

ONLINE SHOPPING: BUY ONE, LOSE LEGAL RIGHTS FOR FREE

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I. INTRODUCTION

The Internet allows consumers to purchase goods from the comfort of their homes without setting foot inside a traditional brick-and-mortar store.¹ While online consumers enjoy the conveniences of online shopping, problems can arise involving the relatively new legal sphere of online contracting. Although consumers obtain goods or electronic information (e.g., music downloads or digital applications) via online purchases, they also lose certain legal rights by entering into retailers' online agreements.² State contract law governs online contracting³ and requires an online consumer's assent to an online retailer's agreement terms.⁴ Online retailers have the burden of proof to show that the consumer had actual or constructive knowledge of the terms—a difficult standard to meet.⁵

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¹ See Shelly Banjo & Drew Fitzgerald, *Stores Confront New World of Reduced Shopper Traffic*, WALL ST. J. (Jan. 16, 2014, 9:38 PM), <http://online.wsj.com/articles/SB10001424052702304419104579325100372435802>.

² See generally Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: *The Average Consumer's Experience*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 55 (discussing the potential loss of one's right to trial by jury through arbitration agreements).

³ See *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 36 (1988) (Scalia, J., dissenting) ("[I]ssues of contract . . . are nearly always governed by state law.").

⁴ *Van Tassell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 789–90 (N.D. Ill. 2011).

⁵ There is a difference between constructive knowledge and constructive notice. In cases lacking actual knowledge, courts consider the various circumstances of a given case to find constructive notice. Courts have used a finding of constructive notice of a browse-wrap agreement's terms and conditions to justify a finding of constructive knowledge in these online contracting cases. To find a particular online agreement enforceable, assent by the parties must be determined by actual knowledge, or more commonly, the finding of such constructive knowledge of the agreement's terms and conditions. See *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014).

The United States Constitution,⁶ as well as many state constitutions,⁷ preserves the right to a civil jury trial unless properly waived. As court dockets have become increasingly populated, mandatory arbitration provisions have helped ease docket caseloads.⁸ The United States Supreme Court has persistently upheld the enforceability of such provisions through its broad interpretation of the Federal Arbitration Act (FAA).⁹ As a result, many online retailers now include arbitration provisions in their online agreements because of the benefits they provide to online retailers.¹⁰ Despite the Supreme Court's strong stance regarding the enforceability of such provisions,¹¹ courts will not enforce them without the consumer's actual or constructive knowledge of the agreement's terms.¹² This requirement has led many courts to consider the presence of actual or constructive knowledge in online contracting cases, especially in the online retailing context.¹³

This Comment will demonstrate how most online consumers have *neither actual nor* constructive knowledge of online browse-wrap agreements' terms. By adopting the reasoning in *Specht v. Netscape Communications Corp.*,¹⁴ the leading case addressing browse-wrap

("But where, as here, there is no evidence that the website user had actual knowledge of the agreement, the validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract."); *Van Tassell*, 795 F. Supp. 2d at 790–91 ("[A]bsent a showing of actual knowledge of the terms by the webpage user, the validity of a . . . contract hinges on whether the website provided reasonable notice of the terms of the contract.").

⁶ U.S. CONST. amend. VII.

⁷ See, e.g., ALA. CONST. art. I, § 11; CONN. CONST. art. I, § 19; N.J. CONST. art. I, § 9.

⁸ See generally Mary Dunnewold, *Alternative Dispute Resolution: What Every Law Student Should Know*, STUDENT LAW., Oct. 2009, at 14.

⁹ Federal Arbitration Act, §§ 1–16 (1925).

¹⁰ See Demaine & Hensler, *supra* note 2.

¹¹ See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (finding that FAA trumps even state laws aimed at protecting consumers from unconscionable class action waivers); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (finding that FAA trumps conflicting state laws); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.").

¹² See, e.g., *Van Tassell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 790–91 (N.D. Ill. 2011) ("[A]bsent a showing of actual knowledge of the terms by the webpage user, the validity of a . . . contract hinges on whether the website provided reasonable notice of the terms of the contract.").

¹³ See generally, e.g., *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 (9th Cir. 2014); *Hines v. Overstock.com, Inc.*, 380 F. App'x 22 (2d Cir. 2010); *In re Zappos.com, Inc.*, 893 F. Supp. 2d 1058 (D. Nev. 2012).

¹⁴ 306 F.3d 17 (2d Cir. 2002).

agreements, and evaluating empirical and psychological data of online consumers' tendencies,¹⁵ courts can create bright-line rules articulating when, in the absence of actual knowledge, constructive knowledge of an online retailer's browse-wrap agreement exists.¹⁶ This Comment suggests rules that state legislatures and/or states' highest courts can adopt to create uniformity regarding online retailers' browse-wrap agreements.

This Comment focuses on browse-wrap agreements between online retailers and consumers. Although its analysis reaches other provisions within such agreements, it has special resonance for arbitration provisions in particular; the increasing use of such provisions and their negative effects on the naïve online consumer make this a pertinent Comment topic. Part II discusses the world of online contracting and its different forms. Part III provides a background of arbitration and its increasing relevance due to the FAA. Part IV of the Comment introduces *Specht* and its rationale for finding particular browse-wrap agreements unenforceable. Part V introduces psychological and eye-tracking studies of online consumers. The studies presented in Part V help support the Second Circuit's decision in *Specht*. Based on the *Specht* court's decision and the studies presented in Part V, Part VI recommends rules of law for online retailers to follow to assure consumers have constructive knowledge of a browse-wrap agreement's terms and conditions. Part VII concludes.

II. ONLINE CONTRACTING

Arbitration provisions not only appear in written contracts but, now, in online contracts as well. To fully understand such a transition, one must understand the different forms of online contracting. This part of the Comment will briefly introduce the two main forms of online contracting: click-wrap and browse-wrap contracts. Although this Comment focuses on browse-wrap contracts, it explains click-wrap contracts for comparative purposes.

A. *Click-Wrap and Browse-Wrap Contracts*

Click-wrap contracts and browse-wrap contracts differ in the way a contracting party accepts contractual terms. Click-wrap agreements

¹⁵ See *McMullen v. State*, 714 So. 2d 368, 379 n.15 (Fla. 1998) (noting the "establishment of the scientific respectability of psychology and its use and effect on the law").

¹⁶ Without these bright-line rules of law, the individual opinions of various judges would determine users' constructive knowledge of browse-wrap agreements, resulting in varied and inconsistent results.

require an online consumer to scroll through the document containing the agreement and affirmatively indicate acceptance of its terms in some way, usually by clicking an “I Agree” box.¹⁷ Conversely, browse-wrap agreements require no such affirmative conduct by the online consumer to show acknowledgement of its terms and conditions. Instead, a consumer’s use of the retailer’s website and/or subsequent purchases from the website are claimed to constitute acceptance of the agreement’s terms.¹⁸ The terms of the browse-wrap agreement, frequently available through hyperlinks labeled “Terms of Use” or “Terms and Conditions,”¹⁹ often appear at the bottom of the retailer’s webpage.²⁰

B. Assent Under Both Types of Online Contracts

Both click-wrap and browse-wrap contracts often contain arbitration provisions that online consumers enter into unknowingly. In the eyes of the courts, the principles of contract law still apply to online contracts.²¹ Under contract law, a valid contract requires a finding of mutual assent between the parties to enter into such a contract.²² State contract law controls the inquiry into proper assent.²³ Courts assume assent to the terms of a given online agreement when they find the online user had proper notice to the agreement’s terms.²⁴

¹⁷ See Ty Tasker & Daryn Pakcyk, *Cyber-Surfing on the High Seas of Legalese: Law and Technology of Internet Agreements*, 18 ALB. L.J. SCI. & TECH. 79, 95–96 (2008).

¹⁸ See *E.K.D. ex rel. Dawes v. Facebook, Inc.*, 885 F. Supp. 2d 894, 901 (S.D. Ill. 2012) (“Browsewrap agreements typically ‘involve a situation where notice on a website conditions use of the site upon compliance with certain terms or conditions, which may be included on the same page as the notice or accessible via a hyperlink.” (quoting *Southwest Airlines v. BoardFirst L.L.C.*, No. 3:06-CV-0891-B, 2007 WL 4823761, at *4 (N.D. Tex. Sept. 12, 2007))).

¹⁹ See, e.g., *DELL*, *infra* note 73; *EBAY*, *infra* note 73.

²⁰ *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009) *aff’d*, 380 F. App’x 22 (2d Cir. 2010) (“[W]ebsite terms and conditions of use are posted on the website typically as a hyperlink at the bottom of the screen.”).

²¹ See *Van Tassell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 789 (N.D. Ill. 2011) (“The making of contracts over the internet ‘has not fundamentally changed the principles of contract.’” (quoting *Register.com v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004))).

²² See *id.* (noting the necessity of mutual assent for contracts on the Internet); see also *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 478 (1989) (“[T]he FAA does not require parties to arbitrate when they have not agreed to do so . . .”).

²³ See, e.g., *Van Tassell*, 795 F. Supp. 2d at 788 (citing *Carey v. Richards Bldg. Supply Co.*, 856 N.E.2d 24 (Ill. App. Ct. 2006)).

²⁴ See Dan Streeter, *Into Contract’s Undiscovered Country: A Defense of Browse-Wrap Licenses*, 39 SAN DIEGO L. REV. 1363, 1388 (2002) (suggesting that if ample evidence exists to find a potential licensee’s action to constitute assent, then any contract formed by such assent should be enforced).

The party wishing to enforce the arbitration agreement, or any other provisions housed within a given online contract, must show proper notice by either the online consumer's: (1) actual knowledge of the terms and conditions; or (2) constructive knowledge of the terms.²⁵ By requiring either actual or constructive knowledge of an online agreement's terms, courts seek to ensure that only those disputes that the parties agreed to arbitrate are actually arbitrated.²⁶

Courts have been more willing to uniformly enforce arbitration provisions contained in click-wrap agreements as opposed to those contained in browse-wrap agreements.²⁷ This outcome evolved from the reasoning that an online consumer's affirmative act of clicking to enter into the click-wrap agreement demonstrates actual knowledge by the consumer of the agreement's terms.²⁸ With notice demonstrated by these affirmative acts, courts need not enter into the muddled waters of determining what exactly constitutes constructive notice. For browse-wrap agreements, however, finding assent to an agreement's terms becomes more difficult.²⁹ Although the assent analysis is the same for the two different types of online contracts, in that both require actual or constructive knowledge, its application for browse-wrap agreements turns on the idea of constructive knowledge.³⁰

²⁵ See *Van Tassell*, 795 F. Supp. 2d at 790–91.

²⁶ See *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010) (“Arbitration is strictly a matter of consent, and thus is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.”) (internal quotation marks and citations omitted); see also *Tasker & Pakcyk*, *supra* note 17, at 90–91 (noting that “[c]ontracts that exist in computerized format are not necessarily unenforceable” unless there is a lack of assent).

²⁷ See *Siedle v. Nat'l Assoc. of Sec. Dealers, Inc.*, 248 F. Supp. 2d 1140, 1143–44 (M.D. Fla. 2002) (finding a click-wrap agreement enforceable and valid); *i.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338–39 (D. Mass. 2002) (recognizing the enforceability of a click-wrap agreement since the website's user, downloading software, “clicked on the box stating ‘I agree’”); William J. Condon, Jr., Note, *Electronic Assent to Online Contracts: Do Courts Consistently Enforce Clickwrap Agreements?*, 16 REGENT U. L. REV. 433, 446 (2003/2004) (stating that “many federal and state courts enforce clickwrap agreements”).

²⁸ *Tasker & Pakcyk*, *supra* note 17, at 96 (“It makes perfect sense that the frequency of cases enforcing click-wrap agreements should generally be higher, as assent is more clearly expressed by clicking on words or buttons indicating agreement.”).

²⁹ See *Streeter*, *supra* note 24, at 1365 (“The key feature of browse-wrap, and the source of its legal uncertainty, is that it does not force a potential licensee to undertake an act that explicitly expresses an intent to enter into the license, such as clicking ‘I agree.’”).

³⁰ See *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014) (“But where, as here, there is no evidence that the website user had actual knowledge of the agreement, the validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract.”); *Be In, Inc. v. Google Inc.*, No. 12–CV–03373–LHK, 2013 WL 5568706, at *7 (N.D. Cal. Oct.

In analyzing an online consumer's assent to a browse-wrap agreement, courts first look for actual knowledge of the agreement's terms. Proving actual knowledge of such terms and conditions is nearly impossible for browse-wrap agreements because this would require the online consumer, usually the party arguing the unenforceability of such a contract, to admit to seeing the terms and conditions on the retailer's website; very few online consumers would admit to doing so when the consumer would prefer his day in court over the decision of an arbitrator. Also, since hyperlinks at the very bottom of retail webpages often house these agreements, very few online consumers will likely have actual knowledge of these terms.

Although courts uniformly fail to find actual knowledge in browse-wrap cases, the decisions pertaining to constructive knowledge are *not* as uniform.³¹ With this lack of uniformity regarding constructive knowledge analysis, the enforceability of online retailers' browse-wrap agreements depends on different judges' individual determinations. Since the crux of the assent analysis for browse-wrap agreements turns on a finding of constructive knowledge rather than actual knowledge, courts need some guidance from their state

9, 2013) (“[C]ourts will refuse to enforce browsewrap arbitration provisions where there is a failure to allege ‘facts tending to show that a user would have had actual or constructive knowledge of the Terms and Conditions.’” (quoting *Hines v. Overstock, Inc.*, 380 F. App’x 22, 25 (2d Cir. 2010))); *E.K.D. ex rel. Dawes v. Facebook, Inc.*, 885 F. Supp. 2d 894, 901 (S.D. Ill. 2012) (“Because no affirmative action is required by the website user to agree to the terms of a contract other than his or her use of the website, the determination of the validity of a browsewrap contract depends on whether the user has actual or constructive knowledge of a website’s terms and conditions.”); *Van Tassell*, 795 F. Supp. 2d at 790–91 (“Thus, absent a showing of actual knowledge of the terms by the webpage user, the validity of a browsewrap contract hinges on whether the website provided reasonable notice of the terms of the contract.”).

³¹ Compare *E.K.D. ex rel. Dawes*, 885 F. Supp. 2d at 901 (finding that Facebook’s Terms of Service (TOS) reasonably put plaintiffs on notice because the TOS “are hyperlinked on every page accessed by a facebook.com user in underlined, blue text that contrasts with the white background of the hyperlink”) (applying California law), *Molnar v. 1-800-Flowers.com, Inc.*, No. CV 08-0542 CAS (JCx), 2008 WL 4772125, at *7 (C.D. Cal. Sept. 29, 2008) (“[T]here is no indication from case law that defendants will be unable as a matter of law to show that plaintiff had notice of the Terms of Use on their website. Indeed, courts have held that a party’s use of a website may be sufficient to give rise to an inference of assent to the Terms of Use contained therein (so called ‘browsewrap contracts’).”), *Ticketmaster L.L.C. v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1107 (C.D. Cal. 2007) (“Having determined that Plaintiff is highly likely to succeed in showing that Defendants viewed and navigated through ticketmaster.com, the Court further concludes that Plaintiff is highly likely to succeed in showing that Defendant received notice of the Terms of Use and assented to them by actually using the website.”), and *Major v. McCallister*, 302 S.W.3d 227, 231 (Mo. Ct. App. 2009) (“Appellant’s contention that the website terms were so inconspicuous that a reasonably prudent internet user could not know or learn of their existence, or assent to them without a ‘click,’ is unconvincing.”), with cases discussed *infra* Part IV.

legislature or their state's highest court to determine what legally constitutes constructive knowledge. Such guidance would create a uniform standard and prevent the enforceability of these agreements, including their encompassed arbitration provisions, from being at the mercy of different judges' individual discretions.

III. BASIC PRINCIPLES OF ARBITRATION AND THE FEDERAL ARBITRATION ACT

Arbitration, a form of alternative dispute resolution in which two opposing parties agree to entrust a neutral third party to determine a dispute's outcome,³² has become increasingly utilized in many different contracts through arbitration provisions. This increasing popularity can be attributed to arbitration's benefits, such as cost and time savings.³³ Not only do businesses engaged in arbitration benefit from this efficiency, but they also limit their exposure to risk because of the confidentiality that arbitration provides.³⁴ When disputes arbitrate, neutral third parties solve the disagreements rather than the court system, which results in a lack of public court records. For businesses, the ability to have disputes invisible to the public provides an immeasurable benefit.

The benefits of arbitration have led to arbitration provisions within a myriad of contracts of adhesion.³⁵ Consumer products, services, employment, and even medical contracts of adhesion have all been littered with arbitration provisions.³⁶ A 2008 empirical study revealed that 76.9% of the consumer contracts studied contained mandatory arbitration provisions,³⁷ and, as a result of arbitration's

³² BLACK'S LAW DICTIONARY 712 (9th ed. 2009).

³³ Charles B. Craver, *The Use of Non-Judicial Procedures to Resolve Employment Discrimination Claims*, 11 KAN. J.L. & PUB. POL'Y 141, 158 (2001) ("Fair arbitral procedures can provide a more expeditious and less expensive alternative that may benefit workers more than judicial proceedings."); Will Pryor, *Alternative Dispute Resolution*, 61 SMU L. REV. 519, 522 (2008) ("[A]nyone with a concern that litigation was just too expensive and too inefficient, began to turn to arbitration as a means of controlling litigation costs and limiting exposure.").

³⁴ Michael A. Satz, *Mandatory Binding Arbitration: Our Legal History Demands Balanced Reform*, 44 IDAHO L. REV. 19, 34 (2007) ("The limited exposure to risk and improved efficiency that arbitration provides for consumer-related industries are the two primary benefits businesses derive by contracting for arbitration with consumers.").

³⁵ See Pryor, *supra* note 33.

³⁶ See *In re Knepp*, 229 B.R. 821, 827 (N.D. Ala. 1999); *Allstar Homes, Inc. v. Waters*, 711 So. 2d 924, 933 (Ala. 1997) (Cook, J., concurring) ("The reality is that contracts containing [arbitration] provisions appear with increasing frequency in today's marketplace.").

³⁷ This empirical study looked at 26 consumer contracts and 164 non-consumer

benefits listed above, this percentage will likely continue to increase.

Although the increasing use of arbitration provisions within different industries³⁸ allows individuals to experience arbitration's benefits, various disadvantages exist as well. This Comment divides these disadvantages into two groups: (1) lack of information disadvantages; and (2) waiving of rights disadvantages.

Arbitration can be detrimental in particular circumstances due to the lack of notice that the absence of court documents creates for future or current litigants. The absence of court records of prior disputes between a company and its consumers leaves future consumers uninformed of a company's customer disputes. An arbitrator may rule a certain way "without explanation of [his] reasons and without a complete record of [his] proceedings."³⁹ With such a lack of explanation and no public records of prior disputes between a retailer and its customers, future customers lose a valuable way of assessing the quality of a company's business relations.

Arbitration provisions in contracts of adhesion also present a more prevalent and frequently discussed disadvantage: the waiving of an individual's right to a civil jury trial. These provisions waive an individual's right to a civil jury trial, in certain cases, which the Constitution's Seventh Amendment and many individual state constitutions establish.⁴⁰ When one waives his right to a civil jury trial,

contracts. The various consumer contracts in the study were from companies listed in *Fortune* magazine's top 100 annual rankings of well-known companies within various sectors. Some of these companies included: Cablevision, Verizon, Time Warner, Comcast, Chase, American Express, and AT&T. The results of the empirical study found that twenty out of twenty-six consumer contracts, or 76.9%, contained mandatory arbitration provisions. Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 980-83 (2008).

³⁸ An empirical study looked at 167 different consumer industries using arbitration provisions. The study broke down these industries into eight broader categories: housing & home, rental services, transportation, health care, food & entertainment, travel, financial, and other. In total, 161 different arbitration provisions were collected in 2001. The study revealed that 35.4% of the different industries had arbitration provisions within their consumer contracts. Although this percentage seems low, the study's data was collected over a decade ago. Surely this test, if done today, would yield very different results. Dermaine & Hensler, *supra* note 2, at 60, 63.

³⁹ *Wilko v. Swan*, 346 U.S. 427, 436 (1953); *see also Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) ("The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result.").

⁴⁰ *In re Knepp*, 229 B.R. at 827 ("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

he also waives all other derivative benefits of having his case heard within the courts. These benefits include time for extended discovery⁴¹ and the right to subpoena witnesses to testify.⁴² Despite these rights being waived, challengers often lose under the FAA when a party claims improper waiver.⁴³

Congress enacted the FAA in 1925 to reverse any longstanding judicial hostility toward arbitration agreements and to “place arbitration agreements upon the same footing as other contracts.”⁴⁴ Under the FAA, courts must treat arbitration provisions as they would any other contractual provision and not fashion rules hostile to arbitration.⁴⁵ Although the text of the FAA remains mostly unchanged since its 1925 enactment, the same cannot be said for the Supreme Court’s interpretation of the FAA, which became vastly more powerful from the 1950s to the present.

The Supreme Court has interpreted § 2, the “primary substantive provision”⁴⁶ of the FAA, throughout a string of cases described below. Section 2 reads:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.⁴⁷

rises as a putrid odor which is overwhelming to the body politic.”).

⁴¹ FED. R. CIV. P. 26–37.

⁴² FED. R. CIV. P. 45.

⁴³ See 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, 670 (2001) (“When made, such challenges have on rare occasion succeeded.”).

⁴⁴ *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 288–89 (2002) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)); see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (“The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements.”).

⁴⁵ H.R. REP. NO. 68–96, at 1 (1924) (“Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs . . .”).

⁴⁶ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

⁴⁷ Federal Arbitration Act, 9 U.S.C. § 2 (1925).

Section 2 has been broken down into two general clauses: the “command clause” and the “savings clause.”⁴⁸ The first part of § 2, the command clause, grants courts the power to find arbitration provisions enforceable in contracts described in § 2, while the savings clause allows for narrow circumstances where courts can find arbitration provisions unenforceable.⁴⁹ Through a series of Supreme Court cases, the Court has given the command clause more power while minimizing the savings clause.

Perhaps the FAA’s most significant expansion was the Supreme Court’s interpretation of § 2 in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,⁵⁰ where the Court introduced what later became known as the doctrine of severability. With the plaintiff wishing for a court to hear the contractual dispute between the parties, the Court found that under the FAA, “the federal court is instructed to order arbitration to proceed once it is satisfied that ‘the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue.’”⁵¹ Before this case, it would have been reasonable to assume that under the savings clause, instances of duress or other contract formation issues rendered the entire contract, including the arbitration provision, unenforceable. The doctrine of severability announced that even when particular contract formation problems render a contract otherwise unenforceable, the contract’s arbitration provision may be separated and enforced by courts.⁵²

A broader interpretation of the FAA continued in a series of cases from 1983 to 1985. The Court expressed a newfound federal policy favoring arbitration provisions in its *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*⁵³ dictum and later restated it as part of *Southland Corp. v. Keating’s*⁵⁴ holding. In *Southland*, Chief Justice

⁴⁸ Arpan A. Sura & Robert A. DeRise, *Conceptualizing Conception: The Continuing Viability of Arbitration Regulations*, 62 U. KAN. L. REV. 403, 410–11 (2013).

⁴⁹ *Id.*

⁵⁰ 388 U.S. 395 (1967).

⁵¹ *Id.* at 403 (quoting 9 U.S.C. § 4).

⁵² Essentially, this holding alerted lower courts and future litigants of the FAA’s inherent power. If a party wishes to void a contract on formation defect grounds, and the contract includes an arbitration clause, courts must send the case to arbitration unless a party alleges a contract formation issue in the inducement of the arbitration clause *itself*. *Id.* at 425 (finding that “[i]f there has never been any valid contract, then there is not now and never has been anything to arbitrate”).

⁵³ 460 U.S. 1, 24–25 (1983) (“[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”).

⁵⁴ 465 U.S. 1, 10 (1984) (“In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a

Burger explained that the FAA trumps any state law pertaining to arbitration provisions under the Supremacy Clause.⁵⁵ In her dissent, Justice O'Connor argued that the 1925 Congress intended the FAA to be procedural in nature rather than substantive and, therefore, should not trump state law under *Erie*.⁵⁶ Justice O'Connor's view, however, remains unrecognized to this day.⁵⁷ The Court also found in *Southland* that the FAA trumps all state laws that explicitly prohibit the use of arbitration provisions.⁵⁸

Beyond interpreting the command clause broadly, the Court has interpreted the savings clause narrowly. It has held that the FAA preempts state laws that: (1) outright prohibit arbitration as seen in *Southland*; (2) require unequal treatment of arbitration provisions and thus create hostility towards them;⁵⁹ or (3) conflict with the FAA's purpose.⁶⁰

This expansion of the FAA's power spanned throughout the 1980s⁶¹ and the 1990s⁶² and continued to the Supreme Court's 2011 decision in *AT&T Mobility LLC v. Concepcion*.⁶³ In Justice Scalia's *Concepcion* opinion, the Supreme Court held that § 2 of the FAA preempts a California state law known as the *Discover Bank* rule,⁶⁴ which classifies "most collective-arbitration waivers in consumer contracts as

judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.").

⁵⁵ The Supreme Court relied on the *Erie* Doctrine to assert that in diversity jurisdiction cases, federal courts apply their own procedural laws but apply state substantive laws. If a federal law trumps a state substantive law, then the federal law prevails. Therefore, the FAA trumps any state law on this matter. *Id.*; see also *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (introducing the *Erie* Doctrine).

⁵⁶ *Southland Corp.*, 465 U.S. at 21–23 (O'Connor, J., dissenting).

⁵⁷ See *Sura & DeRise*, *supra* note 48, at 411 ("Although Section 2 does not contain language expressly preempting state or federal law to the contrary, the Supreme Court has long held the provision to have preemptive effect.").

⁵⁸ *Southland Corp.*, 465 U.S. at 3–5 (finding that FAA trumps California's Franchise Investment Law).

⁵⁹ See *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (holding that a Montana statute requiring conspicuous notice for any arbitration provision within a contract is unenforceable because it conflicts with the FAA since the state statute "solely" targeted arbitration provisions).

⁶⁰ See *Sura & DeRise*, *supra* note 48, at 411.

⁶¹ See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) (holding that arbitration provisions are still enforceable when the issue to be decided by an arbitrator involves enforcement of federal law).

⁶² See, e.g., *Casarotto*, 517 U.S. at 687 (holding that laws specifying how arbitration provisions must appear within contracts or any other state law regulating the use of arbitration provisions are trumped by the FAA, and even if an arbitration provision violates an applicable state law, the provision will still be enforced under the FAA).

⁶³ 563 U.S. 333 (2011).

⁶⁴ *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

unconscionable.”⁶⁵ The California Supreme Court had previously upheld the validity of this state rule⁶⁶ as applied to waivers in either judicial or arbitral fora. Also, “§ 2’s saving clause preserves generally applicable contract defenses.”⁶⁷ Despite these two facts, however, the Court reasoned that nothing in the FAA “suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”⁶⁸ The majority in *Concepcion* found that the *Discover Bank* rule constituted an obstacle to arbitration and, as a result, was trumped by the FAA. *Concepcion*’s holding concerns many consumers, especially those wishing to engage in class action lawsuits, since the Supreme Court’s current treatment of the FAA will trump certain state laws enacted in order to *protect* consumers from unconscionable class action waivers within contracts using arbitration provisions.⁶⁹

This series of Supreme Court cases has allowed arbitration provisions to make their way from business-to-business contracts, where the contracting parties are more accustomed to these agreements, to business-to-consumer contracts.⁷⁰ With the Supreme Court’s blessing, many well-known companies placed mandatory arbitration provisions within their consumer contracts, including: Verizon, Sprint, DIRECTV, AT&T, Sony, Dell, Gateway, and Toshiba.⁷¹ Also, after courts found that contracting parties could indicate

⁶⁵ *Concepcion*, 563 U.S. at 340.

⁶⁶ The California Supreme Court previously upheld the validity of this state law in *Discover Bank*. 113 P.3d at 1100. This law became known as the *Discover Bank* Rule. The Rule essentially made class action waivers in certain consumer contracts under particular circumstances unconscionable under California contract law. As a result, these waivers fell under the savings clause of § 2.

⁶⁷ *Concepcion*, 563 U.S. at 343.

⁶⁸ *Id.*

⁶⁹ Alliance for Justice, *One Year Later: The Consequences of AT&T Mobility v. Concepcion*, JUSTICE WATCH (Apr. 27, 2012, 1:04 PM), <http://afjjusticewatch.blogspot.com/2012/04/one-year-later-consequences-of-at.html> (“The Court held in *Concepcion* that the Federal Arbitration Act (‘FAA’)’s favorable treatment of contractual arbitration clauses preempts state laws aimed at protecting consumers and employees from unconscionable class action waivers.”); *see also* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 623 (2012) (stating that *Concepcion* “broadly validat[ed] arbitration provisions containing class action waivers”).

⁷⁰ *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1636 (2005) (attributing the great increase of binding arbitration provisions within consumer contracts to a series of U.S. Supreme Court decisions).

⁷¹ *Forced Arbitration Rogues Gallery*, PUBLIC CITIZEN, <http://www.citizen.org/forced-arbitration-rogues-gallery> (last visited Feb. 1, 2016); *see also* Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997) (upholding the enforceability of arbitration provision found within the warranty brochure included with a computer purchase, thus showing the presence of arbitration provisions in consumer goods contracts).

acceptance of an agreement's terms by mere actions rather than necessitating a signature, companies then began to include arbitration provisions within their online consumer contracts.⁷² This trend quickly spread and explains why many popular online retailers include arbitration provisions within their online contracting, including: Amazon, Barnes & Nobles, Netflix, Microsoft, Groupon, eBay, and Dell.⁷³ These provisions allow online retailers to reap the benefits of arbitration but at the same time pose disadvantages to the average online consumer who lacks actual knowledge of the online contract's terms, including its arbitration provision.

⁷² See *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1369 (11th Cir. 2005) (“We readily conclude that no signature is needed to satisfy the FAA’s written agreement requirement.”); *Genesco, Inc. v. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987) (stating that “while the [FAA] requires a writing, it does not require that the writing be signed by the parties”); *Valero Ref., Inc. v. M/T Lauberhorn*, 813 F.2d 60, 64 (5th Cir. 1987) (stating that “a party may be bound by an agreement to arbitrate even in the absence of his signature”); *Linea Naviera De Cabotaje, C.A. v. Mar Caribe De Navegacion, C.A.*, 169 F. Supp. 2d 1341, 1346 (M.D. Fla. 2001) (“While an agreement to arbitrate must be in writing, there is no requirement that the writing be signed.”).

⁷³ PUBLIC CITIZEN, *supra* note 71. The arbitration provisions found on eBay’s and Dell’s websites are listed below as examples of what arbitration provisions within these online contracts look like. eBay’s User Agreement contains the following arbitration provision:

You and eBay each agree that any and all disputes or claims that have arisen or may arise between you and eBay relating in any way to or arising out of this or previous versions of the User Agreement, your use of or access to eBay’s Services, or any products or services sold, offered, or purchased through eBay’s Services shall be resolved exclusively through final and binding arbitration, rather than in court. Alternatively, you may assert your claims in small claims court, if your claims qualify and so long as the matter remains in such court and advances only on an individual (non-class, non-representative) basis. The Federal Arbitration Act governs the interpretation and enforcement of this Agreement to Arbitrate.

eBay User Agreement, EBAY, <http://pages.ebay.com/help/policies/user-agreement.html?rt=nc> (last visited Feb. 1, 2016).

Dell’s Consumer Terms of Sale provides the following agreement:

Dispute Resolution and Binding Arbitration. YOU AND DELL ARE AGREEING TO GIVE UP ANY RIGHTS TO LITIGATE CLAIMS IN A COURT OR BEFORE A JURY, OR TO PARTICIPATE IN A CLASS ACTION OR REPRESENTATIVE ACTION WITH RESPECT TO A CLAIM. OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO BE UNAVAILABLE OR MAY BE LIMITED IN ARBITRATION.

Consumer Terms of Sale, DELL, <http://www.dell.com/learn/us/en/vn/terms-of-sale-consumer> (last visited Feb. 1, 2016).

IV. THE SEMINAL CASE OF *SPECHT*⁷⁴

Case law regarding online contracts in general is still sparse and rather new.⁷⁵ In particular, case law revolving around browse-wrap agreements is even newer; in fact, no court addressed the enforceability of such agreements prior to 2000.⁷⁶ The 2002 Second Circuit case of *Specht v. Netscape Communications Corp.*,⁷⁷ which some courts have relied upon for guidance, ought to be followed by many other courts for its constructive knowledge analysis pertaining to browse-wrap agreements.

Specht involved a class action lawsuit by a group of online users who downloaded free software from Netscape's website and had their personal information secretly obtained by Netscape when the downloads were initiated.⁷⁸ In the district court, defendant Netscape moved to compel arbitration under its browse-wrap agreement's arbitration provision. The browse-wrap agreement appeared via a hyperlink at the very bottom of the webpage. To find the hyperlink, plaintiffs needed to scroll past an enticing "Download" button that plaintiffs clicked to obtain the free software.⁷⁹ Had plaintiffs scrolled and clicked on this hyperlink, they would then have seen the "License & Support Agreements" housing the arbitration provision that Netscape wished to enforce.⁸⁰

The Second Circuit denied Netscape's motion to compel arbitration, finding that the downloaders of the software did not assent to the terms of the browse-wrap agreement.⁸¹ Since the downloaders denied actual knowledge of the browse-wrap's terms, the court needed

⁷⁴ See *Van Tassell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 791 (N.D. Ill. 2011) (describing *Specht* as the "seminal browse-wrap case").

⁷⁵ See *Tasker & Pakcyk*, *supra* note 17, at 82–83.

⁷⁶ See *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000) ("No reported cases have ruled on the enforceability of a browse wrap license."); see also Melissa Robertson, *Is Assent Still a Prerequisite For Contract Formation in Today's E-Economy?*, 78 WASH. L. REV. 265, 266–67 (2003) ("Prior to 2000, no court had addressed the issue.").

⁷⁷ 306 F.3d 17 (2d Cir. 2002).

⁷⁸ *Id.*

⁷⁹ *Id.* at 23.

⁸⁰ "Had plaintiffs scrolled down instead of acting on defendants' invitation to click on the 'Download' button, they would have encountered the following invitation: 'Please review and agree to the terms of the *Netscape SmartDownload software license agreement* before downloading and using the software.'" *Id.* The whole agreement did not appear at the bottom of this screen, but rather the agreement's terms were contained in a hyperlink that directed users to the page entitled "License & Support Agreements." *Id.* at 23–24. The agreement required users of the website to read its terms and agree to them prior to downloading any software. *Id.* at 24.

⁸¹ *Id.* at 17.

to determine whether sufficient constructive knowledge of the terms and conditions existed. This inquiry does not consider whether a reasonably prudent website user would have *read* the terms of the agreement, but rather would have *noticed* their presence at all.⁸² In determining constructive knowledge, the *Specht* court recognized that Netscape's online users "could not have learned of the existence of [these] terms unless, prior to executing the download, they had scrolled down the webpage to a screen located below the download button."⁸³ The *Specht* court found that a reasonably prudent user would not have scrolled past an enticing "Download" button to find the hyperlink of the browse-wrap agreement at the bottom of Netscape's webpage. As a result, no constructive knowledge existed, and the arbitration provision within Netscape's browse-wrap agreement was not enforced.⁸⁴

Although the *Specht* court's reasoning involved website users downloading free software, the case has been applied to situations involving online retailers and consumers.⁸⁵ The Ninth Circuit recently

⁸² *Id.* at 23.

⁸³ *Specht*, 306 F.3d at 20.

⁸⁴ *See id.* at 31 ("We are not persuaded that a reasonably prudent offeree in these circumstances would have known of the existence of license terms."); *see also id.* at 32 (stating that in circumstances where Internet users are urged to download something immediately by clicking a button, "a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms").

⁸⁵ Three of the main cases relying on *Specht* involve online retailers: *Overstock.com*, *United Marketing Group*, and *Zappos.com*. In *Hines v. Overstock.com*, the Second Circuit again addressed the issue of a browse-wrap agreement in a case where plaintiffs brought a class action suit against *Overstock.com* after the online retailer tried to charge a thirty-dollar "restocking fee" to its customers returning items. 380 F. App'x 22, 23 (2d Cir. 2010). The online retailer, much like Netscape in the *Specht* case, asked the court to compel arbitration due to the arbitration provision found in the online retailer's browse-wrap agreement housed within a hyperlink at the bottom of its webpage. *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 365 (E.D.N.Y. 2009), *aff'd*, 380 F. App'x 22 (2d Cir. 2010). The *Hines* Court found that neither actual knowledge of these terms and conditions nor constructive knowledge of the terms and conditions were present; without proper assent, the arbitration provision could not be enforced. *Hines*, 380 F. App'x at 24.

In *Van Tassell v. United Marketing Group*, plaintiff-customers brought suit against defendants who again had arbitration provisions within browse-wrap agreements housed in hyperlinks at the bottom of defendants' websites. 795 F. Supp. 2d 770, 770 (N.D. Ill. 2011). Just like in *Overstock.com*, this district court also applied *Specht* to an online shopping scenario. *Id.* at 793.

Finally, *In re Zappos.com, Inc.* provides another situation where plaintiffs wished to sue an online shoe retailer regarding their purchases through the retailer's website. 893 F. Supp. 2d 1058 (D. Nev. 2012). To avoid a class action lawsuit, the defendant, *Zappos*, moved the court to compel arbitration as a result of the arbitration provision found in its browse-wrap agreement. The agreement could be found by clicking a

applied *Specht's* reasoning in analyzing the enforceability of an online retailer's browse-wrap agreement in *Nguyen v. Barnes & Nobles, Inc.*⁸⁶ In *Nguyen*, the plaintiff-consumer purchased a tablet from Barnes & Nobles' website during a sale but later found out that due to excessive demand, the item was out of stock.⁸⁷ The consumer brought a punitive class action against the retailer alleging deceptive business practices and false advertising, but the defendant moved to compel arbitration under its browse-wrap agreement's arbitration provision.⁸⁸ As in *Specht*, the Ninth Circuit in *Nguyen* looked to the conspicuousness and placement of the hyperlink containing the browse-wrap agreement to determine the existence of constructive notice and, therefore, constructive knowledge of the agreement's terms.⁸⁹ The court found no constructive notice because the online retailer made the terms of its agreement available only by hyperlink at the bottom of its webpage.⁹⁰ Although the link was conspicuous to those who scrolled down, the online retailer did not prompt the consumer to continue scrolling or in any other way inform the consumer that such agreement existed.⁹¹

hyperlink labeled "Terms of Use" on Zappos' website. *Id.* at 1063. Since there was no evidence of actual knowledge by the consumers of the browse-wrap's terms, the court looked to constructive knowledge. *Id.* at 1064. The hyperlink to the "Terms of Use" was located between the middle and bottom of each page of the website. The hyperlink, however, was visible only if the user scrolled down. If a consumer printed a physical copy of the defendant's homepage, the hyperlink would appear on the third of four pages. *Id.* Also, the website did not direct a user to the hyperlink upon creating an account, making a purchase, or logging into an existing account. *Id.* Based on these findings and relying on *Specht*, the court found that "[n]o reasonable user would have reason to click on the Terms of Use," and the link is "inconspicuous, buried in the middle to bottom of every Zappos.com webpage." *Id.* Therefore, once again, another court relied on the *Specht* reasoning to find a lack of constructive knowledge of an online retailer's browse-wrap agreement.

⁸⁶ 763 F.3d 1171 (9th Cir. 2014).

⁸⁷ *Id.* at 1173.

⁸⁸ *Id.* at 1174.

⁸⁹ *Id.* at 1177.

⁹⁰ *Id.* at 1179.

⁹¹ *Id.*

Although a series of cases⁹² involving the enforceability of browse-wrap agreements containing arbitration provisions have relied upon *Specht*, those courts have failed to explore the psychological reasoning behind *Specht*. In understanding why courts should adopt *Specht*'s reasoning as a rule of law⁹³ to eliminate inconsistent results of what constitutes constructive knowledge of a browse-wrap agreement's terms, courts cannot underestimate the importance of the human psyche. *Specht* ought to be applied to all online retailing cases that question the enforceability of browse-wrap agreements precisely because psychological studies support its holding.

V. WHY STATES SHOULD RELY ON *SPECHT* FOR GUIDANCE: A
PSYCHOLOGICAL ANALYSIS⁹⁴

A. *The Power of the Impulse Buy*

Cases adopting the reasoning in *Specht*, as well as psychological studies involving online shoppers, both discuss that online shoppers usually would not scroll past enticing items for sale in order to find a hyperlink containing an online retailer's browse-wrap agreement. A majority of purchases made by today's consumers, approximately seventy-five to eighty percent, are categorized as impulse buys.⁹⁵ These

⁹² *Specht* was the first of a string of both state and federal cases addressing the enforceability of browse-wrap agreements in consumer transactions. A preliminary draft of the Restatement of the Law Consumer Contracts claims that "out of a total of 27 cases starting with *Specht* in 2002 and ending with *Nguyen v. Barnes & Nobles* . . . courts enforced browsewraps in all eight cases where the website included both a prominent statement of notice and conspicuous, accessible hyperlinks to the terms." RESTATEMENT OF CONTRACTS § 2 (AM. LAW. INST. Proposed Draft No. 1, 2014) (internal citation omitted). Furthermore, "in all 14 cases where the website lacked both a prominent statement of notice and conspicuous hyperlinks to the terms, courts reused enforcement of the browsewrap for failure to provide sufficient notice." *Id.*

⁹³ Since the idea of assent, which is shown by either actual or constructive knowledge, is an issue of state contract law, this Comment suggests that the highest state courts look toward *Specht* and adopt its reasoning and the reasoning that this Comment emphasizes. If state legislatures want to pass legislation regarding their states' contract laws, these legislative bodies should also consider the reasoning of *Specht* and this Comment for online retailers.

⁹⁴ The field of psychology and psychological studies have important implications when dealing with law and determining the practicality of certain applications of the law. *McMullen v. State*, 714 So. 2d 368, 379 n.15 (Fla. 1998) (noting the "establishment of the scientific respectability of psychology and its use and effect on the law").

⁹⁵ See Pranjali Gupta, *Shopping Impulses, Online vs. Off*, N.Y. TIMES (Dec. 2, 2011, 8:18 AM), <http://www.nytimes.com/roomfordebate/2011/12/01/save-america-shop-at-work/shopping-impulses-online-vs-off> (finding impulse buying increasingly common and resulting in up to two-thirds of all purchases); see also Veronika Svatošová, *Motivation of Online Buyer Behavior*, J. COMPETITIVENESS, Sept. 2013, at 14, 21, <http://www.cjournal.cz/files/141.pdf> ("Experience and global [research] show that

impulse buys occur frequently and cost consumers large sums of money.⁹⁶ An impulse buy occurs when a consumer has a sudden urge to buy something and acts upon that urge.⁹⁷ Although not all online shoppers visit websites with the intent to make a purchase,⁹⁸ many of these consumers ultimately give in to these impulses because of strategies implemented by many online retailers.⁹⁹ Online retailers will place popular or sale items on their homepages in hopes of encouraging online browsers to give in to the powerful urge of the impulse buy. Customers will simply click on a strategically placed item on a retailer's website and proceed to checkout without any need of further exploring the retailer's site.

Traditional brick-and-mortar stores are notorious for triggering impulse sales by using techniques such as strategically placing low-priced items close to checkout stations. As online shopping increased in popularity,¹⁰⁰ online retailers quickly learned how to replicate the

only 20% of all purchases are planned, the remaining 80% are impulsive, based on emotions.”); Brad Tuttle, *Millennials Are Biggest Suckers for Selfish Impulse Buys*, TIME (Apr. 27, 2012), <http://business.time.com/2012/04/27/millennials-are-biggest-suckers-for-selfish-impulse-buys/> (citing finding by brand-research firm, the Integer Group, which notes that Millennials, or those born between 1980 and 1995, are the most likely to engage in impulse buying).

⁹⁶ According to a study conducted by Npower, an organization specializing in technological services, the average consumer spends approximately \$114,293 in his lifetime on impulse buys. The most common items that a consumer buys impulsively include: “food, clothing, magazines, wine, books, DVDs, shoes, trips, beer, . . . toiletries, home furnishings, music, clothes for the kids, jewelry, accessories, gadgets, garden accessories, flowers, toys, and day trips.” Megan Pacheco, *Is Impulse Buying Destroying Your Finances?*, MVELOPES (Sept. 3, 2013, 2:42 AM), <http://www.mvelopes.com/is-impulse-buying-destroying-your-finances/>.

⁹⁷ John LaCour, *How Proper Marketing Tactics Can Attract More Impulse Buyers*, DMN3 BLOG (Aug. 8, 2013), <http://www.dmn3.com/dmn3-blog/how-proper-marketing-tactics-can-attract-more-impulse-buyers/> (“Impulse buying is an unplanned, spur-of-the-moment action/behavior.”).

⁹⁸ For example, an individual may visit different webpages to compare prices for a particular item. See Jiafeng Li, *Study: Online Shopping Behavior in the Digital Era*, IACQUIRE BLOG (May 10, 2013), <http://www.iacquire.com/blog/study-online-shopping-behavior-in-the-digital-era/> (“[Thirty-nine percent] of online shoppers strongly agree that ‘for relatively expensive items, I’ll shop at different stores to make certain I get the best price.’”).

⁹⁹ See *infra* Part V.B.

¹⁰⁰ See Li, *supra* note 98 (“According to Forrester Research, the online retail sales volume for the US 2012 is \$231 billion. This figure is predicted to grow continually to \$370 billion in 2017. Forrester also reports that 53% of people in the US shopped online in 2011 and it is predicted to grow to 58% in 2016”); Tongxiao (Catherine) Zhang et al., *The Value of IT-Enabled Retailer Learning: Personalized Product Recommendations and Customer Store Loyalty in Electronic Markets*, MIS QUARTERLY, Dec. 2011, at 859, 860 (noting that according to Census Bureau of the Department of Commerce (2008), e-commerce sales in 2007 increased by nineteen percent from 2006 to equal \$136.4 billion).

techniques used in brick-and-mortar stores by placing particular items on homepages or on the screen displayed right before online checkout. The phenomenon of impulse buying in brick-and-mortar stores has quickly made its way to the online shopping industry due to present-day technological advances, especially online recommendation systems discussed *infra*.¹⁰¹

The concept of online impulse buying is not the only reason to support the *Specht* court's finding of no constructive notice and, therefore, no constructive knowledge. "Eye tracking" studies show that online consumers generally have a tendency to pay very little attention to the bottom of a retailer's webpage.¹⁰² Such studies use either remote or head-mounted monitoring devices to record eye movement of a website's viewers.¹⁰³ The eye-tracking devices then compile the results to show researchers where online viewers looked and for how long.¹⁰⁴ Many of these eye-tracking studies performed for online retailers support the *Specht* court's finding that online consumers are not on constructive notice of a given provision housed at the very bottom of a webpage. These studies show that an online consumer's attention trails off as the consumer begins to scroll down a webpage. According to these studies, web users spend eighty percent of their viewing time "above the fold," meaning the area of the webpage visible to viewers without scrolling.¹⁰⁵ Even if the online consumer does scroll "past the fold," he gives this area of the website only one-fourth of the attention he gave to the area "above the fold."¹⁰⁶ Most browse-wrap agreements

¹⁰¹ See Dhanila Veena Parboteeah, A Model of Online Impulse Buying: An Empirical Study (Aug. 2005) (unpublished Ph.D dissertation, Washington State University) (on file with the Washington State University Department of Information Systems).

¹⁰² Many marketing giants, including Nielson Norman Group, utilize these studies in order to see exactly where online users look when viewing webpages. Many online retailers can hire these marketing companies to learn their customers' propensities. Based on these studies, online retailers can place important notices or attractive items in areas with the highest visual traffic. See KARA PERNICE & JAKOB NIELSON, NIELSON NORMAN GRP., HOW TO CONDUCT EYETRACKING STUDIES (2014), <http://www.nngroup.com/reports/how-to-conduct-eyetracking-studies/>.

¹⁰³ See *About Us: What is Eyetracking?*, EYETRACKING, <http://www.eyetracking.com/About-Us/What-Is-Eye-Tracking> (last visited Dec. 18, 2015).

¹⁰⁴ *Id.*

¹⁰⁵ *How People Read on the Web*, CENTER FOR PARENT INFO. AND RES. (Aug. 2012), <http://www.parentcenterhub.org/repository/web-reading/>. See also Neil Patel, 8 *Powerful Takeaways from Eye Tracking Studies*, QUICKSPROUT BLOG (Apr. 16, 2014), <http://www.quicksprout.com/2014/04/16/8-powerful-takeaways-from-eye-tracking-studies/>; Jaan M. Sonberg, 19 *Things We Can Learn From Numerous Heatmap Tests*, CONVERSIONXL BLOG (Jan. 3, 2013), <http://conversionxl.com/19-things-we-can-learn-from-numerous-heatmap-tests/#>.

¹⁰⁶ CENTER FOR PARENT INFO. AND RES., *supra* note 105.

will be housed “below the fold” in hidden hyperlinks where consumers’ attention spans wane.¹⁰⁷ These eye-tracking studies and other psychological studies regarding impulse buying reveal that online consumers will rarely view the bottom of an online retailer’s webpage, thus supporting the *Specht* court’s finding of no constructive notice.

B. *Online Recommendation Systems Increase the Likelihood of Impulse Buys*

Although impulse buys occur online without the use of product recommendation systems (PRSs),¹⁰⁸ the likelihood of an impulse buy occurring increases exponentially when online retailers use such systems.¹⁰⁹ The increase of impulse buys from the use of online PRSs comes from the fact that, as the ease of buying increases, so too does the likelihood of an impulse buy.¹¹⁰ An online retailer can now use technology to its advantage by highlighting an item in which the consumer has shown an interest, thereby creating an easier buying situation for that consumer; the consumer only needs to click to purchase an item rather than navigate through a retailer’s website.¹¹¹

These recommendation systems work by studying saved and aggregated historical data of an individual consumer based on his

¹⁰⁷ In a personal study conducted for the purpose of this Comment, the websites of the top 2014 retailers reported by the National Retail Federation (www.nfr.com) were analyzed. With retailers in the categories of “Leading Department Stores,” “Mass Merchants,” “Apparel Merchants,” and “Sporting Goods Merchants,” each and every leading retailer analyzed in these various categories had browse-wrap agreements housed at the very bottom of their webpages. Furthermore, these browse-wraps were not visible without scrolling to the bottom of the webpage.

¹⁰⁸ For example, Wal-Mart and Target have offered “deals of the day” to entice online shoppers into impulse purchases. With these deals offered as soon as an online shopper enters the website, this entices the customer to click the item and immediately add it to his virtual shopping cart. The online retailers do not show these items to particular shoppers because of data collected pertaining to their prior purchase or browsing histories, but these are simply daily deals analogous to the sale items many brick-and-mortar stores place close to the registers. Krystina Gustafson, *The Holy Grail of Online: Getting You To Spend More*, CNBC (Mar. 6, 2014, 11:03 AM), <http://www.cnbc.com/id/101461802>.

¹⁰⁹ Gupta, *supra* note 95 (noting that these “various online product suggestion tools . . . may create more impulse sales”); see Wen-Yu Tsao, *The Fitness of Product Information: Evidence From Online Recommendations*, INT’L J. INFO. MGMT. Feb. 2013, at 1, 1 (noting that one main reason for online retailers to use these recommendation systems is to influence a customer’s purchasing behavior, essentially trying to cause impulse buys).

¹¹⁰ Parboteeah, *supra* note 101, at 39 (noting the “positive relationship between the ease of buying and impulse buying”).

¹¹¹ See *id.* at 40 (“Personalization is another aspect of a website that enhances online purchasing, whereby each visitor is considered as an individual and the website content is tailored to the needs and preferences of the individual.”).

prior activity on the retailer's website, including prior purchases and previously viewed products.¹¹² These systems then employ algorithms using this collected data to determine an individual's potential interests by comparing his prior activity to other visitors of the retail website with similar tastes.¹¹³ The product recommendations appear on a shopper's sidebars or anywhere else in plain view for the consumer. Some online retailers, such as Pottery Barn, take these recommendation systems one step further by e-mailing recommendations to consumers.¹¹⁴ By simply clicking on the e-mailed image of the product sent to him by the online retailer, the consumer will be directed to the retailer's webpage where he can immediately purchase that item.¹¹⁵ PRSs are just one of the many different personalization tools used by online retailers to increase the likelihood of impulse buys.¹¹⁶

Many online retailers, including SkyMall,¹¹⁷ Bluefly,¹¹⁸ and eBay,¹¹⁹ followed the pioneer of recommendation systems, Amazon,¹²⁰ to make recommendation systems "quietly ubiquitous" by 2010.¹²¹ As the use of recommendation systems increased, so too did online retailers' sales. In 2012, Amazon reported that a twenty-nine percent sales increase during its second fiscal quarter could be attributed to the company's use of recommendation systems that prompt consumers to make

¹¹² See Daniel Baier & Eva Stüber, *Acceptance of Recommendations To Buy in Online Retailing*, J. RETAILING & CONSUMER SERVS., May 2010, at 173, 174 ("Recommender systems use the consumer's saved and aggregated historical data to provide recommendations; they register the latest navigation and consumer behavior and consider additional information, or rather, they generate various combinations from suitable data sources.").

¹¹³ See Susan Gregory Thomas, *Getting to Know You.com*, EBSCOHOST (Nov. 15, 1999), <http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=2447180&site=ehost-live&scope=site>.

¹¹⁴ Gustafson, *supra* note 108 ("Stores like Pottery Barn send recommendations based on past purchases and encourage shoppers to pull the trigger on abandoned digital shopping carts.").

¹¹⁵ See *id.*

¹¹⁶ Within the broad category of product recommendation systems, there are different types of recommendation systems. One of the more popular systems, for example, is collaborate filtering. Collaborate filtering "works on the principle that the behavior of a lot of people can be used to make educated guesses about the behavior of a single individual." Thomas, *supra* note 113.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Tsao, *supra* note 109.

¹²⁰ See Baier & Stüber, *supra* note 112; see also Lev Grossman, *How Computers Know What We Want—Before We Do*, TIME (May 27, 2010), <http://content.time.com/time/magazine/article/0,9171,1992403,00.html>.

¹²¹ Grossman, *supra* note 120.

purchases they did not originally intend to make.¹²²

Now, online retailers can not only place popular items in front of their visitors, but can also make sure those items have a high likelihood of being purchased by a given visitor.¹²³ Due to the natural human tendency to impulse buy and the increased use of PRSs, an online retailer's display of products for an online consumer to click and purchase is equally as enticing as the "Download" button in *Specht*. Both the "Download" button and the online products encourage website viewers to immediately click without scrolling further. By clicking in both situations, the online user enters into a browse-wrap agreement, most likely including a mandatory arbitration provision, without having any reason to scroll down to the bottom of the webpage.¹²⁴ As a rule of law, courts ought to find constructive knowledge lacking in these situations. Adopting the Second Circuit's reasoning in *Specht*, there is logically no constructive knowledge because no reasonable online consumer would scroll past enticing items for sale in order to find a hyperlink hidden at the bottom of a webpage that contained the browse-wrap agreement.

¹²² JP Mangalindan, *Amazon's Recommendation Secret*, FORTUNE (July 30, 2012, 11:09 AM), <http://fortune.com/2012/07/30/amazons-recommendation-secret/> ("The company reported a 29% sales increase to \$12.83 billion during its second fiscal quarter, up from \$9.9 billion during the same time last year. A lot of that growth arguably has to do with the way Amazon has integrated recommendations into nearly every part of the purchasing process from product discovery to checkout.").

¹²³ See Sylvain Senecal & Jacques Nantel, *The Influence of Online Product Recommendations on Consumers' Online Choices*, J. RETAILING, Aug. 2004, at 159, 166 (noting an empirical study showing that consumers exposed to product recommendations were more likely to make a purchase than those who were not so exposed, concluding that "online product recommendations greatly influenced subjects' product choices"); Zhang et al., *supra* note 100, at 861 ("Personalization technologies enable a retailer to leverage customers' previous buying habits and customer profile information to make automatic decisions about what data to display to the user and how to display it.").

¹²⁴ Clicking on a product while online shopping merely places the item in a virtual shopping cart. In completing the purchase, however, the online consumer again clicks an enticing "Checkout" button without having to scroll down to the bottom of a webpage to find the hyperlink housing the browse-wrap. This "Checkout" button becomes analogous to the "Download" button in *Specht*. In a study conducted for purposes of this Comment, using the top retailers of 2014 listed by the National Retail Federation, out of the same group of retailers studied for purposes of *supra* note 107, no online retailer mentioned its terms and conditions (housing the browse-wrap agreements) in an area above the "Checkout" button.

VI. SUGGESTIONS FOR ONLINE RETAILERS

The need to create rules of law to determine what constitutes constructive knowledge of browse-wrap agreements, especially those including arbitration provisions, has never been more important. First, online shopping has steadily increased over time and sales have been projected to reach \$370 billion by 2017.¹²⁵ Second, the use of arbitration provisions within these browse-wrap agreements by online retailers has also increased,¹²⁶ leaving naïve consumers to experience the disadvantages of mandatory arbitration.¹²⁷ Although online retailers' browse-wrap agreements contain many provisions other than arbitration provisions, the prevalence of arbitration provisions and the negative consequences associated with taking a consumer's claim out of the court system necessitate prompt action by the courts.

This Comment first suggests a rule of law declaring browse-wrap agreements housed within hyperlinks at the bottom of online retailers' webpages, below enticing products for consumers to click, unenforceable. The reasonable online consumer, triggered by a compulsion to impulse buy, would fail to scroll to the bottom of the webpage to put himself on notice. Next, this Comment makes suggestions for online retailers to render their browse-wrap agreements enforceable. These suggestions consider both an online retailer's desire to make sales without scaring off potential consumers with click-wrap agreements and the importance of providing customers with sufficient constructive knowledge.

Other legal scholars have made different suggestions regarding how courts should treat browse-wrap agreements.¹²⁸ With legal scholars making different suggestions and without clear guidance from state supreme courts, attorneys remain baffled over how to advise clients on this topic.¹²⁹ The most common suggestions from legal scholars encompass two extreme and opposite approaches: (1) courts should enforce only click-wrap agreements;¹³⁰ or (2) courts should enforce all

¹²⁵ See *supra* note 100 and accompanying text.

¹²⁶ See *supra* note 72 and accompanying text.

¹²⁷ See *supra* Part II.A.

¹²⁸ See, e.g., Robertson, *supra* note 76, at 265; Streeter, *supra* note 24, at 1363.

¹²⁹ Christina L. Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279, 288 (2003) ("The shortfall in the browse-wrap case law and the lack of consensus among scholars has left attorneys in a quandary as to how to advise clients who want to rely upon—or already are relying upon—browse-wrap agreements to contractually bind the users of their Web sites or software, or clients who need to know whether they are bound by the terms of a Web site they may have viewed.").

¹³⁰ See Robertson, *supra* note 76, at 267 (insisting that courts "enforce online

browse-wrap agreements, even if hidden at the bottom of a webpage.¹³¹ When applied to the online retailing industry, these two approaches have flaws that can only be ameliorated by a middle-ground approach.

If online retailers relied only on click-wrap agreements, where consumers need to affirmatively check a box or click an “I Agree” button prior to entering a retailer’s webpage, consumers would likely become frustrated. Even if this simple affirmative act takes merely seconds to perform, consumers could become weary of an online retailer’s policies if the retailer used a click-wrap agreement. Click-wrap agreements, an unorthodox contracting method for online retailers,¹³² could possibly lead consumers to take their business elsewhere (perhaps to an online retailer incorporated in a state without a law requiring click-wrap agreements or even to a traditional brick-and-mortar store). Click-wrap agreements can create a lack of trust between the consumer and the online retailer, and a lack of trust negatively affects online sales revenue.¹³³ By studying over thirty of 2014’s top online retailers as reported by the National Retail Federation, none of the online retailers used click-wrap contracts but they all used browse-wrap contracts.¹³⁴ Wanting to conform to these industry norms, many online retailers surely would prefer browse-wrap agreements to click-wrap agreements and would perhaps even lobby against any state law requiring the use of click-wrap agreements.¹³⁵

Similarly, an approach finding all browse-wrap agreements enforceable would be easier to apply than a middle-ground approach, but would be unjust for online consumers. As suggested throughout this Comment, a browse-wrap agreement hidden at the bottom of a retailer’s webpage does not put a reasonable consumer on notice of the agreement’s terms. While online retailers would push for

contracts only where users have adequate notice of the terms and conditions and affirmatively agree to be bound by such terms”).

¹³¹ See Streeter, *supra* note 24, at 1389 (“The distinction between browse-wrap and other types of licenses is illogical, unnecessary, and potentially detrimental to the future development of Internet commerce.”).

¹³² See *supra* note 107.

¹³³ See Chih-Chien Wang et al., *The Impact of Knowledge and Trust on E-Consumers’ Online Shopping Activities: An Empirical Study*, J. COMPUTERS, Jan. 2009, at 11, 16 (“The results of this empirical study revealed that trust in online shopping is positively associated with online shopping activities.”).

¹³⁴ See *supra* note 107.

¹³⁵ Even if a state law required all of its online retailers to use click-wrap agreements, online consumers may still be angry. Such a law in one particular state would not prevent online retailers incorporated in *other* states from using browse-wrap agreements. Such a scenario would put online retailers in the state forbidding browse-wrap agreements at a supposed disadvantage over other online retailers.

legislation implementing this theory, many consumers would be troubled by such an act.

Both online retailers and consumers would support a middle-ground approach, and as a result, it must be implemented. State legislatures and courts must also comply with the FAA,¹³⁶ as well as the Uniform Commercial Code (U.C.C.),¹³⁷ in determining an approach for dealing with online browse-wrap agreements containing arbitration provisions. All states except Louisiana¹³⁸ have adopted the U.C.C., including Article 2, which governs the sale of “goods.”¹³⁹ Although individual states have adopted the U.C.C. with variations made by their state legislatures, these variations are minor, and “the similarities of all states’ U.C.C.[.] provisions . . . far outweigh the differences.”¹⁴⁰ Since online retailers sell movable goods, among other things, the U.C.C. would apply to such transactions. States must be sure to abide by the provisions of the U.C.C. when considering rules of law pertaining to online retailers’ browse-wrap agreements.¹⁴¹

The middle-ground approach this Comment suggests recommends two techniques online retailers can implement so that courts find constructive knowledge and therefore enforce the retailers’ browse-wrap agreements. First, online retailers could place their “Terms and Conditions” hyperlink across the top of their websites rather than at the very bottom. Online consumers read from top to bottom, so following the website’s homepage from top to bottom, the reasonable customer would presumably come across this hyperlink before being persuaded to click on and purchase the enticing items for sale.¹⁴² This recommendation avoids the problems noted in *Specht*

¹³⁶ All state laws must still comply with the FAA since the Supreme Court has found that the FAA trumps state law. If these browse-wrap agreements contain arbitration provisions, which many do, then states must make sure to comply with both the FAA and the Supreme Court’s interpretation of the statute over the years. *See supra* Part III.

¹³⁷ U.C.C. (2015).

¹³⁸ THOMPSON PUBL’G GRP., NATURAL GAS CONTRACTS ¶ 401.003 (1996) (“The Uniform Commercial Code Article 2 (‘UCC’) deals with every aspect of sales of ‘goods’ The UCC has been adopted in every state but Louisiana, and the UCC is indeed uniform, with the exception of some changes in individual states. The similarities of all states’ UCC provisions, however, far outweigh the differences.”).

¹³⁹ The U.C.C. Article 2 applies to the sale of “movable” goods. U.C.C. § 2-105(1). Clearly, online retailers sell goods to online consumers that fit this description.

¹⁴⁰ THOMPSON PUBL’G GRP., *supra* note 138.

¹⁴¹ *See supra* text accompanying note 139.

¹⁴² Studies have shown that an individual’s tendency to read from top to bottom varies depending on the mode in which a given document is presented to the reader. The study showed that for online reading, as opposed to face-to-face reading, readers were more likely to read from top to bottom. Olena Kaminska & Tom Foulsham, *Real-world Eye-tracking in Face-to-face, Web and SAQ Modes*, ISER WORKING PAPER SERIES, June

and highlighted through the psychological and eye-tracking studies of this Comment, which found that no reasonable consumer would scroll past enticing items in order to find the hyperlink at the bottom of a webpage. Under this technique, there is no scrolling required to see the hyperlink containing the browse-wrap agreement, and, because reasonable consumers read from top to bottom, they would have an opportunity to see the hyperlink prior to both placing the item within their shopping carts and checking out.

The second recommendation of this middle-ground approach suggests that retailers place the hyperlinks to these agreements *above* the “Complete Purchase” button on their webpages.¹⁴³ Again, keeping in mind a consumer’s tendency to read from top to bottom,¹⁴⁴ having this hyperlink above the enticing “Complete Purchase” button would put a reasonable online consumer on notice and therefore constitutes constructive knowledge of the agreement’s terms prior to purchasing an item.¹⁴⁵

These two suggestions not only consider the reasoning of the *Specht* court and the psychological analysis of online consumers explored in this Comment, but also take into consideration the statutory requirements of the FAA and the U.C.C. First, many of these browse-wrap agreements contain arbitration provisions¹⁴⁶ and therefore must comply with the FAA since this Act trumps all state laws

2013, at 1, 11, <https://www.iser.essex.ac.uk/research/publications/working-papers/iser/2013-07.pdf> (“The reading order of response options varies much across modes: sequential reading of response options was found dominant in SAQ mode followed by web mode, and rather uncommon in face-to-face mode.”).

¹⁴³ This second suggestion implements the reasoning from *Specht* as well as the cases following *Specht*. Under this reasoning, the consumer has a reasonable opportunity to see the hyperlink above an enticing button to click rather than having to scroll past such an enticing button to find the hyperlink containing the browse-wrap agreement.

¹⁴⁴ Karminska & Foulsham, *supra* note 142, at “Non-technical summary” (“But reading response options in order [from top to bottom] is more common in web and paper and pencil modes than in face-to-face.”).

¹⁴⁵ This second suggestion is very similar to what happened in *Fleja v. Facebook, Inc.*, 841 F. Supp. 2d 829 (S.D.N.Y. 2012). In *Fleja*, the court enforced a browse-wrap agreement because right underneath the “Sign Up” button to create the account, it clearly stated: “By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service.” *Id.* at 835, 841. The only difference that this Comment suggests for online retailers is to place the hyperlink *above* instead of *below* the enticing button that prompts a consumer to click. This recommendation stems from the psychological findings discussed within this Comment regarding an online shopper’s eagerness to click in order to complete an impulse buy. See *supra* Part V.

¹⁴⁶ *Allstar Homes v. Waters*, 711 So. 2d 924, 933 (Ala. 1997) (Cook, J., concurring) (“The reality is that contracts containing [arbitration] provisions appear with increasing frequency in today’s marketplace.”).

regarding arbitration provisions.¹⁴⁷ The recommendations of this middle-ground approach do not: (1) outright prohibit arbitration; (2) require unequal treatment of arbitration provisions, thus creating hostility towards them; or (3) conflict with the FAA's purpose.¹⁴⁸ Under these three circumstances, the Supreme Court has found state laws unenforceable, but because the two recommendations of this Comment do not violate these three requirements, the FAA should not trump state laws adopting these two suggested approaches.

The recommendations of this middle-ground approach must also comply with Article 2 of the U.C.C. because online retailers often sell movable goods. For online retailers to be sure that a court does not find its hyperlinks containing the terms of a browse-wrap agreement unenforceable under the U.C.C., these retailers may also want to make sure their hyperlinks are conspicuous if the agreements themselves contain any disclaimers of warranty.¹⁴⁹ Although the U.C.C. does not explicitly require this, online retailers should take the extra precaution. "Conspicuous" has been defined as something "so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it."¹⁵⁰ This definition, however, still leaves ambiguity for individual courts to decide what exactly constitutes conspicuousness in a particular situation.¹⁵¹ In order to be safe, online retailers ought to have the hyperlinks to agreements containing disclaimers of warranty (regardless of a hyperlink's placement on a retailer's webpage), and not just the disclaimers found within the terms of the agreements, underlined and in blue capital letters to indicate the presence of a hyperlink.¹⁵²

¹⁴⁷ See generally *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

¹⁴⁸ See *Sura & DeRise*, *supra* note 60.

¹⁴⁹ Section 2-316 of the U.C.C. provides that in order for a retailer to disclaim any implied warranties for the goods sold under a given contract, such a disclaimer must be "conspicuous." These browse-wrap agreements may contain disclaimers but even if they do not, being conspicuous would be a good protective measure that online retailers can take in order to make sure that under the FAA, as well as the U.C.C., courts will enforce their browse-wrap agreements' terms. See U.C.C. § 2-316 (2015); see also RESTATEMENT OF CONTRACTS, *supra* note 92, § 5.

¹⁵⁰ U.C.C. §1-201(b)(10).

¹⁵¹ *Id.*

¹⁵² See Gemma Fitzsimmons et al., *On Measuring the Impact of Hyperlinks on Reading*, UNIVERSITY OF SOUTHAMPTON (2013), http://www.gemmafitzsimmons.com/wp-content/uploads/2013/05/On_Measuring_the_Impact_of_Hyperlinks_on_Reading_2013.pdf ("Displaying hyperlinks in blue has become part of the online culture and most people would [recognize] a blue word on a Web page as a hyperlink.").

VII. CONCLUSION

The Second Circuit in *Specht* found that because no reasonable user of Netscape's website would scroll past an enticing "Download" button to find the hyperlink containing Netscape's browse-wrap agreement, the online downloader lacked constructive knowledge of the agreement's terms. As a result, the Second Circuit did not enforce the browse-wrap agreement, including its arbitration provision. With both actual and constructive knowledge lacking, the court held that the parties did not assent to the terms. Notwithstanding the FAA and its strong support by the Supreme Court, arbitration provisions cannot be enforced without such assent.

Psychological studies regarding the predominance of impulse buys by online shoppers in recent years and new technological advances that further encourage impulse buys support the conclusion that the *Specht* court's decision should be applied to all online retailer browse-wrap agreement cases. Due to the analogous nature between an individual enticed to click a "Download" button in *Specht* and an online shopper's impulse to click on a desired item to make a purchase without scrolling any further down a webpage, states should adopt the reasoning in *Specht* for all online retailers' browse-wrap agreements. To prevent courts from finding a retailer's browse-wrap agreement unenforceable due to a lack of constructive knowledge, this Comment recommends that online retailers either place the hyperlink containing the browse-wrap agreement at the top of their webpages or above their "Complete Purchase" buttons.

Although this Comment makes suggestions for state legislatures and/or the highest courts of the states to adopt when dealing with constructive knowledge of browse-wrap agreements, the recommendations of this Comment are intended to apply only to online retailers.¹⁵⁵ The suggestions in this Comment, however, are not limited to only online retailers' browse-wrap agreements containing arbitration provisions. Arbitration provisions, however, have become increasingly popular, and most disagreements regarding browse-wrap agreements revolve around one party wishing to find an arbitration provision within the agreement unenforceable.¹⁵⁶ As a result of the

¹⁵⁵ Major reasons why this Comment focuses on online retailing websites are: (1) because these websites are the most analogous to *Specht*; and (2) online shopping has increased drastically over the past decade, contributing to the necessity of uniformity in court decisions regarding the enforceability of these online agreements. See Banjo & Fitzgerald, *supra* note 1.

¹⁵⁶ See, e.g., *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 (9th Cir. 2014); *Hines v. Overstock.com, Inc.*, 380 F. App'x 22 (2d Cir. 2010); *In re Zappos.com, Inc.*, 893 F. Supp. 2d 1058 (D. Nev. 2012).

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increased need for guidance in this area of law, this Comment focuses on browse-wrap agreements containing arbitration agreements in particular, but its analysis applies equally to online retailers' browse-wrap agreements without such provisions. If states adopt the suggestions of this Comment when dealing with online retailers' browse-wrap agreements, decisions within given jurisdictions will yield consistent, uniform results.