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Online Terms as in Terrorem Devices

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ONLINE TERMS AS *IN TERROREM* DEVICES

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ABSTRACT

Online shopping has quickly replaced the brick-and-mortar experience for a large portion of the consuming public. The online transaction itself is rote: browse items, add them to your cart, and check out. Somewhere along the way, the consumer is likely made aware of (or at least exposed to) the merchant's terms and conditions, via either a link or a pop-up box. Such terms and conditions have become so ubiquitous that most consumers would be hard-pressed to find a merchant that doesn't try to impose them somewhere on their website. Though such terms and conditions are pervasive, most consumers do not bother to read them before checking out. Consumers might be surprised by what they would find if they did read the terms and conditions, as many retailers include clauses limiting liability, disclaiming warranties as well as choice of law, forum selection, arbitration, jury waiver, and class action waiver clauses. Many of these clauses are grounded in a practical concern over limiting liability and lowering transaction costs. However, the fact that retailers do not include such clauses as part of their in-store transactions raises the question of whether the retailers are actually concerned with binding consumers to such terms. The apparent lack of importance of these terms is further highlighted by the fact that most retailers use "browsewrap" terms and conditions to bind their customers, despite browsewrap being one of the least effective methods of making consumers aware of the terms. While these terms and conditions may provide

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some utility to the companies attempting to impose them, the main benefit may in fact be their in terrorem *effect. This is especially true in instances where companies have failed to adequately notify their consumers about the terms' existence. This Article will examine the various methods that are used in online contracting to bind consumers and consider the enforceability of the most common terms. The Article will conclude that the primary incentive sellers have to include such terms on their websites is their* in terrorem *effect. Though the use of online terms and conditions as* in terrorem *devices may be appealing economically, the use of browsewrap as the primary notification device* ex ante *presents moral and ethical issues.*

I. INTRODUCTION

Online shopping has quickly replaced the brick-and-mortar experience for a large portion of the consuming public. The online transaction itself is rote: browse items, add them to your cart, and check out. Somewhere along the way, the consumer is likely made aware of (or at least exposed to) the merchant's terms and conditions, via either a link or a pop-up box. Such terms and conditions have become so ubiquitous that most consumers would be hard-pressed to find a merchant that doesn't try to impose them somewhere on their website. Though such terms and conditions are pervasive, most consumers do not bother to read them before checking out.[1]

Consumers might be surprised by what they would find if they did read the terms and conditions. Based on a recent empirical review of the largest retailers' websites, I found that ninety-four percent had a clause limiting liability and eighty-five percent had clauses disclaiming warranties.[2] Other common clauses were choice of law (eighty-one percent), forum selection (fifty-seven percent), arbitration (thirty-five percent), jury waiver (thirty-four

1. *See* Tracy D. Gunter, *Can We Trust Consumers with Their Brains? Popular Cognitive Neuroscience, Brain Images, Self-Help and the Consumer*, 11 IND. HEALTH L. REV. 483 (2014) (discussing the cognitive dissonance of consumers and the neuroscience behind marketing tactics); Cheryl B. Preston, *"Please Note: You Have Waived Everything": Can Notice Redeem Online Contracts?*, 64 AM. U. L. REV. 535, 538–40 (2015) (recognizing the reality that consumers do not stop to read the terms in online transactions); *cf.* Allyson W. Haynes, *Online Privacy Policies: Contracting Away Control over Personal Information?*, 111 PENN ST. L. REV. 587, 588 (2007) (noting consumers are concerned with information privacy, yet don't read the policies discussing how their information will be used); James P. Nehf, *Shopping for Privacy Online: Consumer Decision-Making Strategies and the Emerging Market for Information Privacy*, 2005 U. ILL. J.L. TECH. & POL'Y 1, 11 (2005) (showing that less than one percent of study participants noticed privacy policies on websites).

2. *See* Colin P. Marks, *Online and "As Is"*, 45 PEPP. L. REV. 1, 38–39 (2017).

percent), and class action waiver (thirty-four percent).[3] In other words, retailers are taking advantage of online transactions by attaching additional terms and conditions that a consumer would not normally find in-store.[4]

Many of these clauses are grounded in a practical concern over limiting liability and lowering transaction costs.[5] However, the fact that retailers do not include such clauses as part of their in-store transactions raises the question: Are retailers actually concerned with binding consumers to such terms? The apparent lack of importance of these terms is further highlighted by the fact that most retailers use "browsewrap" terms and conditions to bind their customers, despite browsewrap being one of the least effective methods of making consumers aware of the terms.[6] In this vein, some commentators have criticized the use of such online terms as failing to elicit true consent.[7] This Article will examine the effect online terms and conditions have on consumers, specifically with regard to the sale of goods.

While these terms and conditions may provide some utility to the companies attempting to impose them, the main benefit may in fact be their *in terrorem* effect.[8] This is especially true in instances where companies have failed to adequately notify their consumers about the terms' existence.[9] Part II of this Article will examine the various methods used in online contracting to bind consumers. It will conclude that while most retailers are using the browsewrap method, this is a rational choice given the retailers' main goal—to make a sale. However, given the ability to choose a more effective method of notice, the very choice of browsewrap represents a conscious tradeoff made by the online sellers to choose expediency over effectiveness.

As not all retailers' terms and conditions will fail for lack of adequate notice, Part III explores the effectiveness of these clauses, differentiating between personal injury plaintiffs and those suffering pure economic harm. It concludes that even if online terms and conditions survive an attack based on notice, in many scenarios, clauses such as warranty and liability disclaimers

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3. *Id.* at 39.

4. *See infra* Part IV.

5. *See infra* Section II.C.

6. *See infra* Section II.B.

7. 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) (discussing the evolution of mandated disclosure and how the prolific nature of boilerplate language in contracts has negatively affected consumer choice and eviscerated mutual consent).

8. Merriam-Webster defines *in terrorem* as "by way of threat or intimidation: serving or intended to threaten or intimidate" and gives as an example: "overbroad covenants not to compete which have *in terrorem* effect on employees." *In Terrorem*, MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/in%20terrorem (last visited Dec. 21, 2018) (citing well-known contracts scholars J. D. Calamari and J. M. Perillo).

9. *See infra* notes 23–43 and accompanying text.

will not be effective.[10] Building on the conclusions found in Parts II and III, Part IV reflects upon the effect such clauses have on consumers and concludes that the primary incentive sellers have to include such terms on their websites is their *in terrorem* effect. The retailer can later use these clauses as a means of deterring consumers from bringing suit based on the misperception that they are bound by such terms.[11] Use of online terms and conditions as *in terrorem* devices may be appealing economically, but such use presents moral and ethical issues.

II. BINDING CONSUMERS IN AN ONLINE WORLD

A. Why Do Retailers Attempt to Bind Consumers?

Before exploring the enforceability of online terms and conditions, it is useful to first pause and consider what a typical retailer would do in response to a lawsuit absent such terms and conditions. For many retailers, a defective product has nothing to do with their interaction with the product. In other words, the defective product was defective when they received it, and the true party at fault is the manufacturer. The Uniform Commercial Code ("U.C.C.") provides that in such a situation, the retailer can "vouch-in" the manufacturer under Section 2-607(5).[12]

This provision gives the manufacturer a chance to defend the suit directly or risk being bound by the finding of liability in a subsequent suit by the retailer.[13] Alternatively, the retailer may implead the manufacturer under

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10. *See infra* Part IV.

11. *See infra* notes 203–208 and accompanying text.

12. This Section provides:

> (5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over
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> (a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.

U.C.C. § 2-607(5)(a) (AM. LAW INST. & UNIF. LAW COMM'N 2017–2018).

13. *See* Smith Radio Commc'ns, Inc. v. Challenger Equip., Ltd., 527 P.2d 711, 712–13 (Or. 1974) (demonstrating the use of U.C.C. § 2-607(5) by a retailer for indemnification against a manufacturer when the manufacturer refuses to participate in the defense). A suit against the retailer, rather than against the manufacturer, may be due to a lack of vertical privity between the buyer and the upstream manufacturer. *See* Conn. Pie Co. v. Lynch, 57 F.2d 447, 448 (D.C. Cir. 1932) (requiring privity for warranty claims); Mouzon v. Radiancy, Inc., 200 F. Supp. 3d. 83, 91 (D.D.C. 2016) ("[P]rivity of contract is required between a plaintiff and a defendant to state a warranty claim."); All W. Elecs., Inc. v. M–B–W, Inc., 75 Cal. Rptr. 2d 509, 514 (Cal. Ct. App. 1998) (restating the California requirement for privity in warranty claims); Lexow & Jenkins, P.C. v. Hertz Commercial Leasing Corp., 122 A.D.2d 25, 26 (N.Y. App. Div. 1986) ("It is now settled that no implied warranty will extend from a manufacturer to a remote purchaser not in privity with the manufacturer where only economic loss and not personal injury is alleged."). However, many states permit direct suits against manufacturers when personal injuries are involved. *See, e.g.*, Rosenthal v. Ford Motor Co.,

Federal Civil Procedure Rule 14 or its state equivalent.[14] In either case, from the retailer's perspective, the real party at fault—the manufacturer—is made to answer for its defective product. In this sense, clauses disclaiming warranties and limiting damages do nothing more than divert the injured consumer to the correct defendant.

Furthermore, even if the retailer is in some way to blame for a defect in a sold good, online terms and conditions may lower transaction costs by narrowing the class of claims. Disclaimers of warranties, and limitations on remedies, provide predictability as to potential liability.[15] Other clauses, such as arbitration clauses, class action waivers, and choice of law clauses, similarly provide predictability and potential cost savings.[16]

The notion that such clauses provide predictability and savings presumes that such clauses are binding. As explored in Part III, the effectiveness of such clauses may depend, among other things, on the type of injury sustained. A plaintiff that has sustained injuries to person or property is much more likely to be able to circumvent "as-is" clauses (both in contract and tort) than a plaintiff who has suffered only economic harm.[17] Furthermore, the method by which an online seller makes its consumers aware of its terms may affect their subsequent enforceability.

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462 F. Supp. 2d 296, 309 (D. Conn. 2006) ("[T]he Connecticut Supreme Court held that, '[w]here the liability is fundamentally founded on tort rather than contract there appears no sound reason why the manufacturer should escape liability simply because the injured user, a party in the normal chain of distribution, was not in contractual privity with it by purchase and sale.'" (quoting Garthwait v. Burgio, 216 A.2d 189, 192 (Conn. 1965))); Copiers Typewriters Calculators, Inc. v. Toshiba Corp., 576 F. Supp. 312, 322 (D. Md. 1983) ("The General Assembly of Maryland, by subsequent legislation, virtually eliminated the requirement of privity in actions for damages for personal injury grounded on breach of an express or an implied warranty.").

14. FED. R. CIV. P. 14(a)(1); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 33.004 (West 2015) (permitting the designation of a responsible third party defendant); CAL. CIV. PROC. CODE § 428.70 (West 2016) (permitting claims against third party defendants); N.Y. C.P.L.R. 1007 (McKinney 2016) (regulating when a third party may be designated by a defendant). Federal Civil Procedure Rule 14(a)(1) provides:

> A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 14 days after serving its original answer.

FED. R. CIV. P. 14(a)(1).

15. *See infra* Section III.B.

16. *See infra* Section III.A.

17. Richard C. Ausness, *Replacing Strict Liability with a Contract-Based Products Liability Regime*, 71 TEMP. L. REV. 171, 206 n.201 (1998) (listing cases in which the court refused to uphold a warranty waiver in favor of a consumer who had suffered personal injury or property damage); William H. Danne, Jr., Annotation, *Construction and Effect of UCC § 2-316(2) Providing That Implied Warranty Disclaimer Must Be "Conspicuous"*, 73 A.L.R.3d § 2[a], at 256 (1976) ("[T]he courts themselves have recognized that where a product defect normally covered by implied warranties causes personal injury or property damage for which recovery is permitted under the doctrine of strict liability in tort, even a conspicuously printed disclaimer of implied warranties may be ineffective to preclude such recovery.").

B. Multitude of "Wrap" Agreements

It is a hallmark of contract law that, in order for a contract to be binding, the parties must be aware that the contract terms exist.[18] This awareness, of course, does not mean that the parties have read, or even understood the terms, but merely that they have been presented with the terms in a fair and forthright manner.[19] In the real world, as opposed to the online world, this is accomplished when the parties receive the actual contract.[20] The contract may be long, complicated, and full of dense provisions, but so long as the parties are made aware of the contract, they will be bound to the terms they agreed upon.[21] Thus, the parties have a duty to read the terms and are presumed, under an objective test, to have agreed to all of the terms whether they have read them or not.[22]

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18. *See* Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 30–32 (applying a reasonably prudent offeree standard); *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 19(2) (AM. LAW INST. 1981) ("The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents."); *Id.* § 33(1) ("Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.").

19. *See* James v. McDonald's Corp., 417 F.3d 672, 678 (7th Cir. 2005) ("A contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome." (quoting ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996))); Caspi v. Microsoft Network, L.L.C., 732 A.2d 528, 531–33 (N.J. 1999) (applying a "fair and forthright" standard of notice to a forum selection clause); RESTATEMENT (SECOND) OF CONTRACTS § 50(1) (AM. LAW INST. 1981) ("Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.").

20. *See* RESTATEMENT (SECOND) OF CONTRACTS § 30 (AM. LAW INST. 1981).

21. Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 476 (2008) ("[I]f a party objectively manifests assent to be bound to a contract (for example, by signing a written contract document), a court will almost automatically find assent to all terms contained in the writing."). *See generally* John D. Calamari, *Duty to Read—A Changing Concept*, 43 FORDHAM L. REV. 341 (1974) (discussing the traditional contract rule that parties have a duty to read contracts).

22. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1204 (2003) ("If the non-drafting party indicates his general assent to the form, courts will enforce the terms contained therein whether or not that party approves of the terms provided, understands those terms, [or] has read them . . . ."). Some consumers are made aware of the terms after the initial purchase. Under a "rolling contracts" approach, these later terms are viewed as the offer. Under such an approach, "the vendor or seller is the master of its offer and can choose to invite acceptance by conduct, such as by using the product. This view of contract formation is limited by the caveat that the buyer must be given an opportunity to review and reject the offer, but otherwise, such contracts are enforceable." COLIN P. MARKS & JEREMY KIDD, MASTERING SALES 50 (2018). Courts adopting a rolling contract approach view this as sufficient to bind the consumers to the terms and conditions. *See* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1997) ("If they constitute the parties' contract because the Hills had an opportunity to return the computer after reading them, then all must be enforced."); *ProCD, Inc.*, 86 F.3d at 1452 ("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."). Not all courts adopt such an approach. *See*

In online contracts, there are no physical contracts handed to the other party, and so efforts must be made by the online retailer, through their website design, to make users aware of the existence of terms and conditions. A review of the case law reveals that four primary methods of binding consumers have emerged: browsewrap, sign-in wrap, clickwrap, and scrollwrap agreements. I add to this list what I term "bannerwrap" agreements, which are an emerging variation of browsewrap agreements. Each type of agreement is described below as well as the relative enforceability of each.

In a browsewrap agreement, "the website will contain a notice that—by merely using the services of, obtaining information from, or initiating applications within the website—the user is agreeing to and is bound by the site's terms of service."[23] It is not unusual for browsewrap agreements to be nothing more than an inconspicuous link at the bottom of a webpage and to be passive in nature, in that there is no need to click separately to continue with a purchase.[24] A primary problem with browsewrap, however, is that the links are not always easy to find, subjecting them to attack for failing to give consumers fair notice of their existence.

This difficulty in finding the browsewrap link is exacerbated when it is submerged on the page below the portion of the screen that is viewable during purchase, effectively permitting the user to continue with the transaction without ever becoming aware of the terms' existence. Such was the case in *Specht v. Netscape Communications*[25]—an oft-cited example of how a website's design can fail to put a reasonable consumer on inquiry notice.[26] In *Specht*, the plaintiffs downloaded "free" software from Netscape's website, which transmitted private information about the plaintiffs to Netscape.[27] When the plaintiffs sued for violations of the Electronic Communications Privacy Act[28] and the Computer Fraud and Abuse Act,[29] Netscape moved to compel arbitration.[30] The arbitration provision was part of the terms in the license agreement, which appeared on the webpage from which the plaintiffs

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Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1340–41 (D. Kan. 2000). But courts, even those that do adopt this approach, require that the recipient of the later terms be put on fair notice of their existence and be informed about how to reject the terms. *See* Defontes v. Dell, 984 A.2d 1061, 1071 (R.I. 2009).

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

24. *See* Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 395 (E.D.N.Y. 2015) (delineating the nature of browsewrap by calling it "passive"); *see also* Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 548 (2014) (defining browsewrap as allowing "buyers to purchase without seeing a prominent hyperlink to the underlying terms").

25. 306 F.3d 17 (2d Cir. 2002).

26. *Id.* at 32.

27. *Id.* at 20–21.

28. 18 U.S.C. §§ 1367, 2521, 2701–2711, 3117, 3121–3127 (2012).

29. 18 U.S.C. § 1030 (2012).

30. *Specht*, 306 F.3d at 20–21.

downloaded the software.[31] However, the license was not located near the "download" button on the visible screen, but rather it was visible only if the plaintiffs had scrolled down the webpage.[32]

In resolving the case, the United States District Court for the Southern District of New York agreed with the plaintiffs, holding that the submerged terms were not binding.[33] On appeal, the United States Court of Appeals for the Second Circuit affirmed,[34] finding that a "reasonably prudent offeree" would not be put on constructive notice of the license's terms due to the submerged nature of the hyperlink on the webpage.[35] With regard to the submerged terms, the court noted:

> [T]here 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.[36]

Though submerged browsewrap terms present clear problems, even viewable browsewrap terms have been held unenforceable when the hyperlinks were "inconspicuous"[37] or failed to put the consumer on notice that the purchase was subject to the terms and conditions.[38] For instance, in *Ngyuen v. Barnes & Noble*,[39] a consumer sought to avoid arbitration of his claims against Barnes & Noble based on its failure to give proper notice of the website's terms and conditions, which were located in a hyperlink in the viewable

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31. *Id.* at 25.

32. *Id.* at 23–25.

33. Specht v. Netscape Commc'ns Corp., 150 F. Supp. 585, 596 (S.D.N.Y. 2001).

34. *Specht*, 306 F.3d at 40.

35. *Id.* at 30.

36. *Id.* at 32.

37. Long v. Provide Commerce, Inc., 200 Cal. Rptr. 3d 117, 126 (Cal. Ct. App. 2016) (describing the browsewrap terms at issue in the case as "simply too inconspicuous to meet [the Specht] standard"); Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 396 (E.D.N.Y. 2015) (calling attention to prominence as a requirement to put consumers on notice of browsewrap terms and conditions and listing numerous cases on both district and appellate levels holding such terms are invalid if they are inconspicuous). In fact, the Ninth Circuit even held that *conspicuous* hyperlinks may 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.").

38. *See* Lee v. Intelius Inc., 737 F.3d 1254, 1261–62 (9th Cir. 2013) (upholding the 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." (quoting *Specht*, 306 F.3d at 35)).

39. 763 F.3d 1171 (9th Cir. 2014).

portion of the screen.[40] Citing *Specht*, the United States Court of Appeals for the Ninth Circuit noted that "where, as here, there is no evidence that the website user had actual knowledge of the agreement, the validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract."[41] The court went on to hold that the terms were unenforceable despite the fact that the website made its terms of use available via a conspicuous hyperlink on every page of the website in close proximity to the checkout buttons.[42] The court stated that because the website "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."[43]

Perhaps in response to the enforceability problems facing browsewrap agreements, some online merchants began using "sign-in wrap" agreements as a method of binding consumers. Sign-in wrap agreements are defined as instances where the website purposely notifies a user "of the existence and applicability of the site's 'terms of use' when proceeding through the website's sign-in or login process."[44] This type of agreement can itself be broken down into two types. The first involves situations where a user creates an account to shop on the website and agrees to the site's terms of use when creating the account; the user later reaffirms such assent by signing in to the account to shop.[45] Perhaps the most famous example of this type of agreement is used by Amazon, which requires consumers to create an account that they sign in to before shopping.[46] The second type does not necessarily require the creation and signing in to an account, but merely contains an acknowledgement that by continuing through the checkout process, the user agrees to the website's terms and conditions.[47]

In the first type of sign-in wrap agreement, in which an account is created and signed in to for purchasing, if the terms and conditions are only

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40. *Id.* at 1173–75.

41. *Id.* at 1177 (citing *Specht*, 306 F.3d at 30–31).

42. *Id.* at 1178–79.

43. *Id.* at 1179.

44. *Berkson*, 97 F. Supp. 3d at 399.

45. *Id.* at 401; *see also* 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.").

46. *See generally* AMAZON, https://www.amazon.com/ (last visited Mar. 7, 2018). *See also Conditions of Use*, AMAZON, https://www.amazon.com/gp/help/customer/display.html?nodeId=201909000 (last updated May 21, 2018).

47. Starke v. Gilt Groupe, Inc., No. 13 Civ. 5497 (LLS), 2014 WL 1652225, at *2–3 (S.D.N.Y. Apr. 24, 2014); Swift v. Zynga Game Network, Inc., 805 F. Supp. 2d 904, 908, 912 (N.D. Cal. 2011).

made available through an inconspicuous link at the bottom of the sign-in page, then the page design is not much different from a browsewrap. However, the problems associated with typical browsewrap can be avoided if, when the account is created, the existence of the terms is made clear—such as by having the user click an "I agree" box to proceed.[48] But if the terms are simply made available somewhere on the account creation page,[49] then such agreements may face the same challenges that browsewrap terms face.[50] This is also true of the second type of sign-in wrap agreement that typically is nothing more than an acknowledgement somewhere near the checkout button and a link to the terms.[51]

Additionally, some websites have resorted to a banner flashing across the screen displaying the terms, presumably to avoid arguments that the website did not clearly present the online terms and conditions. These banners appear at the bottom or top of the viewable page or are on display across the middle of the page, obscuring the content of the website. These bannerwrap agreements (as I am labeling them) are relatively new but appear to simply

48. Nguyen v. Barnes & Noble, Inc., 763 F.3d 1171, 1176–79 (9th Cir. 2014).

49. *See* Cullinane v. Uber Techs., Inc., No. CV 14-14750-DPW, 2016 WL 3751652, at *6 (D. Mass. July 11, 2016), *rev'd*, 893 F.3d 53 (1st Cir. 2018) ("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 . . . .").

50. *See* Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403 (2d Cir. 2004) ("It is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree."); Mark E. Budnitz, *Consumers Surfing for Sales in Cyberspace: What Constitutes Acceptance and What Legal Terms and Conditions Bind the Consumer?*, 16 GA. ST. U. L. REV. 741, 751 (2000) ("The fact that online shopping takes place under different circumstances becomes important because the *Restatement* requires that the consumer 'intends to engage in the conduct and knows or has reason to know' the seller may infer from that conduct that the consumer assents. The consumer may not realize that clicking on the 'submit' button has the effect of finalizing the transaction by constituting her acceptance."). *But see* Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 401 (E.D.N.Y. 2015) (indicating the forum selection clause may be enforced if the hyperlinked terms and conditions appear next to the only button to move forward).

51. Nicosia v. Amazon.com, Inc., 834 F.3d 220, 233 (2d Cir. 2016) ("Whether there was notice of the existence of additional contract terms presented on a webpage depends heavily on whether the design and content of that webpage rendered the existence of terms reasonably conspicuous."); *see also Nguyen*, 763 F.3d at 1177–78 (holding that placement of the "Terms of Use" hyperlink in the bottom left-hand corner of every page on the website, and in close proximity to the buttons a user must click on to complete a purchase was not enough to put a reasonably prudent user on inquiry notice of the terms of the contract); Budnitz, *supra* note 50, at 751 ("The consumer may not realize that clicking on the 'submit' button has the effect of finalizing the transaction by constituting her acceptance. She may believe that, in legal terms, she is merely being invited to make an offer and that clicking on the button simply means that she is submitting her order form for the seller's review; if approved, she believes the seller will make an offer to which she is not obligated to accept."). *But see Starke*, 2014 WL 1652225, at *3 (holding the arbitration clause was binding as the terms were hyperlinked next to the "Shop Now" button).

be a variation of the browsewrap agreement with the added benefit of never being submerged.[52]

With the exception of account-creation sign-in wrap agreements that involve checking a box, the common theme with the above forms of agreements is that they are passive in nature. A user can proceed with a purchase without having to take any affirmative steps to manifest assent or click any icons other than those they were already going to use to make a purchase. In contrast, the remaining two categories of "wrap" agreements—clickwrap and scrollwrap—require users to take affirmative steps above and beyond the simple checkout process.

Clickwrap agreements typically come in the form of a box users must check before proceeding.[53] Thus, clickwrap agreements necessitate an active role by the user of a website.[54] By checking the box, users agree that they have read the terms and conditions and are bound by them, which at the very least puts users on inquiry notice of the terms' existence.[55]

Scrollwrap agreements take the extra step of making the user view the terms and conditions, such as through a pop-up box appearing on the website. Typically, the scrollwrap forces the user to view the terms and conditions as part of the website's construction and design with a method of assenting at the end, such as an "I agree" button that must be clicked to proceed.[56] As clickwraps and scrollwraps both require an active step by the consumer, they are generally viewed as more enforceable than browsewrap agreements.[57]

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52. *See Nicosia*, 834 F.3d at 236–37 (finding the fact there was a banner with terms and conditions in smaller font at the top of the website was unconvincing and that reasonable minds could disagree on the reasonableness of notice).

53. *See* Fteja v. Facebook, Inc., 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012) (clearly defining clickwrap as requiring the consumer to utilize a checkbox indicating assent).

54. 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 (that is, clicking a box) of the "clickwrap" designation and contending "every court to consider the issue has held clickwrap licenses enforceable").

55. *See Berkson*, 97 F. Supp. 3d at 397; *Fteja*, 841 F. Supp. 2d at 837 (clarifying clickwrap "requir[es] that the user manifest . . . assent to the terms" (quoting *Register.com, Inc.*, 356 F.3d at 429)); 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).

56. *Berkson*, 97 F. Supp. 3d at 398.

57. Preston, *supra* note 1, at 544 ("Clickwrap agreements are the generally enforceable, standard form contracts that Internet users assent to merely by clicking an 'I agree' option."); *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."); Stacy-Ann Elvy, *Contracting in the Age of the Internet*

C. The Rational Selection of Browsewrap

Given that clickwrap and scrollwrap agreements are generally viewed as more enforceable than browsewrap, one would think that these would be the preferred methods of notice for online merchants. However, in a recent empirical review of the methods used by the top retailers of goods in the United States, seventy-two percent used browsewrap, while four percent used clickwrap and none used scrollwrap.[58] These findings are consistent with an earlier 2008 study of 500 online sellers (not limited to goods), which found that eighty-eight percent used browsewrap.[59] This inconsistency can be explained as a rational economic choice.

Just as with their brick-and-mortar counterparts, online sellers worry that communicating additional terms and conditions to the buyer will discourage sales and lead to an inefficient use of time. Judge Frank H. Easterbrook, in defending the use of rolling contracts, famously posited:

> Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations . . . had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time. And oral recitation would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it.[60]

Though Judge Easterbrook was speaking to the advantage of providing forms later, the concept is also relevant in online contracting. Forcing consumers to read through pages of terms will likely discourage sales, just as requiring reading them in-person would.[61] Furthermore, plastering the website with large disclosures all over the first page could discourage sales, just

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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)).

58. Marks, *supra* note 2, at 38. Additionally, twenty-four percent of retailers used sign-in wrap. *Id.* "Bannerwrap" is a new term introduced in this Article and was not studied in the previous article; however, I can confirm that no instances of bannerwraps were found in that study.

59. Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 998 (2008). This study did not further delineate forms of assent into sign-in wrap and scrollwrap, so it is therefore possible that some of the methods labeled as browsewrap in that study could have qualified as sign-in wrap.

60. Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149 (7th Cir. 1997).

61. *See* Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire*, 104 MICH. L. REV. 837, 850 (2006) ("[I]ncreasing the information available to consumers, [including] the early display of terms[,] may add to the problem of information overload. Further, without the immediacy of an actual transaction, consumers may find plowing through legalese more tedious and worthless than ever."); *see also* Melvin Aron Eisenberg, *Text Anxiety*, 59 S. CAL. L. REV. 305, 309 (1986) (discussing information overload: "Reading text one

as large signs reading "ALL ITEMS SOLD AS IS—NO RETURNS" would do in a brick-and-mortar store.[62]

Another reason browsewrap agreements are preferred is expediency.[63] Websites are designed to get consumers from product selection to checkout as quickly as possible.[64] At the heart of this design is a concern over lost sales.[65] Any delay in the process, such as by a checkbox or pop-up screen with lengthy contract language, may cause the consumer not to proceed with the sale.[66] What is worse, the consumer may buy the same product elsewhere from a competitor that uses browsewrap (and perhaps with identical terms and conditions).[67] Rather than risk losing a sale through such a delay, online sellers choose to use the form of wrap agreement that requires the least effort from the consumer—browsewrap.[68]

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can't understand is both extremely inefficient and emotionally frustrating. The consumer's reaction to the prospect of reading such text is therefore likely to be anxiety and avoidance."); *cf.* William N. Eskridge, Jr., *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the Economic and Psychological Dynamics of the Home Sale and Loan Transaction*, 70 VA. L. REV. 1083, 1133 (1984) (noting the argument that "Truth-in-Lending Act disclosures overwhelm consumers with complicated forms and too much information, thus discouraging them from shopping"); Preston, *supra* note 1, at 574 ("The Internet-instant-gratification generation will come to see the required action [of clicking through an e-contract] as a mere time-wasting hurdle slowing their access to the desired product or service.").

62. Walter A. Effross, *The Legal Architecture of Virtual Stores: World Wide Web Sites and the Uniform Commercial Code*, 34 SAN DIEGO L. REV. 1263, 1283 (1998) ("[A] visitor to a traditional store might well decline to purchase an item if the proprietor handed him a thick contract or prominently posted on one wall a large list of disclaimers . . . . By contrast, the owner of a Web site risks alienating virtual visitors if she forces them first to view all of the legal information that a cautious lawyer might recommend."); *cf.* Mann & Siebeneicher, *supra* note 59, at 986 ("[R]etailers design websites to balance the benefits of extracting purposeful assent with the burdens of complicating the purchase process.").

63. *See* Amy J. Schmitz, *Pizza-Box Contracts: True Tales of Consumer Contracting Culture*, 45 WAKE FOREST L. REV. 863, 866–67 (2010) (describing how there is a "formalistic enforcement of [browsewrap and clickwrap] contracts as necessary to promote market efficiency").

64. Effross, *supra* note 62, at 1283 ("Site designers, who are commonly cautioned against including graphics that will extend the time required for their pages to be downloaded by a visitor, are also aware that the potential purchaser might not spend the extra time to scroll or 'click' through screens full of disclaimers or other pertinent terms."); *cf.* Schmitz, *supra* note 63, at 863 ("Typical consumers do not ask for or read their contracts pre-purchase, and companies have become accustomed to burying purchase terms in . . . Internet links.").

65. *See* Effross, *supra* note 62, at 1283 ("[T]he owner of a Web site risks alienating virtual visitors if she forces them to first view all of the legal information that a cautious lawyer might recommend."); Nancy S. Kim, *Contract's Adaptation and the Online Bargain*, 79 U. CIN. L. REV. 1327, 1351 (2011) ("A business may lose customers if it asks them to sign contracts before processing relatively minor purchases.").

66. Effross, *supra* note 62, at 1283; *see* Kim, *supra* note 65, at 1352 (suggesting online contracts with burdensome language may cause "the importance of the transaction" to be lost).

67. *See* Hillman, *supra* note 61, at 852 (describing how consumers shop rationally and prefer convenience).

68. *See* Jeffrey H. Dasteel, *Consumer Click Arbitration: A Review of Online Consumer Arbitration Agreements*, 9 ARB. L. REV. 1, 12 (2017) (positing that "transaction simplification and speed are at the root of the decision to employ browsewrap-type sites to sell products and services to consumers").

At this point it is worth noting that online sellers are perfectly capable of designing their websites to incorporate active, as opposed to passive, assent by consumers.[69] Therefore, the choice of browsewrap is a conscious cost-benefit analysis on the part of the sellers.[70] Active forms of assent could cost the sellers money, and—just as with similar choices made in brick-and-mortar stores—online sellers are choosing the route that will not deter sales.[71] This is a rational choice, but not one without consequences when a consumer later seeks to avoid the enforcement of the terms and conditions. However, as two commentators noted, "It seems that for the great majority of internet retailers, the ease of the shopping experience is more important than concerns about possible future liability."[72]

III. ENFORCING ONLINE TERMS AND CONDITIONS

This Article focuses on the prevalence of online terms and conditions in the sale of goods, which are specifically governed by Article 2 of the U.C.C.[73] As the U.C.C. includes specific provisions governing disclaimers of warranties and liability, special attention must be given to such clauses. Though these two types of clauses are the most prevalent, many other terms and conditions, such as arbitration, forum selection, class action, and jury waiver clauses, are also not uncommon. These latter types of clauses are frequently used in conjunction and are not subject to any special rules under the U.C.C. Therefore, a brief explanation of the enforceability of these lesser-used clauses, followed by a discussion of express and implied warranties, applicable remedies, and limitations under the U.C.C., may be helpful in understanding the terms' subsequent consumer impact.

A. General Enforceability of Online Terms and Conditions

As demonstrated in Part II, the enforceability of all terms and conditions may be subject to the defense that the website design did not adequately provide notice of the terms' existence. Beyond this general defense, many of

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69. *See* Kim, *supra* note 65, at 1351 ("[W]ebsites have the capability to set-up how the contracting process will proceed . . . . Websites, in other words, make choices about how to present contractual terms to the customer."); Mann & Siebeneicher, *supra* note 59, at 985 (emphasizing a concern that internet retailers can restructure their websites to their benefit).

70. *See* Hillman, *supra* note 61, at 843–44 ("[B]usinesses can experiment with modes of presentation, including methods of accessing the standard terms, graphics, and font sizes, to determine which presentations most effectively deter reading, and can use those strategies when the consumer decides to contract.").

71. *See id.* at 843 (acknowledging businesses will draft terms in an effort to minimize standard-term shopping).

72. Mann & Siebeneicher, *supra* note 59, at 1011.

73. *See* U.C.C. § 2-102 (AM. LAW INST. & UNIF. LAW COMM'N 2017–2018) ("[T]his Article applies to transactions in goods . . . .").

the clauses may be enforceable, subject to formation defenses, such as unconscionability.[74] Some states do prohibit class action and jury waivers,[75] but forum selection clauses and choice of law clauses generally survive.[76] Arbitration clauses are of special mention, as they are governed by the Federal Arbitration Act[77] ("FAA") and are consistently reaffirmed in Supreme Court decisions.[78] Furthermore, these clauses frequently incorporate forum selection clauses, class action, and jury waivers.[79] This is because the FAA preempts those state laws that are not within the spirit of the national policy favoring arbitration.[80]

The Supreme Court stated that in passing the FAA, Congress intended "to reverse the longstanding judicial hostility to arbitration agreements . . .

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74. *See infra* Section III.E.2.

75. *See 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."); Parsons v. Associated Banc-Corp, 881 N.W.2d 793, 803 (Wis. Ct. App. 2016) (invalidating a jury trial waiver because the court did not believe the consumer "understood the enormous extent and scope of the rights he was giving up"), *rev'd*, 863 N.W.2d 212 (Wis. 2017). *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, 676 (2001) (arguing that mandatory arbitration clauses equate to jury trial waivers and discussing the harm consumers face as a result).

76. *See, e.g.*, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593 (1991) (upholding enforceability of a forum selection clause).

77. 9 U.S.C. §§ 1–14 (2012).

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

79. *Id.* at 282 ("In addition to class action waivers, firms have regularly inserted . . . terms [including]: (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.").

80. *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." (quoting Wilke v. Swan, 346 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 78, 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 . . . .").

and to place arbitration agreements upon the same footing as other contracts."[81] The FAA provides that arbitration agreements are open to traditional contract defenses, but the Supreme Court repeatedly upheld arbitration provisions against traditional contract-based defense claims, such as unconscionability.[82] For instance, in *AT&T Mobility LLC v. Concepcion*,[83] the Court held that a class action waiver tied to an arbitration provision could not be the basis for an unconscionability ruling.[84] The Court reaffirmed this position in *DIRECTV, Inc. v. Imburgia*,[85] declaring state laws prohibiting class action waivers retroactively invalid under the FAA.[86]

In light of Supreme Court precedent, it seems that the wise way to avoid class actions would be to tie them to an arbitration provision. Interestingly, though such clauses have been given such favorable status, they are still not used by the majority of major online retailers. Only thirty-five percent of the retailers studied used arbitration clauses in my 2017 study, which was up from nine percent that used such clauses in a similar study of the top 500 online sellers reported in 2008.[87] Though arbitration clauses may be on the rise, they are not the most common types of terms and conditions being foisted upon consumers. The most common are warranty disclaimers and damage limitations clauses.[88]

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

82. *See* Rent-a-Ctr. W., Inc. v. Jackson, 561 U.S. 63, 66, 71–72 (2010) (holding 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).

83. 563 U.S. 333 (2011).

84. *Id.* at 352.

85. 136 S. Ct. 463 (2015).

86. *Id.* at 469.

87. *Compare* Marks, *supra* note 2, at 39, *with* Mann & Siebeneicher, *supra* note 59, at 999.

88. Marks, *supra* note 2, at 38–39.

B. U.C.C. Warranties

The three main warranties that may be implicated in online sales of goods[89] are: express warranties,[90] implied warranties of merchantability,[91] and implied warranties of fitness for a particular purpose.[92] Express warranties are governed by U.C.C. Section 2-313(1), which provides that such warranties can be created by "[a]ny 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" ("affirmation warranties") or by "[a]ny description of the goods which is made part of the basis of the bargain" ("description warranties").[93]

Affirmation warranties include any affirmative representations as to the quality of the goods as well as warranties and guarantees. Section 2-313(2) makes clear that the use of the words "warranty" and "guarantee" are not necessary but retains 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."[94] Description warranties

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89. There is a fourth, the warranty of title and against infringement. *See* U.C.C. § 2-312(1), (3) (AM. LAW INST. & UNIF. LAW COMM'N 2017–2018). 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. This Section is rarely at issue in the transactions examined in my study and is, therefore, not addressed in this paper.

90. U.C.C. § 2-313.

91. *Id.* § 2-314.

92. *Id.* § 2-315.

93. *Id.* § 2-313 (1)(a), (b). There is a third kind of express warranty that is not typically relevant to online transactions, though it could be. Section 2-313(1)(c) provides, "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." *Id.*

94. U.C.C. § 2-313(2).

include affirmative statements as to the type,[95] dimensions,[96] and specifications[97] of a particular good. Though both warranties require that the affirmation, description, or sample becomes the "basis of the bargain," courts traditionally presume such and do not require plaintiff buyers to show that they actually relied on the express warranty.[98]

Under the U.C.C., implied warranties of merchantability also attach to every sale of goods by a merchant seller. Section 2-314 provides a non-exclusive list of what it means to be merchantable:

> (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 promise or affirmations of fact made on the container or label if any.[99]

A suit for breach of this implied warranty requires a plaintiff to prove both that the good is not merchantable, as defined in subsections (a) through

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95. *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 claim for breach of express warranty where product did not conform to seller's description that product was "good, first-class permanent type of antifreeze").

96. *See* Edward E. Gillen Co. v. City of Lake Forest, No. 91 C 183, 1991 WL 171945, at *7 (N.D. Ill. Aug. 29, 1991) (recognizing failure of delivered product to conform to contractually specified dimensions as a basis for breach of express warranty); Loris Stavrinidis, LTD. v. Graphic Equip. World Wide, No. 79 Civ. 5001 (CBM), 1981 U.S. Dist. LEXIS 9797, at *18–20 (S.D.N.Y. Aug. 31, 1981) (affirming defendant liability for breach of express warranty where press sold to buyer did not conform to the dimensions listed on the contract).

97. *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, 543 (Ill. App. Ct. 1969) (affirming jury verdict for the plaintiff where the defendant was liable for breach of express warranty arising out of equipment not conforming to seller specifications of capacity to lift and overall condition).

98. *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 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 equivocal nature of the phrase "basis of the bargain"); *see also* U.C.C. § 2-313 cmt. 3 (AM. LAW INST. & UNIF. LAW COMM'N 2017–2018) (explaining that proof of reliance is not required if the affirmation is part of a description).

99. U.C.C. § 2-314(2).

(f), and that the failure to be merchantable proximately caused the plaintiff harm.[100] As evident from the number of subsections, a lack of merchantability can be found in a variety of ways. For example, cases have established feed which made farm animals sick was not fit for its ordinary purpose[101] and a shipment of lumber with different types of plywood and warped plywood was not of even kind and quality.[102]

Finally, the implied warranty of fitness for a particular purpose may also arise in a sale of goods. Section 2-315 provides that if a seller has reason to know of any particular purpose for which the buyer is purchasing the goods, and also that the buyer is relying on the seller's skill or judgment in selecting the particular goods, then there exists an implied warranty "that the goods shall be fit for such purpose."[103] Although actual communication need not occur between buyer and seller regarding the particular purpose for purchasing the goods,[104] given the nature of an online transaction, which takes place without a physical salesperson, it seems unlikely this warranty could be available in a purely online transaction.[105] However, it is possible that liability could attach if a buyer called a sales representative prior to purchasing a product online or perhaps communicated electronically during the purchasing process.[106]

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100. *See* WHITE & SUMMERS, *supra* note 98, at 480–81 (explaining the implied warranty of merchantability, including its elements and relationship to tort liability).

101. *See* Duxbury v. Spex Feeds, Inc., 681 N.W.2d 380, 393 (Minn. Ct. App. 2004) (noting an implied warranty of merchantability arose because Spex was in the business of furnishing animal feed, and its substandard corn caused illness and economic loss to Duxburys: "[An] implied warranty of merchantability provides that the product is fit for its ordinary and intended use").

102. *See* Gulf Trading Corp. v. Nat'l Enters., 912 F. Supp. 177, 180 (D.V.I. 1996) (asserting various evidence supported a "finding that the kind, quality and quantity of much of the goods shipped . . . were often different from what was ordered" and thus not merchantable).

103. U.C.C. § 2-315.

104. *Id.* § 2-315 cmt. 1 ("Under this [S]ection the 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 or that the reliance exists.").

105. A recent class action decision by the United States District Court for the Northern District of Illinois, quoting a comment to § 2-315, stated:

> The buyer need not directly communicate the particular purpose to [the seller] 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."

In re Rust-Oleum Restore Mktg., 155 F. Supp. 3d 772, 802–03 (N.D. Ill. 2016) (quoting U.C.C. § 2-315 cmt. 1); *see* Olympic Arms, Inc. v. Green, 176 S.W.3d 567, 582–83 (Tex. App. 2004) (noting a catalog explaining custom barrels with additional specifications serves as some evidence to raise an issue of fact to determine whether there was a breach of implied warranty).

106. *Cf.* Yossi v. Shapiro, No. CV095031240S, 2010 Conn. Super. LEXIS 1678, at *1–3, *19 (Conn. Super. Ct. July 1, 2010) (upholding claims for misrepresentation where an online buyer subject to online auction terms contacted the auction enterprise prior to 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 the defendant's advertisement "on E-Bay [contained] a telephone number, which [the plaintiff] testified calling . . . .").

C. Buyer's Remedies

A buyer's remedies for breach of a seller's contract come in two basic varieties: remedies for non-performance of the contract (as in the case of a failure to deliver the goods or in a proper case of rejection or revocation of the goods) and remedies for failure of the product to perform as advertised (such as breach of warranty remedies).[107] For non-performance, the U.C.C. affords buyers two options for recovery.[108] The buyer can either choose to "cover"—that is, buy a reasonable substitute and sue for the difference in price[109]—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."[110] Once the buyer accepts the goods, the remedies available are governed by Section 2-714 of the U.C.C., which provides: "The 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."[111]

Importantly, under all of the remedies discussed above, the buyer is entitled to incidental and consequential damages under Section 2-715.[112] Incidental damages include "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

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Although in neither case did the plaintiff prevail on a U.C.C. § 2-315 claim specifically, the possibility clearly exists.

107. *See* John A. Sebert, Jr., *Remedies Under Article Two of the Uniform Commercial Code: An Agenda for Review*, 130 U. PA. L. REV. 360, 364–65 (1981) (reviewing remedies for buyers and sellers under the U.C.C., including an exposition on arguments for and against market damages).

108. U.C.C. § 2-711 (providing that an aggrieved buyer may seek "cover" damages or recover under § 2-713 ("market" measure)).

109. *Id.* § 2-712.

110. *Id.* § 2-713(1). The comments indicate that if the buyer chooses to cover, the buyer is limited to that remedy and may not seek the "market" measure of damages. *See id.* § 2-713 cmt. 5 ("The present [S]ection provides a remedy which is completely alternative to cover under the preceding [S]ection and applies only when and to the extent that the buyer has not covered."); *see also* 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 offering two assumptions underlying full compensation rhetoric); Sebert, *supra* note 107, 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.").

111. U.C.C. § 2-714(2). This Section is subject to U.C.C. § 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. *Id.* § 2-607(3)(a).

112. *See id.* §§ 2-712–14 (specifying that additional incidental and consequential damages may be available under § 2-715).

effecting cover and any other reasonable expense incident to the delay or other breach."[113] As for consequential damages, the U.C.C. differentiates between injuries to person or property and pure economic harm.[114] For pure economic harm, a buyer must prove that the damages were either generally or specifically foreseeable and also must attempt to mitigate the consequential damages if possible.[115] However, for injuries to person or property, the U.C.C. does away with foreseeability and the mitigation principle, but requires that the injuries be "proximately" caused by the breach of warranty.[116]

D. How to Limit Warranties and Remedies Under the U.C.C.

The implied warranty of merchantability, as suggested by its name, is implicit in every merchant's sale of goods. A breach of this warranty can lead to consequential damages that are disproportionate to the value of the sold good itself. Therefore, it is understandable why many sellers seek to disavow such warranties and liability. The U.C.C. explicitly permits such disclaimers but with some caveats.

The first, more difficult way a seller may disclaim both the implied warranty of merchantability and the warranty of fitness for a particular purpose falls under U.C.C. Section 2-316(2), which 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."[117]

This provision requires that a written disclaimer of merchantability specifically mention merchantability and be conspicuous.[118] Similarly, disclaimers on warranties of fitness that are in writing must also be conspicuous,

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113. *Id.* § 2-715(1).

114. *Id.* § 2-715(2).

115. *Id.* (defining consequential damages as "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"); WHITE & SUMMERS, *supra* note 98, at 528–29, 535.

116. U.C.C. § 2-715(2)(b); WHITE & SUMMERS, *supra* note 98, at 537.

117. U.C.C. § 2-316(2).

118. "Conspicuous" is defined in U.C.C. § 1-201(b) as follows:

> (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:

but the U.C.C. does not specifically require mention of a particular word or phrase, such as "warranty" or "fitness."[119] Nonetheless, it is not unusual for a typical disclaimer to specifically mention both implied warranties by name.[120]

To satisfy the conspicuousness requirement, sellers typically follow the definition provided in the U.C.C., which suggests using all capital letters in the heading and other methods where "attention can reasonably be expected to be called to it."[121] However, some courts held that it is not enough simply to capitalize the heading or to capitalize particular words, such as "merchantability" and "fitness for a particular purpose," as doing so does not draw attention to the fact that the warranties are disclaimed.[122] In response, some sellers find it prudent to print the entire disclaimer in bold-face capital letters.[123]

Though Section 2-316(2) is somewhat demanding in how to properly disclaim implied warranties, subsection (3) provides a number of simpler and effective alternatives. The one most relevant to online sales of goods is subsection (3)(a), which provides: "[A]ll implied warranties are excluded by expressions like 'as is', '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."[124] In essence, this permits sellers to fashion a general disclaimer, but courts do not look kindly on what might otherwise appear to be equivalent language. For example, simply excluding "all warranties express or implied" is ineffective to disclaim the implied warranties.[125] Out of an abundance of caution, many sellers appear to

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(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.

Id. § 1-201(b)(10).

119. *Id.* § 2-316(2). Though the U.C.C. does explicitly approve of the phrase "There are no warranties which extend beyond the description on the face hereof" to exclude warranties of fitness, this would be insufficient to disclaim the warranty of merchantability. *Id.*

120. WHITE & SUMMERS, *supra* note 98, at 577–79.

121. U.C.C. § 1-201 cmt. 10.

122. *See, e.g.*, Int'l Harvester Co. v. Pike, 466 S.W.2d 901, 907 (Ark. 1971); Massey-Ferguson, Inc. v. Utley, 439 S.W.2d 57, 59 (Ky. 1969).

123. Parsley v. Monaco Coach Corp., 327 F. Supp. 2d 797, 800–02 (W.D. Mich. 2004); WHITE & SUMMERS, *supra* note 98, at 581 n.14.

124. U.C.C. § 2-316(3)(a).

125. 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 also* Zicari v. Joseph Harris Co., 33 A.D.2d 17, 19 (N.Y. App. Div. 1969) (rendering ineffective exclusion language stating "[w]e make no other or further warranty, express or implied" as applied to the implied warranty of merchantability).

use both the "as is" language from Section 2-316(3)(a) and specifically disclaim the warranties of merchantability and fitness by name in accord with Section 2-316(2)—both in conspicuous language.[126] Although there is no express requirement that an "as is" type of clause be conspicuous, many courts require such.[127]

In addition to excluding implied warranties, Section 2-719(1) allows sellers to limit a buyer's potential remedies, providing:

> (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.[128]

Because subsection (b) states that the limited remedy is optional, unless it is expressly agreed to be exclusive, some sellers have found themselves liable to buyers when they have used sloppy language that did not make clear that a remedy was "exclusive."[129] Furthermore, many sellers make such ex-

126. *See* Man Engines & Components, Inc. v. Shows, 434 S.W.3d 132, 135 (Tex. 2014) (illustrating a manufacturer sold a yacht with a certificate of acceptance of vessel's letterhead that stated "as is" and "disclaimed any implied warranty at the time of first sale"); LaBella v. Charlie Thomas, Inc., 942 S.W.2d 127 (Tex. App. 1997) (holding Mercedes-Benz's expressly disclaimed warranties were sufficiently conspicuous); Singleton v. LaCoure, 712 S.W.2d 757, 759 (Tex. App. 1986) (holding seller's "as is" disclaimer regarding a purchased trailer on the front of the invoice was conspicuous based on a reasonable person standard).

127. WHITE & SUMMERS, *supra* note 98, at 586; *see also, e.g.*, Dallas Aerospace, Inc. v. CIS Air Corp., No. 00-CV-1657 (BSJ), 2002 WL 31453789, at *2 (S.D.N.Y. Oct. 31, 2002) (confirming validity of "as-is" clause with bold face disclaimer in sale of airplane engine); Woodruff v. Clark Cty. Farm Bureau Coop. Ass'n, 286 N.E.2d 188. 197 (Ind. Ct. App. 1972) (requiring "as-is" disclaimer conspicuity in sale of chickens).

128. U.C.C. § 2-719(1).

129. *See, e.g.*, 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); 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).

clusions conspicuous as some courts hold that remedy limitations, like warranty exclusions, must be conspicuous, though no such requirement is found in the text.[130]

Subsection (1) permits limitation of remedies, subject to two statutory limitations: (1) the exclusive or limited remedy cannot "fail of its essential purpose"[131] and (2) restrictions on consequential damages that are unconscionable "may be limited or excluded."[132] As to the first limitation, Comment 1 notes that "it is of the very essence of a sales contract that at least minimum adequate remedies be available" and that where other 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]."[133] Under this subsection, a remedy limitation would fail if, for instance, the seller fails to effectively repair or replace a defective good within a reasonable time period[134] or if the buyer is unable to tender the goods for repair due to their complete destruction.[135]

Subsection (3) provides that restrictions on consequential damages that are unconscionable "may be limited or excluded."[136] This subsection goes further than Section 2-302, which generally governs unconscionability,[137] in that it contains a special provision for limitations on personal injury consequential damages. Section 2-719(3) states that "for injury to the person in the case of consumer goods" such limitations are "prima facie unconscionable."[138] Thus, subsection (3) explicitly authorizes contractual exclusions on

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130. *See, e.g.*, Avenell v. Westinghouse Elec. Corp., 324 N.E.2d 583, 587 (Ohio Ct. App. 1974) (construing U.C.C. § 2-719 to include a requirement that exclusive remedy clauses be made conspicuous); *see also* Magnuson-Moss Warranty Act of 1975, 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, Inc., 722 N.E.2d 227, 235 (Ill. App. Ct. 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 (N.D. Iowa 1974) (applying unconscionability standard rather than conspicuous standard to limitations of remedies clauses).

131. U.C.C. § 2-719(2).

132. *Id.* § 2-719(3).

133. *Id.* at cmt. 1.

134. *See* 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); Beal v. Gen. Motors Corp., 354 F. Supp. 423, 426 (D. Del. 1973) (stripping a remedy exclusion of its effect based on the warrantor's failure to timely correct the defect); Mercedes-Benz of N. Am. v. Dickenson, 720 S.W.2d 844, 854 (Tex. App. 1986) (noting the warranty failed for essential purpose when the seller was unable to repair the good in a reasonable time).

135. *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.").

136. U.C.C. § 2-719(3).

137. *Id.* § 2-302.

138. *Id.* § 2-719(3).

consequential damages, subject to the usual burden of the plaintiff to show that such clause is unconscionable, but shifts the burden to the seller in a narrow class of cases that involve consumer goods and a limitation on injuries to person.[139]

E. Are Such Clauses Effective?

As noted above, clauses limiting warranties and remedies can be effective if drafted properly.[140] However, not all online terms and conditions are drafted in such a way as to be effective. A small percentage of retailers have warranty disclaimers that do not meet the definition of "conspicuous" under the U.C.C.[141] Other retailers use ambiguous language as to whether their warranty and damage limitations are only with regard to the use of their website, as opposed to the goods that are sold.[142] However, assuming that such retailers would quickly alter their language the first time a dispute raised the issue, the next question becomes whether such clauses, even well-worded ones, are enforceable against an aggrieved buyer. With regard to warranty and remedy limitations, the answer depends largely on the type of injury involved.

Consider two scenarios. In the first, a defective product causes personal injury, such as by severely burning the buyer/plaintiff. In the second scenario, the buyer/plaintiff is not personally injured, but the defective product damages itself and causes pure economic injuries to the plaintiff, including foreseeable consequential damages. The warranty and remedy limitation clauses will be treated differently in each of these scenarios and, therefore, each must be explored separately.

1. Injuries to Person or Property

If a plaintiff suffers injury to person or property due to a faulty product, such a plaintiff may pursue damages in strict product liability despite the presence of a clause claiming to limit warranties and damages. Section 1 of the Restatement (Third) of Torts: Products Liability states, "One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."[143] Restatement Section 18 goes on to address the effect warranty disclaimers and damage limitation clauses should have on such

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139. *See* WHITE & SUMMERS, *supra* note 98, at 609–16 (explaining the two elements in detail).

140. *See supra* Section III.D.

141. *See* Marks, *supra* note 2, at 38 n.246 (noting that, of the 113 retailers studied, 6 used language that would fail to qualify as conspicuous under the U.C.C.).

142. *Id.* at 31–36 (discussing the ambiguity of words such as "materials" and "contents" in the context of disclaimers).

143. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (AM. LAW INST. 1998); *see also* RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965) (stating that "[o]ne who

claims, stating: "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."[144]

Thus, in the above hypothetical, where a product, such as a laptop, burns a consumer due to a faulty battery, the consumer can sue both the retailer who sold the laptop and the manufacturer in tort for strict products liability. This is true even in the presence of a contractually agreed upon waiver or limitation, 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."[145] Despite the Restatement's view that liability should attach to both the retailer and the manufacturer, a number of states have passed legislation barring a strict liability action against non-manufacturer sellers, such as retailers, though many caveat that the exemption is premised upon there being jurisdiction over the manufacturer.[146]

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sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold").

144. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 18 (AM. LAW INST. 1998); *see also* RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (AM. LAW INST. 1965) (providing that § 402A "is not governed by the provisions of the . . . Uniform Commercial Code, as to warranties; and it is not affected by limitations on the scope and content of warranties," and that "[t]he consumer's cause of action . . . is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands").

145. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 18 cmt. a (AM. LAW INST. 1998). Comment d to that same Section makes an exception for informed consumers represented by powerful bargaining allies. *Id.* at cmt. d.

146. *See* DEL. CODE ANN. tit. 18, § 7001 (West, Westlaw through 82 Laws 2019, ch. 4) (providing various defenses for a seller to assert in response to actions for defective design or manufacturing, including a seller's lack of knowledge of the defect, opportunity to discover the defect, and control of the defective product); IDAHO CODE ANN. § 6-1407 (West, Westlaw through 2018 2d Reg. Sess. 64th Leg.) (protecting nonmanufacturer product sellers from liability if they lack knowledge of the product's defect and did not have reasonable opportunity to assess the product in a manner that would or should uncover the product's defect); IOWA CODE ANN. § 613.18 (West, Westlaw through 2018 Reg. Sess.) (substantially limiting the products liability of nonmanufacturers in strict liability suits based on breach of implied warranty of merchantability or tort); KAN. STAT. ANN. § 60-3306 (West, Westlaw through 2018 Reg. Sess.) (barring product liability claims against product sellers and those who are retail sellers of used products, provided certain factors are established); KY. REV. STAT. ANN. § 411.340 (West, Westlaw through 2018 Reg. Sess.) (conditioning a seller's protection from liability in a product liability action on the manufacturer being "identified and subject to the jurisdiction of the court"); MD. CODE ANN., CTS. & JUD. PROC. § 5-405 (West, Westlaw through 2018 Reg. Sess. Gen. Assemb.) (articulating various defenses available for sellers in a products liability action unless, among other exceptions, the "manufacturer is not subject to service of process" under Maryland law); MINN. STAT. ANN. § 544.41 (West, Westlaw through 2018 Reg. Sess.) (limiting the product liability of nonmanufacturers unless they "exercised some significant control over the design or manufacture of the product," "had actual knowledge of the

Even without tort liability as an option, a buyer/plaintiff that suffers injury to their person may still be able to avoid the implications of "as is" warranty waivers and limitations on liabilities, though the basis for such avoidance seems to stand on somewhat shaky statutory ground. The invalidation of some warranty disclaimers appears to be based on an unintended reading of U.C.C. Sections 2-302, 2-316, and 2-719(3). If a retailer complies with Section 2-316 in disclaiming warranties, an argument can be made that Section 2-302, dealing with unconscionability, need not be implicated.[147] Section 2-316 lays out how to draft an enforceable disclaimer and makes no mention, in either the text or the comments, of unconscionability;[148] however, courts have been willing to nonetheless apply Section 2-302, particularly in the consumer context.[149]

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defect in the product," or "created the defect in the product"); MO. REV. STAT. § 537.762 (Westlaw through 2018 2d Reg. Sess. & 1st Extraordinary Sess. 99th Gen. Assemb.) (allowing for the dismissal from a products liability claim of "[a] defendant whose liability is based solely on his status as a seller in the stream of commerce"); NEB. REV. STAT. ANN. § 25-21,181 (West, Westlaw through 2d Reg. Sess. 105th Leg. (2018)) (prohibiting strict liability actions for product defect to be "commenced or maintained against any seller or lessor of a product" that did not also manufacture the product or the allegedly defective part); N.C. GEN. STAT. ANN. § 99B-2 (West, Westlaw through S.L. 2018-145 2018 Reg. Sess. & Extra Sess. Gen. Assemb.) (shielding sellers from product liability if they lacked an opportunity to inspect, unless "the manufacturer of the product is not subject to the jurisdiction of the courts of [North Carolina] or if such manufacturer has been judicially declared insolvent"); OHIO REV. CODE ANN. § 2307.78 (West, Westlaw through Files 115–67, 169, 170, 172 132d Gen. Assemb. (2017–2018), 2017 State Issue 1, & 2018 State Issue 1) (limiting a supplier's products liability to instances when the supplier's negligence caused the complainant's harm, the product failed to conform to the supplier's representation, or the complainant cannot successfully bring an action against the manufacturer); S.D. CODIFIED LAWS § 20-9-9 (Westlaw through 2018 Reg. & Spec. Sess., Sup. Ct. Rule 18-15 & Nov. 2018 election) (immunizing nonmanufacturer dealers and sellers of a defective product from strict liability unless they knew, or should have known, of the product's defect); TENN. CODE ANN. § 29-28-106 (West, Westlaw through 2018 2d Reg. Sess. 110th Gen. Assemb.) (excepting sellers from products liability unless the seller played a role in causing the defect or provided an express warranty, or the product's manufacturer is not subject to Tennessee jurisdiction); WASH. REV. CODE ANN. § 7.72.040 (West, Westlaw through 2018 Reg. Sess.) (requiring a product seller to assume the manufacturer's liability to a claimant if the manufacturer is not subject to Washington jurisdiction).

147. WHITE & SUMMERS, *supra* note 98, at 231.

148. U.C.C. § 2-316 (AM. LAW INST. & UNIF. LAW COMM'N 2017–2018); *see* WHITE & SUMMERS, *supra* note 98, at 231-32 (questioning the use of § 2-302 as applied to disclaimers compliant with § 2-316).

149. *See* A & M Produce Co. v. FMC Corp., 186 Cal. Rptr. 124 (Cal. Ct. App. 1982) ("Generally,' . . . courts have not been solicitous of businessmen in the name of unconscionability.' This is probably because courts view businessmen as possessed of a greater degree of commercial understanding and substantially more economic muscle than the ordinary consumer. Hence, a businessman usually has a more difficult time establishing procedural unconscionability in the sense of either 'unfair surprise' or 'unequal bargaining power.'" (quoting WHITE & SUMMERS, *supra* note 98, at 170)); Kugler v. Romain, 279 A.2d 640, 651–52 (N.J. 1971) (attempting to clarify the concept of unconscionability in the consumer context by calling it "an amorphous concept" and intended to "effectuate the public purpose" by ensuring that "marketers of consumer goods are brought to an awareness that the restraint of unconscionability is always hovering over their operations"); Fischer v. General Elec. Hotpoint, 438 N.Y.S.2d 690, 691 (N.Y. Dist. 1981) (declaring unconscionable a

This unintended reading opens the door to the following argument: If a warranty disclaimer prevents a consumer from bringing suit for a personal injury, the clause is prima facie unconscionable under Section 2-719(3), as it would also prevent the consumer from recovering consequential damages.[150] The problem with this line of reasoning is that it conflates liability with the damage limitation.[151] Indeed, the comments to Section 2-316 lay this out, specifically stating:

> This Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty. Under subsection (4) the question of limitation of remedy is governed by the sections referred to rather than by this section.[152]

Despite this explicit statement, in the context of personal injuries to consumers, courts seem more willing to engage in a deeper scrutiny of such clauses. Or as Professors White and Summers concluded, "In light of the cases decided thus far, we suspect that whenever a consumer's blood is spilled, even wild horses could not stop a sympathetic court from plowing through the most artfully drafted and conspicuously printed disclaimer clause in order to grant relief."[153]

2. *Pure Economic Losses*

A consumer who suffers pure economic injury is much less likely to be able to avoid the effect of these clauses. Without a harm to person or property, the injured consumer will be relegated to contract to seek redress under the economic loss rule. Professor Vincent Johnson offered the following illustration:

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clause in a contract between a consumer and a corporate defendant); *see also* Edith Resnick Warkentine, *Article 2 Revisions: An Opportunity to Protect Consumers and "Merchant/Consumers" Through Default Provisions*, 30 J. MARSHALL L. REV. 39, 50–53 (1996) (discussing different approaches courts take when reviewing contracts between merchants and consumers, merchants and merchants, and merchants and hybrid merchant/consumers).

150. WHITE & SUMMERS, *supra* note 98, at 609–16; *see also* William L. Stallworth, *An Analysis of Warranty Claims Instituted by Non-Privity Plaintiffs in Jurisdictions That Have Adopted Uniform Commercial Code Section 2-318 (Alternative A)*, 20 PEPP. L. REV. 1215, 1237 (1993) ("Section 2-719(3) provides that the exclusion or limitation of consequential damages for personal injury is prima facie unconscionable in the case of consumer goods.").

151. *See* U.C.C. § 2-316(4) (stating that "[r]emedies for breach of warranty can be limited in accordance with the provisions of this Article on . . . contractual modification of remedy," indicating that once there is a breach, a contractual limitation would apply); *see also* WHITE & SUMMERS, *supra* note 98, at 598–99 (discussing the interplay between U.C.C. §§ 2-316 and 2-719).

152. U.C.C. § 2-316 cmt. 2.

153. WHITE & SUMMERS, *supra* note 98, at 620.

> [I]f a person buys a can of paint and applies the paint to a door, the person has a potential tort claim (and perhaps a contract claim as well based on breach of warranty) if toxic odors from the paint make the plaintiff sick or if the paint eats away at the door and damages that "other" property. However, if the paint simply fails to adhere to the door effectively and flakes off, or quickly discolors, causing no other damage but making the paint's purchase a waste of money, the buyer's sole avenue for recovery is rooted in contract principles.[154]

Thus, a consumer would be limited to a claim in contract and normal contract principles of enforceability would apply. This limits the consumer's ability to avoid the waivers of warranties, limitations on damages, and enforcement of arbitration provisions.

As noted above, a consumer who suffers a personal injury gets the advantage of a presumption that the limitation on consequential damages (and sometimes warranty waivers) are prima facie unconscionable.[155] If the harm is purely economic, however, the burden shifts back to the consumer to show that the clauses are unconscionable.[156] This is no small task. First, there is some question as to whether a properly drafted waiver of implied warranties is even subject to an unconscionability defense.[157] Assuming it is, attacking any clause as unconscionable would require a showing that the term is unconscionable under the classic two-part analysis of procedural and substantive unconscionability. Section 2-302(1) of the U.C.C. provides:

> 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.[158]

Though the U.C.C. does not define the term "unconscionable," the oft-cited *Williams v. Walker-Thomas Furniture, Co.*[159] court famously described it as follows: "Unconscionability has generally been recognized to include an

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154. Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 550–51 (2009).

155. U.C.C. § 2-719(3); *see also* Richard C. Ausness, *Replacing Strict Liability with a Contract-Based Liability Regime*, 71 TEMP. L. REV. 171, 213 (1998) (reiterating the burden-switching element of § 2-719(3) related to the unconscionability of exclusions on consequential damages in cases of personal injury).

156. WHITE & SUMMERS, *supra* note 98, at 610–12.

157. *See supra* notes 150–153 and accompanying text. It should be noted that if such a clause failed to meet § 2-316, such as by failing to be conspicuous, it should not be given effect and unconscionability would never come into play. *Id.*

158. U.C.C. § 2-302(1).

159. 350 F.2d 445 (D.C. Cir. 1965).

absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[160] Most courts follow renowned contracts scholar Professor Arthur Leff's two-part analysis of examining the contract or clause for both procedural and substantive unconscionability.[161] Procedural unconscionability looks to the contract formation, while substantive unconscionability looks to whether the terms themselves are overly harsh.[162] Plaintiffs have successfully voided warranty disclaimers,[163] liability limitations,[164] and arbitration clauses[165] all on this basis. However, the argument that online terms and conditions are unconscionable faces some obstacles.

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160. *Id.* at 449.

161. WHITE & SUMMERS, *supra* note 98, at 220-30; Hillman, *supra* note 70, at 93; Arthur Allen Leff, *Unconscionability and The Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967); *see also* Thomas J. Stipanowich, *The Third Arbitration Trilogy:* Stolt-Nelson, Rent-A-Center, Concepcion *and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 351 (2011) ("Proving unconscionability normally requires a showing of circumstances indicating an 'adhesive' bargain (so-called 'procedural unconscionability') as well as unfair contract terms ('substantive unconscionability').").

162. WHITE & SUMMERS, *supra* note 98, at 220–24 (discussing procedural unconscionability); *Id.* at 225 (describing how the cases disclose that clauses found substantively unconscionable fall within one of two headings, including excessive price cases); *id.* at 225–30 (analyzing cases which held that excessive price rendered a contract unconscionable); *see also* Elvy, *supra* note 57, at 888–96 (reviewing the two distinct pieces of unconscionability).

163. Carlson v. General Motors Corp., 883 F.2d 287, 292 n.5 (4th Cir. 1989) (explaining the favorable and unfavorable position on whether unconscionability claims are applicable to warranty—AP disclaimers and stating, "Most courts have impliedly adopted the . . . view . . . that warranty disclaimers are subject to the § 2-302 unconscionability rules"); FMC Fin. Corp. v. Murphree, 632 F.2d 413, 420 (5th Cir. 1980) ("[T]hough the disclaimer may be conspicuous so that the buyer is aware of it, unconscionability may still exist if the disclaimer is oppressive.").

164. Jasphy v. Osinsky, 834 A.2d 426, 432 (N.J. Super. Ct. App. Div. 2003) (permitting application of an unconscionability claim to contractual liability limitations despite the allowance of such limitations in the U.C.C.); Glassford v. BrickKicker, 35 A.3d 1044, 1054 (Vt. 2011) ("For the reasons outlined above, we conclude that the contract's limited liability and binding arbitration provisions are unconscionable and thus unenforceable."). *But see* Canal Electric Co. v. Westinghouse Electric Co., 973 F.2d 988, 997 (1st Cir. 1992) (refusing to apply unconscionability to a liability limitation clause but narrowing the decision to consequential damages and notating the plaintiff had not requested non-consequential damages).

165. Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1170, 1180 (9th Cir. 2003) ("Thus, a contract to arbitrate is unenforceable under the doctrine of unconscionability when there is 'both a procedural and substantive element of unconscionability.' . . . While it is within this court's discretion to sever unconscionable provisions, because an 'insidious pattern' exists in Circuit City's arbitration agreement[,] . . . we conclude that the agreement is wholly unenforceable." (first quoting Ferguson v. Countrywide Credit Indus., Inc., 298 F.3d 778, 783 (9th Cir. 2002); then citing Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 895 (9th Cir. 2002))); Domingo v. Ameriquest Mortg. Co., 70 F. App'x 919, 920 (9th Cir. 2003) (applying the defense of unconscionability to an arbitration clause). As noted above, increasingly, in light of the Supreme Court's aggressive application of the FAA, unconscionability arguments are harder to successfully make. *See supra* notes 76–88 and accompanying text; *see also* Ramona L. Lampley, *"Underdog" Arbitration: A Plan for Transparency*, 90 WASH. L. REV. 1727, 1741 (2015) ("While *Concepcion* could not have wholly removed unconscionability as a general contract defense to a truly one-sided arbitral agreement, it did significantly limit the contours under which that defense could be asserted. No longer is the argument that arbitration agreements are unfair because they remove the class device valid. This is true even

Procedurally, buyers who seek to avoid clauses found only online might be able to argue that, as these terms are not found when shopping in-store at a brick-and-mortar branch, it would constitute unfair surprise to impose them only on online transactions. But, cutting against this argument is that when there is no rush to purchase, buyers have the luxury of browsing the terms and conditions at their leisure, and they do so in the comfort of their own home before making a purchasing decision. Of course, behavioral law and economics has taught us that few buyers will ever read these terms,[166] but that does not necessarily lead to the conclusion that the terms and conditions are unconscionable, and the case law decided thus far seems to lean against procedural unconscionability.[167]

As for substantive unconscionability, buyers could claim that the effect of these clauses is to deny them any realistic chance at recovery for a faulty good that causes economic harm. Even in states that do not require privity with the manufacturer, many buyers may find that their lack of bargaining power makes negotiating an informal settlement of their claim (such as by repair or replace) less effective than if the retailer had just returned the product. And in states that do require privity of contract, buyers whose retailers disclaimed all warranties may find that they have no suit. However, at least two counter-arguments levy against such claims. First, the very fact that the U.C.C. recognizes the ability to add such clauses, explicitly in the case of

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for traditionally 'underdog' claims."); Stipanowich, *supra* note 161, at 428–29 (detailing the evolution of arbitration clause enforcement, recognizing the contemporaneous negative judicial stance on using unconscionability to attack arbitration clauses, and suggesting editing the FAA to include "a set of standards operating as a floor for protection of consumers and employees").

166. Robert A. Hillman & Ibrahim Barakat, *Warranties and Disclaimers in the Electronic Age*, 11 YALE J.L. & TECH. 1, 3 (2008) ("[E]vidence mounts that people do not and will not carefully read their e-standard forms . . . ."); Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 167, 173 (2017) (positing that "consumers are unlikely to evaluate terms before assent" and noting that the Restatement approach to assent encourages companies to flag terms, "even though it will not change anything about consumer choice *ex ante*").

167. Preston, *supra* note 1, at 546 ("In short, current standards for denying claims of procedural unconscionability are sufficiently low that they would rout unconscionability challenges for almost all wrap contracts."); *see, e.g.*, Plazza v. Airbnb, Inc., 289 F. Supp. 3d 537, 557 (S.D.N.Y. 2018) (rebuffing the plaintiff's claim that Airbnb's arbitration provision was hidden and, therefore, procedurally unconscionable because the plaintiff could have accessed and read the provision when he initially created an Airbnb user account but admittedly did not do so); Zepher v. Kaiser Found. Hosp., 687 Fed. App'x 636, 639 (9th Cir. 2017) (declining to declare as procedurally unconscionable a general release agreement signed by a former employee because she "admittedly did not read the General Release and there [was] no objective evidence . . . to support [her] belief that she had no power to negotiate the terms of her retirement package"); Dan Ryan Builders, Inc. v. Nelson, No. 3:10-CV-76, 2014 WL 496775, at *12 (N.D.W. Va. Feb. 6, 2014) (rejecting the possibility that the plaintiff was an unsophisticated consumer held to procedurally unconscionable terms in part because the plaintiff "failed to identify any conduct on the part of [the defendant] that prevented him from reading and reviewing the contract" and "did not allege that he was illiterate or unable to read the contract"); Schultz v. Dan Ryan Builders, Inc., No. 3:12-CV-15, 2013 WL 3365244, at *11 (N.D.W. Va. July 3, 2013) (rejecting the plaintiffs' procedural unconscionability claim in part because they "were educated consumers, and they had ample time to read the contract—whether or not they chose to do so").

warranty and liability limitations, lends credibility to the presence of such terms. Second, almost all retailers, except in the food service and grocer industries, provide for returns.[168] Though these return policies may be shorter than the statute of limitations, the presence of a return period offers the buyer a set period within which to return the product for a full refund or exchange, ameliorating the ill effects of the other clauses.

3. Compliance with the Magnuson-Moss Warranty Act

In addition to the above limitations, clauses that limit implied warranties, damages, and, in some jurisdictions, even clauses that provide for arbitration may be affected by the Magnuson-Moss Warranty Act ("MMWA" or "the Act").[169] This federal act applies to the sale of consumer products, defined as "any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes."[170] If the Act applies to a transaction, it sets minimum standards for express warranties that are made,[171] provides for a limitation on the ability to disclaim implied warranties, and makes remedies for breach of such warranties easier to access.[172] The Act permits consumers to bring suit in state or federal court[173] and provides that a prevailing plaintiff can recover attorneys' fees.[174]

The MMWA applies to any consumer product warrantors.[175] Thus, the Act loosens vertical privity requirements that might normally be an obstacle for downstream purchasers of goods by extending liability to suppliers. Furthermore, though there exists some authority for the proposition that the Act only applies to those making express written warranties,[176] the weight of authority seems to favor application of the Act even where no express warranties have been made and a suit is brought for a breach of an implied warranty,

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168. *See* Marks, *supra* note 2, at 47 tbl.5.2 (analyzing the terms and conditions of 113 of the largest U.S. retailers and determining that retailers of the food service and grocer industries were least likely to include return policy provisions).

169. 15 U.S.C. §§ 2301–2312 (2012).

170. *Id.* § 2301(1).

171. *Id.* § 2304(a), (e).

172. Jonathon A. Eddy, *Effects of the Magnuson-Moss Act Upon Consumer Product Warranties*, 55 N.C. L. REV. 835, 851–52, 862, 869–72 (1977).

173. 15 U.S.C § 2310(d)(1). For federal jurisdiction there are threshold requirements, such as the amount in controversy must be at least $50,000. *See id.* § 2310(d)(3)(B).

174. *Id.* § 2310(d)(2).

175. Section 2310(d) of the MMWA provides that "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief." *Id.* § 2310(d)(1).

176. *See* Anderson v. Newmar Corp., 319 F. Supp. 2d 943, 948 (D. Minn. 2004); Gross v. Shep Brown's Boat Basin, No. Civ. 99-140-B, 2000 WL 1480373, at *2 (D.N.H. Feb. 28, 2000); McNamara v. Nomeco Bldg. Specialties, Inc., 26 F. Supp. 2d 1168, 1175 (D. Minn. 1998); Skelton v. Gen. Motors Corp., 500 F. Supp. 1181, 1190 (N.D. Ill. 1980), *rev'd on other grounds*, 660 F.2d 311 (7th Cir. 1981).

such as merchantability.[177] This could arise in a case where a seller makes no written warranties but fails to disclaim implied warranties, such as the warranty of merchantability, which, under state law, accompany all sales by merchants unless properly disclaimed.[178]

While the scope of liability as to who can be sued is enlarged by Section 2310(d) of the MMWA, retailers are not liable for simply selling consumer goods that come with a manufacturer's warranty, unless the retailer itself also warrants the goods.[179] The Code of Federal Regulations makes this clear, stating:

> Section [2310(f)] of the Act . . . provides that only the supplier "actually making" a written warranty is liable for purposes of FTC and private enforcement of the Act. A supplier who does no more than distribute or sell a consumer product covered by a written warranty

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177. *See* McCurdy v. Texar, Inc., 575 So. 2d 299, 300 (Fla. Dist. Ct. App. 1991); *see also* Milicevic v. Fletcher Jones Imps., Ltd., 402 F.3d 912, 918 (9th Cir. 2005) ("The Act's consumer-suit provision . . . supplies a federal remedy for breach of written and implied warranties . . . ." (quoting Richardson v. Palm Harbor Homes, Inc., 254 F.3d 1321, 1325 (11th Cir. 2001))); Rentas v. DaimlerChrysler Corp., 936 So. 2d 747, 750 (Fla. Dist. Ct. App. 2006) (MMWA "provide[s] an independent federal cause of action for breach of warranty"); Hyler v. Garner, 548 N.W.2d 864, 874 (Iowa 1996) ("The Magnuson-Moss Act created a federal remedy for breach of written and implied warranties falling within the statute"); CAROLYN L. CARTER ET AL., NAT'L CONSUMER LAW CTR., CONSUMER WARRANTY LAW: LEMON LAW, MAGNUSON-MOSS, UCC, MANUFACTURED HOME, AND OTHER WARRANTY STATUTES § 2.3.1.3 (5th ed. 2015); Christopher Smith, *Private Rights of Action Under the Magnuson-Moss Warranty Act*, *in* PRACTICING LAW INST., COMMERCIAL LAW AND PRACTICE COURSE HANDBOOK SERIES 223, 225 (1985) (stating the MMWA allows consumers to bring a federal action for breach of an implied warranty of merchantability or fitness even if a written warranty has not been given); Annotation, *Consumer Product Warranty Suits in Federal Court Under Magnuson-Moss Warranty Federal—Trade Commission Improvement Act (15 U.S.C.A. § 2301 et seq.)*, 59 A.L.R. Fed. 461, 470 n.10 (1982) ("This provision has not only provided a means of enforcing the substantive requirements of the Act, but also has established a federal cause of action for breach of an implied warranty which has arisen under state law even if no written warranty was involved.").

Though a claim under the MMWA may be brought for the breach of an implied warranty, some courts do not view the MMWA as extending vertical privity to upstream manufacturers. *See* Walsh v. Ford Motor Co., 588 F. Supp. 1513, 1525 (D.D.C. 1984), *rev'd on other grounds*, 807 F.2d 1000 (D.C. Cir. 1986) ("If, in this action, there are to be any implied warranty claims at all under Magnuson-Moss, they must 'originate' from or 'come into being' from state law. Therefore, if a State does not provide for a cause of action for breach of implied warranty where vertical privity is lacking, there cannot be a Federal cause of action for such a breach." (citation omitted)); Mendelson v. Gen. Motors Corp., 432 N.Y.S.2d 132, 136 (N.Y. Sup. Ct. 1980), *aff'd*, 441 N.Y.S.2d 410 (N.Y. App. Div. 1981) ("[T]he term 'implied warranty' is defined as an 'implied warranty arising under State law.' Thus, State vertical privity rules control and the applicable measure of damages is that provided by State law." (citation omitted)); Nat'l Consumer Law Ctr., *12 Reasons to Love the Magnuson-Moss Warranty Act*, 11 J. CONSUMER & COM. L. 127, 128 (2008).

178. *See* U.C.C. §§ 2-314, 2-316 (AM. LAW INST. & UNIF. LAW COMM'N 2017–2018).

179. 15 U.S.C. § 2310(f) ("Warrantors subject to enforcement of remedies. For purposes of this [S]ection, only the warrantor actually making a written affirmation of fact, promise, or undertaking shall be deemed to have created a written warranty, and any rights arising thereunder may be enforced under this [S]ection only against such warrantor and no other person.").

> offered by another person or business and which identifies that person or business as the warrantor is not liable for failure of the written warranty to comply with the Act or rules thereunder.[180]

Notably the retailer should identify the manufacturer as the warrantor, and though the retailer may not be liable under the Act for an express warranty, unless it properly disclaims the implied warranties, other provisions of the Act might still apply.[181]

If the Act applies, and a written warranty was made, then a warrantor must conspicuously designate the warranty as either a "full warranty" or a "limited warranty."[182] A "full warranty" comes with a number of conditions that impact the enforceability of implied warranty disclaimers and damage limitations clauses. Section 2304 of the Act lists a number of mandates, including that warrantors must remedy breaches of express warranties "within a reasonable time and without charge" and further prohibits limiting the duration of implied warranties, permits exclusions or limitations on consequential damages for breach of any warranties that conspicuously appear on the face of the warranty, and requires the warrantor to refund or replace, without charge, the product if the warrantor is unable to remedy any alleged defect after a reasonable number of attempts.[183] Importantly for consumers, the Act

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180. 16 C.F.R. § 700.4 (2018).

181. *See, e.g.*,Voelker v. Porsche Cars N. Am., Inc., 353 F.3d 516, 526 (7th Cir. 2003) (finding a lessor's written, conspicuous disclaimer specifically mentioning merchantability sufficient to safeguard against a lessee's MMWA claim for breach of implied warranty and improperly pled breach of express warranty claim); Hemmings v. Camping Time RV Ctrs., LLC, No. 1:17-CV-1331-TWT, 2017 WL 4552896, at *5–6 (N.D. Ga. Oct. 11, 2017) (dismissing a consumer's claims under MMWA § 2310 against a seller after the consumer's breach of express and implied warranties claims failed because the seller had not "adopted the manufacturer's warranty or assumed the performance of [that] warranty" and had conspicuously disclaimed all warranties in its sales agreement); Semitekol v. Monaco Coach Corp., 582 F. Supp. 2d 1009, 1027–30 (N.D. Ill. 2008) (upholding a motorhome dealer's disclaimer of implied warranties, which "specifically state[d] 'dealer' in the [S]ection identifying who was disclaiming the warranty," after concluding that two purported promises by the dealer were not written warranties for MMWA § 2308 purposes and thus could not bar the dealer from disclaiming implied warranties); Rokicsak v. Colony Marine Sales & Serv., 219 F. Supp. 2d 810, 815 (E.D. Mich. 2002) (protecting a retailer from liability for an alleged breach of the implied warranty of merchantability where the applicable purchase agreement "disclaimed all warranties using clear and conspicuous language" that "ma[de] plain there were no warranties except 'THOSE WRITTEN WARRANTIES PROVIDED BY THE MANUFACTURER'" that "specifically incorporat[ed] the term 'merchantability' into the waiver language and expressly disclaim[ed] any implied warranty of fitness").

182. 15 U.S.C. § 2303. The Act defines a "written warranty" as:

> [A]ny undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

Id. § 2301(6)(B).

183. *Id.* § 2304.

also prohibits a warrantor that makes an express written warranty from excluding implied warranties.[184] But even if a warrantor opts to go with a "limited warranty," the Act prohibits the complete disclaimer of implied warranties, allowing a warrantor only to limit their duration to the extent of the express warranties made.[185]

Application of the MMWA may also affect the enforceability of arbitration clauses. The Federal Trade Commission ("FTC") has promulgated regulations that prohibit warrantors from compelling consumers to adhere to binding arbitration for disputes involving the breach of a warranty under the Act.[186] This regulation sits on shaky ground, however, as it may be in conflict with the FAA. Although some courts have upheld the FTC's position that the MMWA prohibits warrantors from compelling consumers to adhere to binding arbitration,[187] two federal circuits and numerous state courts take the position that the FTC regulation does not prohibit binding arbitration because the FAA preempts the FTC's regulation.[188] Furthermore, recent opinions

184. *Id.* § 2308(a).

185. *Id.* § 2303.

186. 16 C.F.R. § 703.5(j) ("Decisions of the Mechanism shall not be legally binding on any person."). The CFR defines "mechanism" as "an informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of Title I of the Act applies, as provided in [S]ection 110 of the Act, 15 U.S.C. 2310." *Id.* § 703.1(e).

187. *See* Higgs v. Warranty Grp., 2007 WL 2034376, at *3 (S.D. Ohio July 11, 2007) ("The arbitration provision is inapplicable . . . because the parties never manifested an understanding that such claims would be arbitrated."); Rickard v. Teynor's Homes, Inc., 279 F. Supp. 2d 910, 921 (N.D. Ohio 2003) ("Thus, the MMWA precludes enforcement of binding arbitration agreements for claims under a written warranty."); Browne v. Kline Tysons Imps., Inc. 190 F. Supp. 2d 827, 831 (E.D. Va. 2002) ("A clear reading of the statute evinces Congress' intent to encourage informal dispute settlement mechanisms, yet not deprive any party of their right to have their written warranty dispute adjudicated in a judicial forum."); Koons Ford of Balt., Inc., v. Lobach, 919 A.2d 722, 723–24 (Md. 2007) ("[U]nder the MMWA, claimants may not be forced to resolve their claims through binding arbitration because Congress expressed an intent to preclude binding arbitration when it enacted the MMWA. The FAA does not supersede the MMWA."); Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 673 (S.C. 2007) ("Moreover, the MMWA has been interpreted to supersede the FAA with respect to consumer claims for breach of written warranty." (citing Boyd v. Homes of Legend, Inc., 981 F. Supp. 1423, 1437–38 (M.D. Ala. 1997))).

188. *See* Walton v. Rose Mobile Homes LLC, 298 F.3d 470, 479 (5th Cir. 2002) ("Magnuson–Moss Warranty Act does not preclude binding arbitration of claims pursuant to valid binding arbitration agreement, which courts must enforce pursuant to the FAA."); Richardson v. Palm Harbor Homes, Inc., 254 F.3d 1321, 1325 (11th Cir. 2001) (noting that § 703.5(j) does prohibit binding arbitration; however, the FAA supersedes); *accord* Palm Harbor Homes, Inc. v. Turner, 796 So. 2d 295, 296–97 (Ala. 2001) (holding that the Magnuson-Moss Warranty Act did not preclude enforcement of arbitration agreement in a warranty dispute); S. Energy Homes, Inc. v. Ard, 772 So. 2d 1131, 1135 (Ala. 2000) (Magnuson-Moss Act does not invalidate arbitration provisions in a written warranty.); Results Oriented, Inc. v. Crawford, 538 S.E.2d 73, 81 (Ga. Ct. App. 2000) ("Magnuson-Moss Warranty Act did not preclude manufacturer from arbitrating purchaser's express and implied warranty claims."), *aff'd*, 548 S.E.2d 342, 343 (Ga. 2001) (holding that arbitration clauses are not unconscionable); *In re* Am. Homestar of Lancaster, Inc., 50 S.W.3d 480, 490 (Tex. 2001) ("[N]othing in the Magnuson-Moss Act's text, legislative history, or purposes preclude enforcement of predispute binding arbitration agreements under the FAA . . . .").

from the Supreme Court have signaled an adherence to arbitration.[189] Even in jurisdictions that find arbitration is not prohibited under the MMWA, a warrantor may still be required to place the arbitration provision in the written warranty, thus providing another basis to attack the validity of an arbitration clause.[190]

As previously discussed, the MMWA only applies in two possible situations: (1) if a written warranty is made, or (2) in some jurisdictions, even if no warranty is made, the MMWA will apply if implied warranties are not properly disclaimed. Given these limits and the broad use of warranty disclaimers, application of the MMWA to online transactions may be rare. As noted, eighty-five percent of retailers I studied used some form of implied warranty disclaimer,[191] and the vast majority of the retailers studied were not the manufacturers of the goods sold.[192] Accordingly, it is unlikely that non-manufacturer retailers would be subject to the Act's provisions as no warranties, express or implied, are made in many of these instances. But, there are a number of ways that the online merchants could nonetheless fall within the scope of the Act.

First, some online retailers do make warranties as they are also the manufacturers of the goods.[193] In such cases, the Act would apply, as would the above limitations.[194] Second, online retailers may also be subject to the Act

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189. *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013) ("[The] text [of the FAA] reflects the overarching principle that arbitration is a matter of contract. And consistent with that text, courts must 'rigorously enforce' arbitration agreements according to their terms, including terms that 'specify *with whom* [the parties] choose to arbitrate their disputes,' and 'the rules under which that arbitration will be conducted.'" (first quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1988); then quoting Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp., 559 U.S. 662, 683 (2010))); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011) ("Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." (citing Rent-a-Ctr. W., Inc. v. Jackson, 561 U.S. 63, 67–69 (2010))).

190. *See* Nat'l Consumer Law Ctr., *supra* note 177, at 128 (citing Cunningham v. Fleetwood Homes of Ga., Inc. 253 F.3d 611 (11th Cir. 2001)).

191. Marks, *supra* note 2, at 38.

192. *Id.* at 45 (reporting that 93 of the 113 retailers studied were non-manufacturer retailers).

193. For example, Apple's website has a "Apple One (1) Year Limited Warranty" that provides that Apple:

> [W]arrants the Apple-branded iPhone, iPad, iPod, Apple TV, or HomePod hardware product and the Apple-branded accessories contained in the original packaging ("Apple Product") against defects in materials and workmanship when used normally in accordance with Apple's published guidelines for a period of ONE (1) YEAR from the date of original retail purchase by the end-user purchaser ("Warranty Period"). Apple's published guidelines include but are not limited to information contained in technical specifications, user manuals and service communications.

See Legal, APPLE, http://www.apple.com/legal/warranty/products/ios-warranty-document-us.html (last updated July 13, 2018).

194. Apple seemingly recognizes that its own implied waiver provisions are not enforceable as its website provides:

> IN SO FAR AS SUCH WARRANTIES CANNOT BE DISCLAIMED, APPLE LIMITS THE DURATION AND REMEDIES OF SUCH WARRANTIES TO THE DURATION

if they offer service warranties or extended warranties with their products, as the Act specifically applies to service contracts.[195] For instance, Best Buy offers on its website a "Geek Squad® Protect & Support Plus" service contract that includes "Hardware Protection" ("If something breaks, we'll repair it. It's that simple.") and 24/7 technical support ("If you need help, we're standing by.").[196] If a consumer purchases this additional protection, Best Buy will be subject to the MMWA, and its attempts to disclaim implied warranties on the products sold will be invalidated. Third, and finally, online retailers may be subject to the Act if they do not make clear that the warranties offered on a product come from a manufacturer rather than from them. For instance, while shopping online for home fixtures, you might come across a faucet with a brushed nickel finish that advertises a "limited lifetime finish warranty" without mention that the warranty is actually made by the manufacturer and not the retailer.[197] Such a retailer, through sloppy advertising, has now inadvertently made an express written warranty subjecting it to the Act.[198]

While it is unknown how many online retailers' terms and conditions would be subject to the MMWA, a brief review of a few websites reveals that some sales either are or could be.[199] In some instances, the making of a warranty may be done knowingly, and the boilerplate disclaimers are, at best, the

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> 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.

See Legal, APPLE, http://www.apple.com/legal/warranty/products/ios-warranty-document-us.html (last updated July 13, 2018).

195. *See* Anderson v. Gulf Stream Coach, Inc., 662 F.3d 775, 780 (7th Cir. 2011) ("It provides a federal private cause of action for a warrantor's failure to comply with the terms of a 'written warranty, implied warranty or service contract.'" (quoting Voelker v. Porsche Cars, Inc., 353 F.3d 516, 522 (7th Cir. 2003))); Mesa v. BMW of N. Am., LLC, 904 So. 2d 450, 455 (Fla. Dist. Ct. App. 2005) ("[T]he MMWA allows a 'consumer' to sue a supplier, warrantor, or manufacturer who fails to comply with any obligation under the MMWA, a written warranty, an implied warranty, or a service contract." (citing 15 U.S.C. § 2310(d) (2001))).

196. *See* BEST BUY, INC., http://www.bestbuy.com/site/geek-squad-protection/geek-squad-protect-support-plus/pcmcat748300491884.c?id=pcmcat748300491884 (last visited Jan. 3, 2019).

197. One of my research assistants actually ran across such an advertisement—a screen shot of the faucet is on file.

198. *Cf.* Freeman v. Hubco Leasing, Inc., 324 S.E.2d 462, 465–67 (Ga. 1985) (holding that a lessee of a DeLorean automobile was the third-party beneficiary of a contract between the manufacturer and original dealer in which the dealer undertook to address warranty claims, despite the fact that the lessor (who bought the car from the dealer) had disclaimed warranties of merchantability and fitness for a particular purpose).

199. *See, e.g.*, *Geek Squad Protection*, BEST BUY, INC., http://www.bestbuy.com/site/geek-squad-protection/geek-squad-protect-support-plus/pcmcat748300491884.c?id=pcmcat748300491884 (last visited Jan. 23, 2019) (offering an optional service plan); *5-Year Protect Plan for Major Appliance $2000–$10000*, HOME DEPOT, https://www.homedepot.com/p/5-Year-Protect-Plan-for-Major-Appliance-2000-10000-N60MA9999/304130373 (last visited Jan. 23,

result of an overcautious legal team, and, at worst, an attempt to fool customers into accepting less than they are entitled to under the law. Other online retailers may be inadvertently subjecting themselves to the MMWA, though careful drafting and website design could cure the defects exposing them to liability.

IV. THE *IN TERROREM* EFFECT OF ONLINE TERMS AND CONDITIONS

So far, it has been established that the vast majority of the largest online sellers prefer to use browsewrap to make consumers aware of the terms and conditions that they are trying to impose, despite this being the least effective "wrap" method available.[200] However, some consumers may actually read the browsewrap (or at least click on it), in which case it has accomplished the goal of notice.[201] But even if consumers read the browsewrap, or if the seller uses a more effective form such as clickwrap, not all of the terms and conditions will be enforceable in every case. Personal injury claims may avoid application limitations placed in the terms and conditions; and even if the injury is purely economic, sloppy wording or design could lead to limitations being ineffective, either as a matter of interpretation or due to the Magnusson-Moss Warranty Act.[202]

Given that many of the clauses could fail scrutiny for lack of notice and that even those that survive notice scrutiny may be invalidated, the question that must be asked is: Why go through all of the bother of inserting these elaborate clauses, especially when the sellers don't try to impose them in their brick-and-mortar equivalents? One simple answer may be, why not? Even with questionable enforceability of browsewrap agreements, there is a chance the consumer will read and be bound by them, and the cost of inserting the browsewrap link is minimal.[203] And even if a court finds a particular clause objectionable, it is likely that only that clause will be voided—not the whole

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2019) (same); LOWE'S, LOWE'S PRODUCT AND REPLACEMENT PLANS: TERMS AND CONDITIONS, https://www.lowes.com/pdf/serv_elpp0004s0916_v5-0718.pdf (last visited Jan. 23, 2019) (same).

200. *See supra* Section II.C.

201. *See* Preston, *supra* note 1, at 570 (contending that if the positioning of a hyperlink in a visible manner can confer notice on a consumer sufficient to counter claims of unconscionability, "then an admission of having followed the link and read any part of the wrap is utterly damning"); *cf.* Matt Meinel, *Requiring Mutual Assent in the 21st Century: How to Modify Wrap Contracts to Reflect Consumer's Reality*, 18 N.C. J.L. & TECH. ON. 180, 197 (2016) (discounting the relevance of the act of clicking to a browsewrap enforceability assessment, given that "the click itself does not increase or decrease the chances that the consumer had notice of the terms and should not be considered until after notice is established").

202. *See supra* Section III.E.

203. *See* Kim, *supra* note 65, at 1349 (regarding the inclusion of onerous terms in online contracts as coming at "no additional cost to the website . . . , either with respect to the economic costs of reproduction or loss of goodwill"); *see also* Preston, *supra* note 1, at 553 (distinguishing the costs of online wrap versus in-store paper contracting, as "wrap contract drafters do not have to worry about printer or paper costs, mailing or storage costs, or the cautionary impact of presenting a long paper contract to a consumer in its obvious fullness").

contract.[204] But there may be another, stronger reason online sellers include such terms, and that is the *in terrorem* effect they have on consumers.[205]

If a consumer buys a wearable fitness tracker online through a site that uses browsewrap terms and conditions, the consumer may very well proceed to checkout without once considering matters such as implied warranties or whether they have been disclaimed.[206] Indeed, it is likely the average consumer is unaware of the U.C.C. Article 2's gap-filler warranties at all, let alone how they can be disclaimed.[207] If the device begins to malfunction six weeks later, the consumer's first reaction might be to contact the online retailer. At this point, a company representative on the other side of the phone might politely point out that the retailer, as part of the terms and conditions that the consumer agreed to when completing the transaction, has a limited thirty-day return policy for electronics and, further, that the retailer has disclaimed all warranties associated with the device—essentially selling the device as is. So, what is the typical consumer response in light of being presented with "contractual" language that is purportedly binding?

It turns out that the typical response is that the consumers assume they are in fact bound, despite having never seen or been made aware of the terms.[208] Thus, the mere presence of the language has a deterrent effect on consumers pursuing the matter any further.[209] In some instances, the online

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204. *See* Wilkinson-Ryan, *supra* note 166, at 171 (commenting that "if the worst thing that will happen is that the term will get thrown out, there is no reason not to include it and hope for the best").

205. *See id.* at 121; Lydia P. Loren, *Slaying the Leather-Winged Demons in the Night: Reforming Copyright Owner Contracting with Clickwrap Misuse*, 30 OHIO N.U. L. REV. 495, 499–500 (2004) (noting, in the context of copyrights, that overreaching contractual terms in "shrinkwrap and clickwrap licenses has a certain *in terrorem* effect on users").

206. Schmitz, *supra* note 63, at 878 (assessing the tendency of consumers to read standard form contracts and concluding that "consumers have become accustomed to not reading contracts due to limited access, time, and ability to negotiate contract terms").

207. *See* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 468 (2002) (articulating e-consumers' common beliefs that reading online "boilerplate is unlikely to be of any benefit" and that "there is little risk to agreeing to standard terms").

208. *See* Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 EMORY INT'L L. REV. 1, 25 (2002) (asserting that sellers' persistence in using unenforceable terms stems from their knowledge that buyers typically believe in the terms' enforceability and comply with the terms without presenting a challenge); Preston, *supra* note 1, at 555 (revealing the widespread practice of online retailers to draft wrap contracts with disclaimer provisions known to be unenforceable because they are confident that consumers "may well accept without question the company's statement that they have waived all claims to relief"); Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127, 1136 (2009) (explaining "the obvious reason why one party would seek a clause it knew to be unenforceable is that it believed the other party to be unaware of the fact and likely to remain unaware of it[,]" perhaps due to a lack of "sophistication and legal counsel").

209. *See* Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence From the Residential Rental Market*, 9 J. LEGAL ANALYSIS 1, 7 (2017) ("Consumers might be discouraged from claiming their rights through judicial procedure, given the *in terrorem* effect

seller may even use the *in terrorem* terms to present itself as a "commendable" seller by telling the consumer that, though they don't have to, they will waive some provision or make some allowance, thus giving the impression that the seller values its customers.[210] Of course, in both cases, this tactic only works if consumers believe they are bound.

From the online seller's perspective, this result achieves exactly what it desires—the insertion of terms advantageous to the seller—without having to worry about slowing down the online user experience or customizing its particular terms. Furthermore, the online sellers can argue that the effect is to direct the consumers to the real party at fault—the manufacturer of the device.[211] Finally, online sellers can argue that the deterrent effect won't work on the really motivated consumers who, either due to the value of their claim or simply stubborn persistence, continue to pursue a claim.[212] Thus, the only claims deterred are low-value claims that consumers are not very motivated to pursue anyway.[213] Eliminating such claims through *in terrorem* clauses is an efficient way to save costs, which in turn are passed on to other consumers.[214]

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produced by the mere appearance of the unenforceable provision in the contract."); Sullivan, *supra* note 208, at 1137–38 (analogizing the relationship between two contracting parties to a game of chicken, which the drafter might win by including a contract term known to be unenforceable because "the existence of the (unenforceable) clause may itself deter the other party from the course of action she would otherwise pursue"); *see also* Schmitz, *supra* note 63, at 871 (relating the unwillingness of consumers to "seek contract changes due to fear such requests will backfire or 'rock the boat'" to the *in terrorem* effect of certain contract language).

210. *See* Tal Kastner, *The Persisting Ideal of Agreement in an Age of Boilerplate*, 35 LAW & SOC. INQUIRY 793, 808–09 (2010) (explaining the theory of Professor Jason Scott Johnston that boilerplate terms can act "as a baseline from which agents of a firm have the discretion to negotiate with consumers" and "to make exceptions to the standard terms on a case-by-case basis"); Preston, *supra* note 1, at 556–57 (recognizing the ability for businesses, confronted with customers calling to challenge harsh terms, to "make individualized determinations of which customers are worth saving" and to "waive contract terms for individual cases" when "the caller appears to be a 'desirable' customer").

211. Recall at the outset of Part II, many of the terms and conditions used are simply to take the retailer out of the picture as a middleman in what should really be a dispute between the consumer and the manufacturer. *See infra* Part II.

212. *See* Preston, *supra* note 1, at 557 (acknowledging the futility of the deterrence effect on "the truly obstreperous [customers], and those with excess time and ability to articulate" their complaints but condemning the provision of exceptions for these customers as a practice that rewards antagonistic behavior while "punishing the less aggressive"); *see also* R. Ted Cruz & Jeffrey J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635, 674–75 (1996) (pointing out sellers' differential ex-post treatment of buyers and their willingness to make contract exceptions for informed consumers who complain, while uninformed, non-complainers are left to tolerate the loss).

213. *See* Roger C. Bern, *Terms Later Contracting: Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law, Judge Easterbrook Notwithstanding*, 12 J.L. & POL'Y 641, 732–33 (2004) (observing the minimal costs that a seller incurs in the rare event that a disgruntled buyer is persistent and successfully reverses a transaction or is granted an exception to boilerplate terms).

214. *See* Bates, *supra* note 208, at 4 (describing how standardized terms benefit sellers in the form of efficiency-savings and buyers in the form of "the reduction in price that results when the seller elects to pass the savings onto the consumer directly").

These arguments have some flaws, however. First, while some consumers may have success pursuing claims against the manufacturer, this assumes that the consumers will be able to overcome lack of privity defenses, which is by no means a given on claims for pure economic harm.[215] Second, consumers are in a much worse position to argue for a refund or remedy than the retailer. Retailers buy in bulk from manufacturers, and manufacturers have an incentive to take back faulty items to keep the large institutional client happy.[216] Indeed, it may be a part of the contract between the manufacturer and retailer to do so. While the individual consumer is certainly a concern as well, the incentives are not the same, and the party in the better position to bargain is the large retailer.[217] Finally, with regard to the persistent consumer, why should only the most assertive consumers be rewarded? While this may reflect some degree of importance regarding the underlying claim, the acquiescence without challenge by some consumers to one-sided terms may also reflect a lack of education, a different cultural norm, or perhaps just someone who is more passive by nature.[218] All of this leads to the question of whether the use of online terms and conditions as *in terrorem* devices is ethical, the answer to which appears to be "it depends."

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215. A review of state laws reveals that at least twenty states still require privity of contract when pure economic harm is at issue. *See, e.g.*, Finch v. Ford Motor Co., 327 F. Supp. 2d 942, 946 (N.D. Ill. 2004) (declining to permit a consumer's claim for breach of implied warranty against a manufacturer because no privity of contrast existed between the parties); Rampey v. Novartis Consumer Health, Inc., 867 So. 2d 1079, 1089 (Ala. 2003) (asserting a lack of contractual privity in the buyer-manufacturer relationship as the basis for rejecting a buyer's breach of implied warranties claim against a manufacturer); *see also* Harry M. Flechtner, *Enforcing Manufacturers' Warranties, "Pass Through" Warranties, and the Like: Can the Buyer Get a Refund?*, 50 RUTGERS L. REV. 397, 451–52 (1998) (addressing the position of many courts that have refused to allow consumers to obtain a refund from third-party manufactures due to the absence of privity between the contracting parties); Gregory J. Krabacher, Note, *Revocation of Tripartite Rolling Contracts: Finding a Remedy in the Twenty-First Century Usage of Trade*, 66 OHIO ST. L.J. 397, 397 (2005) (asserting that consumers may lose their right to revoke a contract against a manufacturer when the disclaiming retailer breaks the privity chain). For further discussion on state law and privity requirements, see *supra* note 7.

216. *See* Leon E. Trakman, *The Boundaries of Contract Law in Cyberspace*, 38 PUB. CONT. L.J. 187, 199 (2008) (implying that retailers are in a better position to bargain with manufacturers than online consumers, who typically "lack the resources, know-how, and confidence to stand off against large-scale producers").

217. *See id.*; *see also* Korobkin, *supra* note 22, at 1284 (articulating the law-and-economics theory that "efficient allocations usually assign risks to the party best able to avoid a potential loss or able to avoid the loss most cheaply, in order to provide the maximum incentive for that party to take the necessary precautions").

218. *See* Zev J. Eigen, *The Devil in the Details: The Interrelationship Among Citizenship, Rule of Law and Form-Adhesive Contracts*, 41 CONN. L. REV. 381, 381 (2008) (theorizing that "less educated, lower skilled and lower paid subjects with greater employment dependency are more likely to feel bound by the terms of form-adhesive agreements that restrict their resort to law than more educated, higher skilled, and higher paid subjects with less employment dependency").

The use of online terms and conditions is not per se unethical. Online sellers are trying to draft terms that can be applicable to a wide array of consumers and in varying circumstances. Many of the more typical terms, such as warranty disclaimers and liability limitations, are permitted under the U.C.C. However, when a company representative speaks to a consumer over the phone, it is unlikely that the customer has read the company's terms and conditions. In the case where the consumer *did* take the time to read the terms and conditions, the potential enforceability of the terms would be more likely because of the customer's knowing assent. But, the fact that sellers who use browsewrap know how unlikely it is that the terms are adequately brought to their consumers' attention is problematic from a business ethics perspective.[219] These sellers have made a conscious effort to use a less noticeable form of "wrap" agreement in exchange for increasing the likelihood of a sale.[220] It is, therefore, unethical to use browsewrap in order to gain the benefits and then try to avoid the consequences of that decision by asserting rights that the sellers know are likely unenforceable against the consumer.[221] Though online sellers may argue that these terms are often unread even when properly noticed,[222] this argument misses the mark because basic tenets of contract law require that the other party be given a reasonable opportunity to read the terms.[223]

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219. *See* Robert A. Hillman & Maureen O'Rourke, *Defending Disclosure in Software Licensing*, 78 U. CHI. L. REV. 95, 102 (2011) (detailing the moralists' perspective on retailers' use of standardized terms, which condemns the exploitation of a party's lack of knowledge of material information and "would require disclosure as a matter of right and wrong"); *cf.* Wilkinson-Ryan, *supra* note 166, at 164 (noting the mismatch between consumer contracting and contract doctrine, and commenting that "[t]he problem is that the terms, afforded so little attention *ex ante*, have too much weight *ex post*").

220. *See* Kim, *supra* note 65, at 1342 (emphasizing the growth of companies' exploitative power that accompanied "judicial validation of the clickwrap and browsewrap forms," as "companies further expanded the reach of their contract clauses" and "began to use contracts to extract from consumers additional benefits that were unrelated to the transaction"); *see also* Schmitz, *supra* note 63, at 870 (relaying the fear that powerful companies utilize adhesion contracts "to harness their monopoly power and impose unfair or one-sided terms on consumers").

221. *See* MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 107 (1993) (discussing the duty to disclose information when the other party reasonably has no knowledge of the information); *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 112 (7th ed. 2007) ("[C]osts are avoided by the imposition on the seller of a duty to disclose information that he obtained costlessly.").

222. *Cf.* Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 547 (2014) ("[E]vidence suggests that consumers seldom read Internet contracts, which contain many controversial provisions."); *Id.* at 547–48 ("In one study tracking the Internet browsing behavior of 45,091 households on sixty-six online software sites, . . . 'only one or two out of every thousand retail software shoppers chooses to access the license agreement, and those few that do spend too little time, on average, to have read more than a small portion of the license text.'" (citing Yannis Bakos et al., *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts* 1 (N.Y.U. Sch. of Law Ctr. for Law, Econ. & Org., Working Paper No. 09-40, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443256)).

223. *See* Hillman & O'Rourke, *supra* note 219, at 105.

Online sellers are unlikely, however, to cease using browsewrap as the primary means of communicating the desired terms. In addition to being beneficial from a sales perspective, online sellers also have little incentive to change their behavior when competitors are engaged in the same behavior without penalty. In this sense, the current state of affairs resembles a sporting event where performance enhancing drugs ("PEDs") are unregulated. Competing athletes in such an environment, even if morally and ethically opposed to PEDs, will feel pressured to use them or risk losing to other athletes that are taking advantage of the unregulated environment.[224] The online sellers, like the athletes, will not want to use another, more conspicuous form of wrap agreement when their competitors are using the less conspicuous browsewrap with possibly the same or more onerous terms. In such an environment, only two things will likely change online sellers' behavior: public outrage or regulation mandating minimum standards of disclosure.[225]

V. CONCLUSION

Online sellers have at their disposal a variety of methods to make buyers aware of the terms and conditions that purportedly are binding upon them. Though clickwrap and scrollwrap are the most effective at notifying buyers of the existence of terms (even if they remain unread), most sellers still choose the less effective type—browsewrap. Sellers undoubtedly know that they have chosen the least conspicuous form of wrap agreement, but the choice is a rational one meant to maximize sales by streamlining the online buying experience. But even where the buyer is made aware of the terms, many may be unenforceable depending on the surrounding circumstances.

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224. Kenneth M. Plotz, *Athlete Drug Testing: Coming to a Race Near You*, COLO. LAW., Jan. 2017, at 19 ("The reality is that some participants will do more than just train hard for the next competition: they will try to boost performance by using banned substances. Such shortcuts can be tempting, especially when athletes suspect others are getting away with them.").

225. *See* Thomas H. Koenig & Michael L. Rustad, *Wolves of the World Wide Web: Reforming Social Networks' Contracting Practices*, 49 WAKE FOREST L. REV. 1431, 1436, 1502-04 (2014) (arguing for EU-style regulations with a "blacklist" of prohibited terms and a "graylist" of terms that are presumed to be unfair to address concerns over the terms of use on social media sites); Michael L. Rustad & Maria Vittoria Onufrio, *Reconceptualizing Consumer Terms of Use for a Globalized Knowledge Economy*, 14 U. PA. J. BUS. L. 1085, 1143–45 (2012) (arguing that U.S. companies need to reform their terms of use to meet EU standards). Though public outrage can be used to combat perceived abuses, even where the public has organized to garner a response from corporations, the effect may be limited, short reaching, and merely designed to stave off regulation. *See, e.g.*, Josh Constine, *Facebook Rewrites Terms of Service, Clarifying Device Data Collection*, TECH CRUNCH (Apr. 4, 2018), https://techcrunch.com/2018/04/04/facebook-terms-of-service/ (discussing Facebook's rewrite of its terms of use policies in light of backlash to its data collection procedures and noting that "[a]s Facebook deals with a disgruntled public and awoken regulatory bodies, the rewriting of these policies might be perceived as the company trying to cover itself after neglecting to detail how it pulls and uses people's data. . . . But today's revamp could also give Facebook stronger documents to point to as it tries to prove it doesn't need heavy-handed government regulation.").

Personal injury claims will likely avoid limitations imposed contractually. But even in claims involving pure economic harm, claims of unconscionability may be persuasive, particularly if the terms are not conspicuous, and the Magnusson-Moss Warranty Act may also provide relief.

The obstacles to enforcement of the online terms do not seem to bother online sellers as evidenced by the failure to attempt to include such terms in live, brick-and-mortar sales. This indicates that the primary motivation for including online terms as part of the sale is not that the sellers expect them to be enforceable if challenged, particularly with browsewrap agreements, but more as an *in terrorem* device. Online sellers can point to these terms and conditions to dissuade consumers from pursuing claims or to offer to "settle" the matter by appearing to give in under the guise of being a "commendable" seller, thus using the unenforceable terms to actually enhance their reputation. Though the terms themselves may have varying levels of effectiveness if properly noticed, the fact that, under some circumstances, the terms may not be enforceable is not per se unethical, but the use of browsewrap does raise ethical and moral concerns. Online sellers that use browsewrap to purposely deemphasize their terms, but then point to them later as if they are enforceable, seek to take advantage of their own buyers' ignorance. While it may be argued that online buyers are unlikely to read such terms anyway, it is one thing to provide terms that are unread, but it is a very different thing to never provide notice of the terms in the first place and deny buyers a reasonable opportunity to review the terms. Unfortunately, market forces will likely continue to pressure sellers to use less noticeable forms of wrap agreements unless and until online sellers are forced, likely through some form of regulation, into changing their behavior.