various merchants’ websites, in such instances each subsidiary website is studied and counted separately.<sup>182</sup>

This study examined 154 retailers, including retailers that appear on the National Retail Federation’s 2014, 2015, or 2016 list, as well as any subsidiaries.<sup>183</sup> The field was then narrowed to include only retailers that actually sold goods online.<sup>184</sup> Some retailers either did not sell goods online or sold only gift cards online.<sup>185</sup> Those retailers were excluded from the survey.<sup>186</sup> However, merchants that permitted orders to be placed online with an option for in-store pick up or delivery were not excluded.<sup>187</sup> This includes merchants in the food service industry that permit online orders.<sup>188</sup> Once the field was narrowed, 113 merchants remained.<sup>189</sup>

### B. Methodology

The standard online terms and conditions of the 113 retailers included in the study were examined and compared with the retailers’ in-store policies,

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<https://nrf.com/2014/top100-table> (last visited Oct. 20, 2017).

179. Colin P. Marks, Data Collection of Frequency of Standard Online Terms of Major U.S. Retailers (Mar. 15, 2017) (unpublished data collection) (on file with author).

180. See *infra* note 181 and accompanying text.

181. See *Our Brands*, YUM BRANDS, <http://www.yum.com/brands/> (last visited Oct. 20, 2017).

182. Marks, *supra* note 179.

183. *Id.*

184. *Id.*

185. *Id.*

186. For the purposes of this study, gift cards were deemed not to be included in the U.C.C. definition of “goods.” See U.C.C. § 2-314 (AM. LAW INST. & UNIF. LAW COMM’N 2012) (defining “goods”). For a discussion of whether gift cards should qualify as goods, see Eniola Akindemowo, *Contract, Deposit or E-Value? Reconsidering Stored Value Products for a Modernized Payments Framework*, 7 DEPAUL BUS. & COM. L.J. 275, 302–06 (2009), in which the author posits that, because gift cards are goods–services hybrids, their classification as either goods or services should depend on their predominant purpose or the gravamen of the dispute arising from the transaction.

187. Marks, *supra* note 179.

188. *Id.*

189. See Appendix A. The list was originally 115 but two of the retailers were removed—one due to bankruptcy (A&P) and another ceased maintaining separate sales from its parent company (The White Barn Company now part of Bath & Body Works, which was also a part of the dataset).

including whether similar terms and conditions were posted in the stores themselves.<sup>190</sup> The retailers were further broken down, by industry, into the following categories: clothing (e.g., Ann Taylor), consumer electronics (e.g., Best Buy), food service (e.g., Pizza Hut), grocers (e.g., H-E-B), general merchandise (e.g., Walmart), home and garden (e.g., Home Depot), office products (e.g., Office Max), and a general “other” category for any retailer that did not fit into one of the previous seven categories.<sup>191</sup> A second classification was also made as to whether the retailer played a significant role in the manufacture of the final product (such as with Apple and many retailers in the food service industry).<sup>192</sup>

As an initial matter, it was determined how retailers were contractually binding their consumers, i.e. via browsewrap, clickwrap, scrollwrap, or sign-in wrap.<sup>193</sup> Next, each retailer’s terms and conditions were reviewed to look for the presence of clauses that disclaim implied warranties, specifically disclaim warranties as to the use of the website, limit liability (including limiting consequential damages), require arbitration, and whether there was a return policy articulated.<sup>194</sup> Furthermore, warranty disclaimers were coded to reflect whether they were conspicuous, as defined under the U.C.C.,<sup>195</sup> and whether the language was clear enough to reach the products sold.<sup>196</sup> Additional coding was conducted for the presence of clauses that limit the users’ statute of limitations, choice of law provisions, forum selection clauses, class actions waivers, jury waivers, and nondisparagement clauses.<sup>197</sup>

With respect to coding for warranty disclaimers, some retailers did not

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190. Marks, *supra* note 179. This was accomplished by assuming that each national retailer maintained uniform in-store policies and then traveling to the store and observing whether any additional terms and conditions were posted there. *Id.* When it was not possible to travel to a retailer’s local branch, a phone call was made to a branch store in another location to inquire whether additional terms and conditions were posted. *Id.* Though some stores maintained special shelves or areas containing returned or refurbished goods that were sold with disclaimers, such special areas did not count as being equivalent to the types of terms and conditions found online, because they did not apply store-wide. *Id.*

191. *Id.*

192. *Id.* This second classification is meant to help determine, among other things, if downstream liability correlates to the presence of certain terms and conditions.

193. *Id.*

194. *Id.*; see discussion *supra* Section II.B.

195. U.C.C. § 1-201 (AM. LAW INST. & UNIF. LAW COMM’N 2012) (defining conspicuous); see also discussion *supra* Section II.B.3.

196. Marks, *supra* note 179; see discussion *supra* Section II.C.

197. Marks, *supra* note 179.



use the words “goods” or “products,” but instead used words such as “materials” or “contents.”<sup>198</sup> For instance, the Apple Store/iTunes terms and conditions provides in part the following:

THE SITE AND ITS CONTENT ARE DELIVERED ON AN “AS-IS” AND “AS-AVAILABLE” BASIS. ALL INFORMATION PROVIDED ON THE SITE IS SUBJECT TO CHANGE WITHOUT NOTICE. APPLE CANNOT ENSURE THAT ANY FILES OR OTHER DATA YOU DOWNLOAD FROM THE SITE WILL BE FREE OF VIRUSES OR CONTAMINATION OR DESTRUCTIVE FEATURES. APPLE DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTIES OF ACCURACY, NON-INFRINGEMENT, MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.<sup>199</sup>

Arguably, the disclaimer is aimed only at problems encountered with the website itself.<sup>200</sup> Definitions of the word *content* include “[s]omething contained

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198. See *infra* note 199 and accompanying text.

199. *Apple Website Terms of Use*, APPLE, <http://www.apple.com/legal/internet-services/terms/site.html> (last updated Nov. 20, 2009). Of note, in another part of the Apple website, different from the page on which the above disclaimer is found, Apple describes the warranties that come with its products—such as iPhones and iPads—and much more clearly states that it disclaims the implied warranties:

**WARRANTY LIMITATIONS SUBJECT TO CONSUMER LAW**  
TO THE EXTENT PERMITTED BY LAW, THIS WARRANTY AND THE REMEDIES SET FORTH ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, REMEDIES AND CONDITIONS, WHETHER ORAL, WRITTEN, STATUTORY, EXPRESS OR IMPLIED. APPLE DISCLAIMS ALL STATUTORY AND IMPLIED WARRANTIES, INCLUDING WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND WARRANTIES AGAINST HIDDEN OR LATENT DEFECTS, TO THE EXTENT PERMITTED BY LAW. IN SO FAR AS SUCH WARRANTIES CANNOT BE DISCLAIMED, APPLE LIMITS THE DURATION AND REMEDIES OF SUCH WARRANTIES TO THE DURATION OF THIS EXPRESS WARRANTY AND, AT APPLE’S OPTION, THE REPAIR OR REPLACEMENT SERVICES DESCRIBED BELOW. SOME STATES (COUNTRIES AND PROVINCES) DO NOT ALLOW LIMITATIONS ON HOW LONG AN IMPLIED WARRANTY (OR CONDITION) MAY LAST, SO THE LIMITATION DESCRIBED ABOVE MAY NOT APPLY TO YOU.

*Apple One (1) Year Limited Warranty*, APPLE, <https://www.apple.com/legal/warranty/products/ios-warranty-document-us.html> (last visited Oct. 20, 2016). Though Apple eventually addresses the warranties more clearly, this part of its website is not readily apparent when visiting its homepage. See APPLE, <https://www.apple.com> (last visited Oct. 20, 2017).

200. See *Apple Website Terms of Use*, *supra* note 199. In addition to the page’s title—*Apple Website Terms of Use*—the word “site” is included in the terms three times, indicating a specific focus on

in a receptacle,”<sup>201</sup> and “something contained—usually used in plural.”<sup>202</sup> But other definitions include “[s]ubject matter, as of a written work,”<sup>203</sup> “the topics or matter treated in a written work,”<sup>204</sup> and “the principal substance (such as written matter, illustrations, or music) offered by a website.”<sup>205</sup>

The word *materials* is similarly ambiguous.<sup>206</sup> For instance, consider the following language used on the Belk website:

**Disclaimer.** Users assume all responsibility and risk for the use of [Belk, belk.com, Belk tablet and smartphone apps (“Platforms”)] and the Internet generally. All information and materials provided on the Platforms are provided “as is,” without any express or implied warranty of any kind, including, without limitation, warranties of merchantability, fitness for a particular purpose and noninfringement of intellectual property. . . . In no event will Belk be liable for any damages whatsoever (including, without limitation, any special, indirect or consequential damages or damages resulting from loss of use of data, or profits, or business interruption) arising out of the use of or inability to use the content of the Platforms or any website linked thereto, even if Belk has been advised of the possibility of such damages. Belk does not warrant the accuracy or completeness of the information, text, graphics, links, and other items contained on the Platforms. . . . Warranty information regarding any products offered for sale on the Platforms is available through the vendor/manufacturer that made the product. Please contact the vendor/manufacturer for any questions or concerns. Thank you.<sup>207</sup>

The website’s disclaimer appears to be geared toward the information on

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the website itself. *See id.*

201. *Content*, THE AM. HERITAGE DICTIONARY 151 (2d College ed. 1983) [hereinafter *Content (Am. Heritage)*].

202. *Content*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/content> (last visited Sept. 16, 2017) (giving examples, such as “the jar’s *contents*” and “the drawer’s *contents*”) [hereinafter *Content (Merriam-Webster)*].

203. *Content (Am. Heritage)*, *supra* note 201.

204. *Content (Merriam-Webster)*, *supra* note 202 (giving, as an example, “table of *contents*”).

205. *Id.*

206. *See infra* notes 207–14 and accompanying text.

207. *Terms of Use*, BELK, [http://www.belk.com/AST/Misc/Belk\\_Stores/Customer\\_Service/Policies\\_Guidelines/Terms\\_of\\_Use.jsp](http://www.belk.com/AST/Misc/Belk_Stores/Customer_Service/Policies_Guidelines/Terms_of_Use.jsp) (last updated Aug. 12, 2017).

the website, rather than the products, but the word “materials” is ambiguous.<sup>208</sup> Definitions of *material* include: “the elements, constituents, or substances of which something is composed or can be made”<sup>209</sup> and “relating to, derived from, or consisting of matter.”<sup>210</sup> Though all these definitions could refer to a purchased item, they are an ill-fit with reference to many products.<sup>211</sup> But other definitions seem more consistent with the intangible nature of the information found on websites.<sup>212</sup> For instance, two definitions of *material*—“(in *sing.* or *pl.*) information, etc., to be used in writing a book, etc.”<sup>213</sup> and “something (such as data) that may be worked into a more finished form”<sup>214</sup>—seem to indicate that the warranty disclaimers are to be read as referring to the information, as opposed to the products sold on the website.<sup>215</sup>

Complicating this analysis is the fact that most website disclaimer clauses studied, including the two listed above, follow the “contents” and “materials” lines with specific mention of disclaiming “merchantability” and “fitness for a particular purpose.”<sup>216</sup> As noted, one effective way of disclaiming these two implied warranties is doing so specifically.<sup>217</sup> Given that the only way such implied warranties normally arise is through the sale of goods under Article 2 of the U.C.C., it might be fair to infer that this language is being used to disclaim those warranties with regard to sales of goods on a website.<sup>218</sup> Indeed, at least one court has adopted this approach.<sup>219</sup>

In *Orthoflex, Inc. v. ThermoTek, Inc.*, the plaintiffs sued ThermoTek for

208. *See id.* (using phrases such as “damages . . . arising out of the inability to use the content of the Platforms or any website linked thereto”). Further, note that the Belk website disclaimer was not in all caps, *see id.*, nor does it otherwise appear to satisfy the U.C.C.’s definition of *conspicuous*, *see* U.C.C. § 1-201(b)(10) (AM. LAW INST. & UNIF. LAW COMM’N 2012) (noting that capitalization and contrasting fonts and colors make a term sufficiently conspicuous).

209. *Material*, THE AM. HERITAGE DICTIONARY 488 (2d College ed. 1983).

210. *Material*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/material> (last visited Sept. 16, 2017) [hereinafter *Material (Merriam-Webster)*].

211. *See infra* notes 220–27 and accompanying text.

212. *See infra* notes 213–14 and accompanying text.

213. *Material*, OXFORD DESK DICTIONARY & THESAURUS 510 (2d ed. 2002).

214. *Material (Merriam-Webster)*, *supra* note 210.

215. *See supra* notes 199, 207 and accompanying text.

216. *See supra* notes 199, 207 and accompanying text; *infra* notes 224–46 and accompanying text.

217. *See supra* note 115 and accompanying text.

218. *See* U.C.C. § 2-314 (AM. LAW INST. & UNIF. LAW COMM’N 2012) (stating that “a warranty that the goods shall be merchantable is implied in a contract”) (emphasis added); *see also id.* § 2-315 (setting forth the conditions from which an implied warranty of fitness for a particular purpose arises).

219. *See infra* notes 220–227 and accompanying text.

breach of express and implied warranties in their purchases of Thermotek’s VascuTherm System and wraps, which together transferred “pressure, heat, and cold to various body parts during medical therapy.”<sup>220</sup> ThermoTek moved to dismiss the implied warranty claims under the U.C.C., claiming that it had properly disclaimed such warranties under Texas Business & Commercial Code, section 2.316.<sup>221</sup> Though the product was not purchased online, ThermoTek used disclaimer language in its sales agreement and user manual that is similar to the language referenced in the Apple and Belk disclaimers:

THE INFORMATION CONTAINED IN THIS DOCUMENT IS PROVIDED “AS IS”, THERMOTEK EXPRESSLY DISCLAIMS ALL INFORMATION INCLUDING, BUT NOT LIMITED TO, EXPRESS AND IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR USE, OR NON-INFRINGEMENT. IN NO EVENT WILL THERMOTEK BE LIABLE FOR ANY DIRECT, INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, INCLUDING LOST PROFITS, LOST BUSINESS OR LOST DATA, RESULTING FROM THE USE OF OR RELIANCE UPON THE INFORMATION, WHETHER OR NOT THERMOTEK HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.<sup>222</sup>

Plaintiffs claimed that the reference to “information” limited the disclaimer, including the disclaimers of merchantability and fitness for a particular purpose, to the information and not to the products themselves.<sup>223</sup> The court, however, found that the language reached the products at issue, reasoning that there are no implied warranties of merchantability or fitness for a particular purpose that apply to information, and that such implied warranties only apply to goods.<sup>224</sup> The court posited:

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220. *Orthoflex, Inc. v. Thermotek, Inc.*, Nos. 3:11-CV-0870-D, 3:10-CV-2618-D, 2013 WL 4045206, at \*1-3 (N.D. Tex. Aug. 9, 2013).

221. *Id.* at \*2-3. Texas Business & Commercial Code, section 2.316, is Texas’s enactment of U.C.C., section 2-316. *See* TEX. BUS. & COM. CODE ANN. § 2.316 (West, through the end of the 2017 Reg. and First Called Sess. of the 85th Legis.).

222. *Orthoflex, Inc.*, 2013 WL 4045206, at \*3.

223. *Id.* at \*3-4.

224. *Id.* at \*4.

Reading the disclaimers to disclaim only warranties pertaining to “information” would in context make the disclaimers meaningless. By specifically mentioning certain warranties and using the term “AS IS”—which indicates the disclaimer of implied warranties—it is unmistakable that ThermoTek intended to disclaim all implied warranties. And the only such warranties that could be implied would apply to the products ThermoTek was selling.<sup>225</sup>

The court did note, however, that the disclaimers were found in the part of the document concerning warranties for the products themselves.<sup>226</sup> Though this helped bolster the conclusion that the disclaimer was meant to reach the products, the court’s reasoning casts some doubt on whether an argument similar to the plaintiffs’ in *Orthoflex* would be convincing if words such as “contents” and “materials” were used in conjunction with “as is” clauses, disclaimers of merchantability and fitness for a particular purpose, or both.<sup>227</sup>

The purpose of this article is not to resolve this issue but to report on the frequency with which certain clauses are used.<sup>228</sup> To that end, three categories were established: (1) merchants that clearly disclaimed all implied warranties with regard to the products sold online; (2) merchants that did not use language sufficient to reach the implied warranties for products; and (3) an “arguable” category.<sup>229</sup> Merchants that used clear language—by, for example, mentioning “products” or “merchandise” in conjunction with “as is” type statements—express disclaimers of merchantability and fitness for a particular purpose, or both, were put into the first category.<sup>230</sup> Merchants that failed to mention the implied warranties by name and did not use “as is” clauses, or limited the “as is” clause to the information on the page, were put in the second category.<sup>231</sup> Merchants that used language such as “contents” and “materials” in conjunction with “as is” type clauses, explicit disclaimers of merchantability and fitness for a particular purpose, or both, were placed in the third category.<sup>232</sup>

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225. *Id.* (footnote omitted).

226. *Id.*

227. *See id.*

228. *See infra* Section III.C.

229. Marks, *supra* note 179; *see also infra* Tables 2.1, 2.2.

230. Marks, *supra* note 179.

231. *Id.*

232. *Id.* Classification did not consider whether the clauses were conspicuous—that was coded separately. *Id.*

Merchants were categorized in two ways to help determine whether certain kinds of merchants used certain kinds of clauses more or less often.<sup>233</sup> First, merchants that manufactured the goods they sold were given a different designation than pure retailers.<sup>234</sup> Food service merchants, for example, were designated “manufacturers,” as were traditional manufacturers, such as Apple, that sell goods directly to consumers.<sup>235</sup> Second, each merchant was placed into one of the following industry categories: clothing, consumer electronics, food service, grocers, general merchandise, home and garden, office products, and “other.”<sup>236</sup> Industry categorization was determined by how a merchant marketed itself, without regard to whether the merchant sold items that could fit into a different category.<sup>237</sup> For instance, H-E-B was categorized as a grocer,<sup>238</sup> even though it also sells some electronics and clothing,<sup>239</sup> because it markets itself as a general grocer.<sup>240</sup>

### C. Results

#### 1. Overall Results by Category

##### a. Form of Assent

As Table 1.1 demonstrates, the vast majority of retailers rely on browse-wrap agreements to bind consumers, although sign-in wrap agreements are also somewhat prolific.<sup>241</sup>

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233. See *infra* notes 235–43 and accompanying text.

234. Marks, *supra* note 179.

235. *Id.*

236. *Id.*

237. *Id.*

238. Marks, *supra* note 179.

239. See *Entertainment and Electronics*, H-E-B, <https://www.heb.com/category/shop/entertainment-and-electronics/2867> (last visited Oct. 22, 2017); *Clothing*, H-E-B, <https://www.heb.com/category/shop/clothing/2866> (last visited Oct. 22, 2017).

240. See *About Us*, H-E-B, <https://www.heb.com/static-page/About-Us> (last visited Oct. 22, 2017) (“H-E-B is one of the largest independent food retailers in the nation.”).

241. See *infra* Table 1.1; Marks, *supra* note 179.

**Table 1.1**

| Browsewrap   | Clickwrap  | Scrollwrap | Sign-in Wrap |
|--------------|------------|------------|--------------|
| 82/113 (72%) | 4/113 (4%) | 0/113 (0%) | 27/113 (24%) |

Given the deficiencies of browsewrap agreements, one would think that online vendors would use clickwrap agreements more often. But, interestingly, in a 2008 study of 500 online retailers, 88% were still using pure browsewrap as the means of manifesting assent.<sup>242</sup> Although browsewrap still dominates, the trend, at least with regard to sellers of goods, appears to be moving toward sign-in wrap,<sup>243</sup> while clickwrap and scrollwrap are rarely used.<sup>244</sup>

*b. Warranty disclaimers*

As seen in Table 2.1 below, of the 113 retailers studied, the majority (85%) use some form of implied warranty disclaimer.<sup>245</sup> As seen in Table 2.2, of the ninety-six retailers that used implied warranty disclaimers, 57% (49% of all studied) were classified as “arguable.”<sup>246</sup> Interestingly, except in the case of refurbished or display items, none of the retailers had a similar implied warranty disclaimer posted in their stores.<sup>247</sup> This was also true of the other clauses discussed below, except for return policies.<sup>248</sup>

**Table 2.1**

|  |              |
|--|--------------|
| Some Form of Implied Warranty Disclaimer | 96/113 (85%) |
| No Implied Warranty Disclaimer           | 17/113 (15%) |

242. Mann & Siebeneicher, *supra* note 12, at 998. Mann and Siebeneicher did not further delineate forms of assent into sign-in wrap and scrollwrap agreements. *See id.* at 995–96 (describing the study’s methodology). It is therefore possible that some of the websites categorized as “browsewrap” in that study could have qualified as sign-in wrap. *See id.* at 990 (noting that, “although too simple in the real world” and despite numerous “variations” within the categories, the websites were categorized only as browsewrap or clickwrap).

243. *See supra* Table 1.1; Marks, *supra* note 179.

244. *See supra* Table 1.1; Marks, *supra* note 179.

245. *See infra* Table 2.1; Marks, *supra* note 179.

246. *See infra* Table 2.2; Marks, *supra* note 179. Apart from classifying the clauses as either clearly disclaiming warranties or being “arguable,” the online terms and conditions were also studied for conspicuousness of the warranty disclaimers. *See* Marks, *supra* note 179. Only six of the studied retailers used disclaimers that could arguably be classified as inconspicuous under Article 2. *See id.*

247. *See infra* Tables 2.1, 2.2; Marks, *supra* note 179.

248. *See* discussion *infra* Section III.C.1.c.

**Table 2.2**

|                              |             |
|------------------------------|-------------|
| Clear Warranty Disclaimer    | 41/96 (43%) |
| Arguable Warranty Disclaimer | 55/96 (57%) |

*c. Remaining Categories*

Table 3.1 shows the frequency of the following categories: disclaimers of warranties as to the use of the website, clauses limiting liability, arbitration clauses, return policies, clauses shortening the statute of limitations, choice of law clauses, forum selection clauses, jury waivers, class action waivers, and nondisparagement clauses.<sup>249</sup>

**Table 3.1**

| <b>Disclaimer/Clause</b>             | <b>Number/113 (Percentage)</b> |
|--------------------------------------|--------------------------------|
| Use of Website                       | 102/113 (90%)                  |
| Limitation of Liability              | 106/113 (94%)                  |
| Arbitration                          | 40/113 (35%)                   |
| Return Policy                        | 82/113 (73%)                   |
| Alteration of Statute of Limitations | 16/113 (14%)                   |
| Choice of Law                        | 91/113 (81%)                   |
| Forum Selection                      | 64/113 (57%)                   |
| Jury Waiver                          | 38/113 (34%)                   |
| Class Action Waiver                  | 38/113 (34%)                   |
| Nondisparagement                     | 2/113 (2%)                     |

Further categorizing retailers by implied warranty disclaimer, as shown in Table 3.2, reveals that retailers that use implied warranty disclaimers are more likely to include other clauses as well.<sup>250</sup>

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249. See *infra* Table 3.1; Marks, *supra* note 179. An in-store terms-and-conditions category was deleted from the table because no retailer provided such disclaimers. Marks, *supra* note 179.

250. See *infra* Table 3.2; Marks, *supra* note 179.



**Table 3.2**

| <b>Disclaimer/Clause</b>             | <b>Implied Warranty Waiver (Percentage)</b> | <b>No Implied Warranty Waiver (Percentage)</b> |
|--------------------------------------|---|--|
| Use of website                       | 92/96 (95%)                                 | 10/17 (59%)                                    |
| Limitation of Liability              | 96/96 (100%)                                | 10/17 (59%)                                    |
| Arbitration                          | 35/96 (36%)                                 | 5/17 (29%)                                     |
| Return Policy                        | 69/96 (72%)                                 | 13/17 (76%)                                    |
| Alteration of Statute of Limitations | 15/96 (16%)                                 | 1/17 (6%)                                      |
| Choice of Law                        | 80/96 (83%)                                 | 11/17 (65%)                                    |
| Forum Selection                      | 57/96 (59%)                                 | 7/17 (41%)                                     |
| Jury Waiver                          | 33/96 (34%)                                 | 5/17 (29%)                                     |
| Class Action Waiver                  | 32/96 (33%)                                 | 6/17 (35%)                                     |
| Nondisparagement                     | 2/96 (2%)                                   | 0/17 (0%)                                      |

A few numbers stand out.<sup>251</sup> First, most online retailers make some attempt to disclaim any warranties relating to the use of their websites.<sup>252</sup> Frequently, these disclaimers mention the accuracy of the site’s information or the inability of a user to access the site.<sup>253</sup> Second, it is clear that the vast majority of online retailers use limited liability clauses to reign in damages that would result from a successful lawsuit.<sup>254</sup> These clauses were even more prevalent than implied warranty waivers.<sup>255</sup> Third, despite using “as is” type clauses to limit warranties, most retailers—sixty-nine of the ninety-six (72%) that employed an implied warranty waiver—are still willing to accept returns of their merchandise within a specific time period.<sup>256</sup> While this may seem at odds with the warranty disclaimers, these time periods are usually far more limiting than the four-year statute of limitations provided under the U.C.C.,<sup>257</sup>

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251. See *infra* notes 252–58 and accompanying text.

252. See *supra* Table 3.1, 3.2; Marks, *supra* note 179.

253. Marks, *supra* note 179.

254. See *supra* Tables 3.1, 3.2 (reporting that 106 of the 113 retailers studied (94%) included in their terms and conditions a clause limiting liability); Marks, *supra* note 179.

255. Compare *supra* Table 2.1 (showing that ninety-six retailers employed some type of implied warranty waiver), with *supra* Table 3.2 (showing that 106 retailers employed limited liability clauses); Marks, *supra* note 179.

256. See *supra* Table 3.2; Marks, *supra* note 179.

257. See U.C.C. § 2-725(1) (AM. LAW INST. & UNIF. LAW COMM’N 2012) (“An action for breach

which was altered by only fifteen of the ninety-six (16%) retailers using “as is” types of clauses.<sup>258</sup> Thus, without a breach of warranty claim, a consumer might have no cause of action against a retailer, though this could depend on the nature of the injury.<sup>259</sup>

While the warranty and liability disclaimer numbers may be expected, the dearth of arbitration clauses is somewhat surprising.<sup>260</sup> Arbitration is frequently viewed as a pro-business form of dispute resolution that minimizes litigation costs.<sup>261</sup> Furthermore, the Supreme Court’s FAA jurisprudence has

of any contract for sale must be commenced within four years after the cause of action has accrued.”).  
258. See *supra* Table 3.2; Marks, *supra* note 179.

259. See U.C.C. § 2-316. Such clauses are generally ineffective against personal injury product liability claims. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 18 (AM. LAW. INST. 1998) (“Disclaimers and limitations of remedies by product sellers or other distributors, waivers by product purchasers, and other similar contractual exculpations, oral or written, do not bar or reduce otherwise valid products-liability claims against sellers or other distributors of new products for harm to persons.”). This is true even in the presence of a contractually agreed upon waiver or limitation, such as “[i]t is presumed that the ordinary product user or consumer lacks sufficient information and bargaining power to execute a fair contractual limitation of rights to recover.” *Id.* § 18 cmt. a. Comment d to that same section makes an exception for informed consumers represented by powerful bargaining allies. *Id.* § 18 cmt. d. Some states have altered this result to protect retailers that are not manufacturers. See, e.g., NEB. REV. STAT. § 25-21,181 (2017); S.D. CODIFIED LAWS § 20-9-9 (Westlaw through 2017 Reg. and Spec. Sess. Laws, Exec. Order 17-2, and Supreme Court Rule 17-11). Other states with such statutes premise their exemption upon there being jurisdiction over the manufacturer. See, e.g., DEL. CODE ANN. tit. 18, § 7001 (LEXIS through 81 Del. Laws, ch. 179); IDAHO CODE § 6-1407 (LEXIS through the 2017 Legis. Sess.); 735 ILL. COMP. STAT. 5/2-621(a)–(c) (2017); IOWA CODE § 613.18 (2017); KAN. STAT. ANN. § 60-3306 (West, Westlaw through laws effective on or before July 1, 2017, enacted during the 2017 Reg. Sess. of the Kansas Legis.); KY. REV. STAT. ANN. § 411.340 (West, Westlaw through the end of the 2017 reg. sess.); MINN. STAT. § 544.41 (2017); MO. REV. STAT. § 537.762 (2016); N.C. GEN. STAT. § 99B-2 (LEXIS through Sess. Laws 2017-56 of the 2017 Reg. Sess., but not including Sess. Laws 2017-6 or corrections and changes made by the Revisor of Statutes); OHIO REV. CODE ANN. § 2307.78 (LexisNexis, LEXIS with Legis. passed by the 132nd General Assem. and filed with the Secretary of State through file 17 (HB 103) with the exception of file 14 (HB 49)); TENN. CODE ANN. § 29-28-106 (LEXIS through 2017 Reg. Sess. (Ch. 493)); WASH. REV. CODE § 7.72.040 (2017).

260. See *supra* Table 3.1 (noting that only forty of the 113 (35%) retailers included in the study used an arbitration clause in their terms and conditions); see generally Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, METROPOLITAN. CORP. COUNS., July 2006, at 32 (describing how arbitrations are more efficient with respect to time and money).

261. See Jean R. Stermlight, *In Defense of Mandatory Arbitration (if Imposed on the Company)*, 8 NEV. L.J. 82, 83 (2008) (stating that defenders of mandatory arbitration clauses typically claim that “arbitration is quicker and cheaper than litigation and overall just as fair or fairer,” an assertion Professor Stermlight patently rejects). Andrew Pincus, a partner at a Washington firm and the attorney who argued on behalf of AT&T Mobility LLC in the landmark case, refutes the plaintiff bar’s calling the Supreme Court “pro-business” and highlights pro-consumer provisions in the contract at issue in that case. See Andrew Pincus, *The Advantages of Arbitration*, N.Y. TIMES: DEALBOOK (May 24, 2012,

clearly favored enforcement of arbitration clauses.<sup>262</sup>

In light of the Supreme Court’s complicity in enforcing arbitration clauses<sup>263</sup> and the benefits arbitration bestows upon businesses such as retailers,<sup>264</sup> the absence of arbitration clauses in so many terms and conditions is striking.<sup>265</sup> It could be that retailers believe existing warranty and liability disclaimers are sufficient, or perhaps retailers are simply unconcerned with the prospect of a traditional courtroom setting.<sup>266</sup> Their absence could merely be an oversight.<sup>267</sup> If that is the case, then it would not be surprising to see this number increase in coming years.<sup>268</sup> Indeed, some retailers that were

1:44 PM), <http://dealbook.nytimes.com/2012/05/24/the-advantages-of-arbitration> (“AT&T’s contract with its wireless customers had special pro-consumer provisions; AT&T agreed to pay all of the arbitration fees for small claims, and to provide special bonuses, including double lawyers’ fees, if a claimant recovered an amount greater than AT&T’s settlement offer.”).

262. See Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 18 (1997) (“While a federal policy ‘favoring arbitration’ might conceivably mean a policy that looked upon arbitration with favor, rather than a policy that favored arbitration over litigation, the Court made it clear that it was endorsing the latter use of the term ‘favor.’ Specifically, it explicitly proclaimed that any doubts as to whether an ambiguous contract called for arbitration over litigation ‘should be resolved in favor of arbitration.’” (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983))).

263. See Sternlight, *supra* note 262, at 18.

264. The arbitration alternative to litigation provides benefits to businesses, such as speed, cost, and expert decision makers. See Fellows, *supra* note 260, at 32 (comparing the outcomes and timeframes of arbitration and litigation and concluding that while the substantive outcomes are similar, arbitration is quicker and its cost is “very reasonable”). But see Stephen J. Ware, *Is Adjudication a Public Good? “Overcrowded Courts” and the Private Sector Alternative of Arbitration*, 14 CARDOZO J. CONFLICT RESOL. 899, 905–06 (2013) (analyzing the difference in cost subsidization between litigation and arbitration and concluding that while litigation court costs are at least partially subsidized by tax dollars, parties bear the full cost of arbitration).

265. See Mann & Siebeneicher, *supra* note 12, at 998, 1011.

266. See *id.* at 1011 (attributing the absence of arbitration clauses in retailers’ terms and conditions to two factors: “the desire to have terms that appear to be benign and the desire to have terms . . . to which consumers will accede in the event of a dispute”).

267. See Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 373 (2007) (“[L]arge corporate actors do not systematically embrace arbitration.”).

268. See Nancy S. Kim & D.A. Jeremy Telman, *Internet Giants as Quasi-Governmental Actors and the Limits of Contractual Consent*, 80 MO. L. REV. 723, 734 (2015) (suggesting that although only about one-third of the top websites incorporate rights-limiting terms in wrap agreements, “it will not take long for other websites” to embrace such practices, in light of the Supreme Court’s jurisprudence favoring these terms); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES: DEALBOOK (Oct. 31, 2015) <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> (“Over the last few years, it has become increasingly difficult to . . . shop online without agreeing to private arbitration.”).

studied added arbitration clauses in the year prior to concluding this research.<sup>269</sup>

It is also interesting to note that while arbitration clauses often include other clauses—such as choice of law clauses, jury waivers, and class action waivers—those clauses also appear in the standard terms and conditions of websites that do not have arbitration clauses.<sup>270</sup> Table 3.3 shows the prevalence of the other clauses for retailers that also have arbitration clauses.<sup>271</sup> The frequency of many of the clauses is similar to the frequency found in disclaimers that do not use arbitration clauses.<sup>272</sup>

**Table 3.3**

| <b>Disclaimer/Clause</b>             | <b>Arbitration Clause<br/>(number/total)</b> | <b>No Arbitration<br/>Clause<br/>(number/total)</b> |
|--------------------------------------|--|---|
| Implied Warranty Disclaimer          | 35/40 (86%)                                  | 61/73 (84%)   |
| Use of Website Disclaimer            | 40/40 (100%)                                 | 62/73 (85%)   |
| Limitation of Liability              | 40/40 (100%)                                 | 66/73 (90%)   |
| Return Policy                        | 30/40 (75%)                                  | 52/73 (71%)   |
| Alteration of Statute of Limitations | 7/40 (18%)                                   | 9/73 (12%)  |
| Choice of Law                        | 36/40 (90%)                                  | 55/73 (75%)   |
| Forum Selection                      | 23/40 (56%)                                  | 41/73 (56%)   |
| Jury Waiver                          | 33/40 (83%)                                  | 5/73 (7%)   |
| Class Action Waiver                  | 31/40 (78%)                                  | 7/73 (10%)  |
| Nondisparagement                     | 2/40 (5%)                                    | 0/73 (0%)   |

Many of the similarities are understandable; for instance, choice of law provisions are generally enforceable, give the seller some predictability in how the terms of the contract will be interpreted, and are useful even if the

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269. Marks, *supra* note 179. Those retailers include: Amazon, Baskin Robbins, Best Buy, CVS, Farm Fresh Supermarkets, Gap, JC Penney, Jared, Kay, Maurice’s, Meijer, Nordstrom’s, Save Mart Supermarkets, and Whole Foods. *Id.*

270. See *infra* Table 3.3 (comparing the prevalence of standard terms and conditions between websites that employ arbitration clauses and those that do not); Marks, *supra* note 179.

271. See *infra* Table 3.3.

272. See *infra* Table 3.3.

parties do not use arbitration.<sup>273</sup> But jury and class action waivers, outside of the context of arbitration, often get scrutinized as being either unconscionable or against public policy.<sup>274</sup> The Supreme Court’s prescriptive interpretations of the FAA save such clauses when they are part of an arbitration provision.<sup>275</sup> Apparently, a few online vendors wish to avoid the ease and speed of arbitration—which arguably benefits consumers—but retain the right to avoid class actions (10%) or jury trials (7%)<sup>276</sup>—which does not benefit consumers.<sup>277</sup> In other words, these sellers want to have their cake and eat it too; but outside of arbitration, the enforceability of such clauses is suspect.<sup>278</sup>

## 2. Manufacturers Versus Retailers

As noted above, retailers (including food service retailers) were also coded for whether they played a role in manufacturing the products sold on their websites.<sup>279</sup> Table 4.1 shows the breakdown with regard only to the

273. See Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 366–67 (2003) (reporting that, based on a study of approximately 700 cases, choice of law provisions “are enforced in all but certain narrow categories of cases”).

274. See *Gaylord Dep’t Stores of Alabama, Inc. v. Stephens*, 404 So. 2d 586, 588 (Ala. 1981) (“Courts upholding jury waivers follow a general rule that . . . a waiver will be strictly construed.”); see also Leslie, *supra* note 158, at 277 (noting that some courts have held class action waivers unconscionable and against public policy).

275. *Muriithi v. Shuttle Exp., Inc.*, 712 F.3d 173, 180 (4th Cir. 2013) (distinguishing the holding in *Concepcion* as prohibiting “application of the general contract defense of unconscionability” in attempts “to invalidate” agreements to arbitrate in otherwise valid circumstances).

276. See *supra* Table 3.3 (noting that seven of seventy-three (10%) and five of seventy-three (7%) retailers employed class action waivers and jury waivers, despite electing not to include an arbitration clause in their terms and conditions); Marks, *supra* note 179.

277. See Leslie, *supra* note 158, at 275–81 (pointing to the nature of class action waivers as inherently anti-consumer in that they foreclose small claim recovery due to eclipsing litigation costs); see also *In re Knepp*, 229 B.R. 821, 827 (Bankr. N.D. Ala. 1999) (“The reality that the average consumer frequently loses his/her constitutional rights and right of access to the court when he/she buys a car, household appliance, insurance policy, receives medical attention or gets a job rises as a putrid odor which is overwhelming to the body politic.”); see generally Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to A Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001) (arguing that mandatory arbitration clauses equate to jury trial waivers and discussing the harm consumers face as a result).

278. See Leslie, *supra* note 158, at 292 (“By holding that judges cannot use the unconscionability doctrine to invalidate a term embedded in an arbitration agreement, *Concepcion* risks limiting the ability of courts to hold other unconscionable contract terms unenforceable. . . . So long as a firm inserts an otherwise unenforceable, unconscionable term in an arbitration agreement, *Concepcion* could prevent lower courts from invalidating that unconscionable term.”).

279. See *supra* Section III.B.

types of warranty disclaimer used,<sup>280</sup> while Table 4.2 shows the remaining categories.<sup>281</sup>

**Table 4.1**

|  | <b>Manufacturer<br/>(number/total)</b> | <b>Non-Manufacturer<br/>(number/total)</b> |
|--|--|--|
| Some Form of Implied Warranty Disclaimer | 17/20 (85%)                            | 79/93 (85%)                                |
| No Implied Warranty Disclaimer           | 3/20 (15%)                             | 14/93 (15%)                                |

**Table 4.2**

| <b>Disclaimer/Clause</b>             | <b>Manufacturer<br/>(number/total)</b> | <b>Non-Manufacturer<br/>(number/total)</b> |
|--------------------------------------|--|--|
| Use of website                       | 19/20 (95%)                            | 83/93 (89%)                                |
| Limitation of Liability              | 20/20 (100%)                           | 86/93 (92%)                                |
| Arbitration                          | 7/20 (35%)                             | 33/93 (35%)                                |
| Return Policy                        | 8/20 (40%)                             | 74/93 (80%)                                |
| Alteration of Statute of Limitations | 5/20 (25%)                             | 11/93 (12%)                                |
| Choice of Law                        | 17/20 (85%)                            | 74/93 (80%)                                |
| Forum Selection                      | 9/20 (45%)                             | 55/93 (59%)                                |
| Jury Waiver                          | 5/20 (25%)                             | 33/93 (35%)                                |
| Class Action Waiver                  | 5/20 (25%)                             | 33/93 (35%)                                |
| Nondisparagement                     | 0/20 (0%)                              | 2/93 (2%)                                  |

There are few significant differences between manufacturers and non-manufacturers.<sup>282</sup> Non-manufacturers are less likely to have clauses that alter the statute of limitations, but are more likely to have forum selection clauses, jury waivers, and class action waivers.<sup>283</sup> The biggest difference between manufacturers and non-manufacturers is found in the return policy category.<sup>284</sup> This is most likely because sellers in the food service industry are

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280. See *infra* Table 4.1; Marks, *supra* note 179.

281. See *infra* Table 4.2; Marks, *supra* note 179.

282. See *supra* Tables 4.1, 4.2; Marks, *supra* note 179.

283. See *supra* Table 4.2; Marks, *supra* note 179.

284. See *supra* Table 4.2 (reporting that only eight of twenty (40%) manufacturers specified a return

classified as manufacturers.<sup>285</sup>

### 3. Breakdown by Industry

The retailers were further broken down by industry.<sup>286</sup> Industries were determined by reviewing the retailers’ websites and the products that were offered.<sup>287</sup> The categories into which these are divided include: clothing, consumer electronics, food services, general merchandise, grocers, home and garden, office products, and “other.”<sup>288</sup> Though many retailers offer products that could be in multiple categories, determinations were made based on the primary thrust of the business.<sup>289</sup> For instance, some grocers sell small consumer electronics, and some home and garden retailers sell certain limited kinds of clothing, but these are not the primary products that these businesses sell.<sup>290</sup> Retailers—such as Walmart—that truly offer a full range of products, were coded as “General Merchandise,” and retailers that did not fit into any of the specialized categories were placed in a catch-all category—“other.”<sup>291</sup> Table 5.1 shows the breakdown of the retailers by category.<sup>292</sup>

**Table 5.1**

| Industry                  | Percentage (number) |
|---------------------------|---------------------|
| Clothing (Cl.)            | 16% (18/113)        |
| Consumer Electronics (CE) | 5% (6/113)          |
| Food Service (FS)         | 15% (17/113)        |
| General Merchandise (GM)  | 19% (21/113)        |
| Grocers (Gr.)             | 21% (24/113)        |
| Home and Garden (H&G)     | 10% (11/113)        |

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policy, in contrast to seventy-four of ninety-three (80%) non-manufacturers); Marks, *supra* note 179.

285. *See infra* Section III.C.3.

286. *See infra* notes 287–99 and accompanying text.

287. Marks, *supra* note 179.

288. *See infra* Table 5.1; Marks, *supra* note 179.

289. Marks, *supra* note 179.

290. Compare, e.g., *Workwear, Safety Gear, and Equipment*, HOME DEPOT, <http://www.homedepot.com/b/Tools-Workwear-Safety-Gear-Equipment/N-5yc1vZc4ow> (last visited Oct. 22, 2017), with *See Our History*, HOME DEPOT, <https://corporate.homedepot.com/about> (last visited Oct. 22, 2017).

291. Marks, *supra* note 179. The retailers included in the “other” category were not numerous enough to form their own category, but did neatly fit into the “other” category. *Id.* For instance, Toys “R” Us was the only toy retailer in the study and so was placed in the “other” category. *Id.*

292. *See infra* Table 5.1; Marks, *supra* note 179.

|                      |              |
|----------------------|--------------|
| Office Products (OP) | 2% (3/113)   |
| Other                | 12% (13/113) |

Table 5.2 displays the frequency with which each type of clause appeared by industry.<sup>293</sup>

**Table 5.2**

| Disclaimer/clause                    | CL              | CE            | FS              | GM             | Gr.            | H&G            | OP            | Other           |
|--------------------------------------|-----------------|---------------|-----------------|----------------|----------------|----------------|---------------|-----------------|
| Implied Warranty Disclaimer          | 13/18<br>(72%)  | 6/6<br>(100%) | 16/17<br>(94%)  | 17/21<br>(81%) | 21/24<br>(88%) | 9/11<br>(82%)  | 3/3<br>(100%) | 11/13<br>(85%)  |
| Use of Website                       | 15/18<br>(72%)  | 6/6<br>(100%) | 17/17<br>(100%) | 19/21<br>(90%) | 22/24<br>(92%) | 8/11<br>(73%)  | 3/3<br>(100%) | 12/13<br>(92%)  |
| Limitation of Liability              | 16/18<br>(89%)  | 6/6<br>(100%) | 16/17<br>(94%)  | 20/21<br>(95%) | 23/24<br>(96%) | 10/11<br>(91%) | 3/3<br>(100%) | 12/13<br>(92%)  |
| Arbitration                          | 7/18<br>(39%)   | 2/6<br>(33%)  | 6/17<br>(35%)   | 9/21<br>(43%)  | 9/24<br>(38%)  | 2/11<br>(18%)  | 0/3<br>(0%)   | 5/13<br>(38%)   |
| Return Policy                        | 18/18<br>(100%) | 6/6<br>(100%) | 6/17<br>(35%)   | 18/21<br>(88%) | 8/24<br>(33%)  | 10/11<br>(91%) | 3/3<br>(100%) | 13/13<br>(100%) |
| Alteration of Statute of Limitations | 0/18<br>(0%)    | 1/6<br>(17%)  | 9/17<br>(53%)   | 1/21<br>(5%)   | 0/24<br>(0%)   | 2/11<br>(18%)  | 1/3<br>(33%)  | 2/13<br>(15%)   |
| Choice of Law                        | 15/18<br>(83%)  | 4/6<br>(67%)  | 15/17<br>(88%)  | 17/21<br>(81%) | 19/24<br>(79%) | 6/11<br>(55%)  | 3/3<br>(100%) | 12/13<br>(92%)  |
| Forum Selection                      | 12/18<br>(67%)  | 1/6<br>(17%)  | 10/17<br>(59%)  | 11/21<br>(52%) | 13/24<br>(54%) | 6/11<br>(55%)  | 3/3<br>(100%) | 8/13<br>(62%)   |
| Jury Waiver                          | 8/18<br>(44%)   | 2/6<br>(33%)  | 5/17<br>(29%)   | 7/21<br>(33%)  | 10/24<br>(42%) | 1/11<br>(9%)   | 0/3<br>(0%)   | 5/13<br>(38%)   |
| Class Action Waiver                  | 7/18<br>(39%)   | 2/6<br>(33%)  | 5/17<br>(29%)   | 11/21<br>(52%) | 6/24<br>(25%)  | 1/11<br>(9%)   | 1/3<br>(33%)  | 5/13<br>(38%)   |
| Nondisparagement                     | 0/18<br>(0%)    | 0/6<br>(0%)   | 0/6<br>(0%)     | 1/21<br>(5%)   | 1/24<br>(4%)   | 0/11<br>(0%)   | 0/3<br>(0%)   | 0/13<br>(0%)    |

The frequencies found in several categories are similar across industries.<sup>294</sup> For instance, nondisparagement clauses are rarely used at all, while limitation of liability clauses are used very frequently (between 89% and 100%) in every industry.<sup>295</sup> Implied warranty disclaimers also appear frequently, except in the clothing industry where only 72% of those studied included such a disclaimer.<sup>296</sup> This may have something to do with the nature

293. See *infra* Table 5.2; Marks, *supra* note 179.

294. See *supra* Table 5.2; Marks, *supra* note 179.

295. See *supra* Table 5.2; Marks, *supra* note 179.

296. See *supra* Table 5.2; Marks, *supra* note 179.



of the goods as well as the high frequency of return policies (100% in the clothing industry).<sup>297</sup> Return policy provisions appeared with high frequency in all other industries as well, except for the food service (35%) and grocer industries (33%).<sup>298</sup> Given the perishable nature of the goods in these two industries (and the reality that the goods are often consumed soon after purchase), the low frequency of return policies is not surprising.<sup>299</sup>

#### IV. CONCLUSION

The online sale of goods is a booming industry that has increased the convenience with which consumers can shop.<sup>300</sup> The ease of simply clicking a button to complete a purchase brings with it the concomitant ease with which vendors can make their sales subject to additional terms and conditions.<sup>301</sup> This article has explored some of the most common terms and conditions, but it is worth noting that none of the stores studied attempted to make in-store purchases subject to the same terms and conditions.<sup>302</sup> Furthermore, the vast majority of the websites studied used a form of assent—browsewrap<sup>303</sup>—typically viewed as the least likely to make consumers aware of the terms and conditions, and thus the most susceptible to attack.<sup>304</sup> Meanwhile, the most enforceable and conspicuous forms of assent, clickwrap and scrollwrap,<sup>305</sup> are barely used at all.<sup>306</sup>

These two revelations—the failure to use the same terms and conditions

297. Marks, *supra* note 179.

298. See *supra* Table 5.2; Marks, *supra* note 179.

299. See Christine Gallary, *Kitchen Facts: What’s Considered Perishable Food?*, KITCHN (Aug. 21, 2015), <http://www.thekitchn.com/whats-considered-perishable-food-222540>. Furthermore, if goods are non-conforming under sections 2-601 and 2-602 of the U.C.C., then the buyer has the right to reject within a reasonable time after delivery. U.C.C. §§ 2-601, -602 (AM. LAW INST. & UNIF. LAW COMM’N 2012). The seller could then have the opportunity to cure. *Id.* § 2-508.

300. See Andrew Soergel, *As Online Sales Boom, Is Brick-and-Mortar on the Way Out?*, U.S. NEWS & WORLD REPORT (Dec. 20, 2016, 12:46 PM), <http://www.usnews.com/news/articles/2016-12-20/wit-h-online-sales-booming-is-brick-and-mortar-on-the-way-out> (“[P]roject[ed] total holiday sales will be up a respectable 3.6 percent in 2016. But non-store sales are likely to grow at twice that pace—between 7 and 10 percent. The percentage of consumers expected to shop online this holiday season, 56.5 percent, is almost identical to the percentage that will shop in department stores—56.6 percent.”).

301. See *supra* Section II.A (discussing how online retailers contract with consumers).

302. See *supra* Sections III.B–C (discussing the study methods and findings).

303. See *supra* Section III.C.1.a (reporting findings).

304. See *supra* Section II.A (distinguishing types of online contracting techniques).

305. See *supra* Section II.A.

306. See *supra* Section III.C.1.a (reporting findings).

online and in the store, and the failure to use a more conspicuous form of assent to terms—raise the question whether vendors are all that concerned with the terms that they include on their websites.<sup>307</sup> Some terms, such as stand-alone class action waivers that are not a part of an arbitration clause, could be attacked as unconscionable and in violation of public policy.<sup>308</sup> Other terms, such as disclaimers of implied warranties and liability limitations, are of limited utility because they would likely be unenforceable in cases involving personal injury.<sup>309</sup> While this article has not deeply analyzed the enforceability of all the terms that were studied, the above issues raise questions as to why online vendors include them as part of their websites.<sup>310</sup>

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307. *See supra* Section II.A.

308. *See supra* notes 261–74 and accompanying text (reviewing several contract terms which have traditionally been viewed as pro-business and anti-consumer).

309. *See supra* notes 144–47 and accompanying text (providing analysis of consequential damages limitations in personal injury cases).

310. *See supra* notes 307–09 and accompanying text.

APPENDIX A:  
LIST OF RETAILERS STUDIED (IN ALPHABETICAL ORDER)<sup>311</sup>

1. Ace Hardware
2. Advance Auto Parts
3. Albertsons
4. Amazon
5. Ann Taylor (Ascena Retail Group)
6. Apple Stores / iTunes
7. Applebee's (DineEquity)
8. Army Air Force Exchange
9. AT&T Wireless
10. AutoZone
11. Barnes & Noble
12. Baskin Robbins (Dunkin Brands)
13. Bath and Body Works (L Brands)
14. Bed Bath & Beyond
15. Belk
16. Best Buy
17. Bi-Lo
18. BJ's Wholesale Club
19. Burlington Coat Factory
20. Carrabbas (Bloomin' Brands)
21. Catherine's (Ascena Retail Group)
22. Chik-fil-A
23. Chili's (Brinker International)
24. C.O. Bigelow (L Brands)
25. Costco
26. Cub Foods (SUPERVALU)
27. CVS Caremark
28. Dell
29. Dick's Sporting Goods
30. Dillard's
31. Dollar General
32. Dollar Tree
33. Domino's Pizza

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311. A subsidiary's parent group is indicated in parentheses.

34. Dress Barn (Ascena Retail Group)
35. Dunkin Donuts (Dunkin Brands)
36. Farm Fresh (SUPERVALU)
37. Foot Locker
38. GameStop
39. Gap
40. Giant (Ahold USA)
41. Giant Eagle
42. H-E-B
43. Henri Bendel (L Brands)
44. HornBachers (SUPERVALU)
45. Hudson's Bay
46. Hy-Vee
47. Ikea North America Services
48. J.C. Penney
49. Jared (Signet Jewelers)
50. Justice (Ascena Retail Group)
51. Kay (Signet Jewelers)
52. KFC (YUM! Brands)
53. K-Mart (Sears Holdings)
54. Kohl's
55. Kroger
56. La Senza (L Brands)
57. Lane Bryant (Ascena Retail Group)
58. Loft (Ascena Retail Group)
59. LongHorn Steakhouse (Darden )
60. Lou Grey (Ascena Retail Group)
61. Lowe's (Lowe's Companies)
62. Macy's
63. Maggiano's (Brinker International)
64. Maurices (Ascena Retail Group)
65. Martin's (Ahold USA)
66. Meijer
67. Menard
68. Michaels
69. MyGofer (Sears Holdings) ONLINE w/ K-mart
70. Neiman Marcus
71. Nordstrom

72. Office Depot
73. OfficeMax
74. Olive Garden (Darden Restaurants)
75. O'Reilly Automotive
76. Orchard Supply (Lowe's Companies)
77. Outback (Bloomin Brands)
78. Panera
79. Peapod (Ahold USA) ONLINE ONLY
80. Peoples (Signet Jewelers)
81. PetSmart
82. Piercing Pagoda (Signet Jewelers)
83. Pizza Hut (YUM! Brands)
84. Price Chopper Supermarkets
85. Publix
86. QVC (ONLINE ONLY)
87. Rite Aid
88. Safeway
89. Save Mart Supermarkets
90. Sears (Sears Holdings)
91. Shop 'n Save (SUPERVALU)
92. Shop Your Way (Sears Holdings)
93. Shoppers (SUPERVALU)
94. Staples
95. Starbucks
96. Stater Bros. Holdings
97. Stop and Shop (Ahold USA)
98. Subway
99. Taco Bell (YUM! BRANDS)
100. Target
101. The Home Depot
102. Toys "R" Us
103. Tractor Supply Co.
104. True Value
105. Verizon Wireless
106. Victoria's Secret (L Brands)
107. Walgreen
108. Wal-Mart
109. Wegmans Food Market

[Vol. 45: 1, 2017]

*Online and "As Is"*  
PEPPERDINE LAW REVIEW

- 110. Whole Foods Market
- 111. Williams-Sonoma
- 112. WinCo Foods
- 113. Zales (Signet Jewelers)

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