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Online Shopping: Buy One Lose Legal Rights for Free
Laura Cicirelli*

I. Introduction

The Internet allows consumers to purchase their favorite 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 and the issues these contracts present to online consumers.² Although consumers obtain goods or electronic information, such as music downloads or digital applications, from online purchases, they also lose certain legal rights by entering into retailers' online agreements.³ State contract law governs online contracting⁴ and requires assent between the online retailer and the online consumer regarding the agreement's terms.⁵ Showing assent to these terms and conditions can be difficult for online retailers who have the burden of proof in showing that the consumer had actual or constructive knowledge of the terms.⁶

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

² See Advising e Bus. § 8:2 (2013) ("The Internet has not changed the basic needs for a contract—it has simply raised new issues as to when those requirements are met.").

³ See, e.g., Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55, 55 (2004) (discussing the potential loss of one's right to trial by jury through arbitration agreements).

⁴ See *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 36 (1988) (Scalia, J., dissenting) ("Issues of contract . . . are nearly always governed by state law.").

⁵ *Van Tasell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 789 (N.D. Ill. 2011).

⁶ 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 see if constructive notice can be found. 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. *Id.* 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."); *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

The United States Constitution,⁷ as well as many state constitutions,⁸ preserves the right to a civil jury trial unless properly waived. As court dockets have become increasingly populated, mandatory arbitration provisions and other alternative dispute resolution techniques have eased the docket caseload.⁹ The Supreme Court has persistently upheld the enforceability of such provisions through its broad interpretation of the Federal Arbitration Act (FAA).¹⁰ As a result, many online retailers now contain arbitration provisions in their online agreements because of the benefits they supply online retailers.¹¹ Despite the Supreme Court's strong stance regarding the enforceability of such provisions,¹² these provisions will not be enforced without actual or constructive knowledge of the agreement's terms.¹³ This has led many courts to consider the presence of actual or constructive knowledge in online contracting cases, especially in the online retailing context.¹⁴

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

browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract.”).

⁷ U.S. CONST. amend. VII.

⁸ *See, e.g.*, ALA. CONST. art. I, §11; N.J. CONST. art. I, §9; CONN. CONST. art. I, §19.

⁹ *See* Mary Dunnewold, *What Every Law Student Should Know*, STUDENT LAWYER vol. 38 (2009), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/what_every_law_student_should_know.authcheckdam.pdf.

¹⁰ 9 U.S.C. §§1–16 (1925).

¹¹ *See* Demaine & Hensler, *supra* note 3.

¹² *See, e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (stating that in a contract between an Alabama contracting corporation and a hospital, “any 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”); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (finding the FAA trumps conflicting state law); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (finding the FAA trumps even state laws aimed at protecting consumers from unconscionable class action waivers).

¹³ *Van Tasell 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.”).

¹⁴ *See, e.g.*, *Hines v. Overstock.com, Inc.*, 380 F. App'x 22 (2d Cir. 2010); *In re Zappos.com, Inc., Customer Data Sec. Breach Litig.*, 893 F. Supp. 2d 1058 (D. Nev. 2012); *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 (9th Cir. 2014).

Specht v. Netscape Communications Corporation,¹⁵ the leading case addressing browse-wrap agreements, and taking into account empirical data on the tendencies of online consumers,¹⁶ courts can create bright-line rules articulating the circumstances where constructive knowledge of an online retailer's browse-wrap agreement exists even when actual knowledge does not.¹⁷ This Comment suggests rules that state legislatures and/or states' highest courts can adopt in order 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 all terms of such agreements, it may have special resonance for agreements containing arbitration provisions; the increasing use of such provisions and their negative effects on the naïve online consumer make it a pertinent topic for this Comment. Part II of this Comment 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 introduces *Specht v. Netscape* and its reasoning for finding particular browse-wrap agreements unenforceable. 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 condition, and Part VII concludes.

II. Online Contracting

Arbitration provisions now appear not only in written contracts but also in online contracts. To fully understand such a transition, one needs to understand the different forms of online contracting. This section will briefly introduce online contracting and its two main forms:

¹⁵ 306 F.3d 17 (2nd Cir. 2002).

¹⁶ 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”).

¹⁷ Without these bright-line rules of law, this leaves the determination of constructive knowledge of browse-wrap agreements on online retailers' webpages to be determined by the individual opinions of various judges, resulting in inconsistent results.

click-wrap and browse-wrap contracts. Although this Comment focuses only on browse-wrap contracts, it explains click-wrap contracts for comparison purposes.

i. Click-Wrap and Browse-Wrap Contracts

Click-wrap contracts and browse-wrap contracts differ in the way a contracting party accepts the contract's terms. Click-wrap agreements 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.¹⁸ Conversely, browse-wrap agreements do not require any affirmative conduct by the online consumer to show acknowledgement of the agreement's terms and conditions. Instead, a consumer's use of the retailer's website and/or subsequent purchases from the website are claimed to constitute the consumer's acceptance of the agreement's terms.¹⁹ The terms of the browse-wrap agreement, usually available through hyperlinks labeled "Terms of Use" or "Terms and Conditions,"²⁰ often appear at the bottom of the first and perhaps subsequent pages of the retailer's website.²¹

i. 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 courts, the principles of contract law

¹⁸ 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, 96 (2008).

¹⁹ 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.*, 2007 WL 4823761, at *4 (N.D. Tex. Sept. 12, 2007)).

²⁰ See, e.g., *EBAY*, *infra* note 75; *DELL*, *infra* note 75.

²¹ *Fteja v. Facebook, Inc.*, 841 F. Supp.2d 829, 836 (S.D.N.Y. 2012) ("[W]ebsite terms and conditions of use are posted on the website typically as a hyperlink at the bottom of the screen.") (quoting *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009)).

still apply to online contracts.²² Under contract law, a valid contract requires a finding of mutual assent between the parties to enter into such a contract.²³ State contract law controls the inquiry into proper assent.²⁴ Courts assume assent to the terms of a given online agreement when they find proper notice to the online customer of the agreement's terms.²⁵ The party wishing to enforce the arbitration agreement, or any other provisions housed within a given online contract, must show proper notice by either (1) actual knowledge of these terms and conditions by the online consumer or (2) constructive knowledge of the terms by the consumer.²⁶ By requiring either actual knowledge 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.²⁷

Courts have been more willing to uniformly enforce arbitration provisions contained in click-wrap agreements as opposed to those contained in browse-wrap agreements.²⁸ This difference 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

²² 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.”) (internal quotations and citation omitted).

²³ See *id.* (noting that there must be mutual assent for contracts on the Internet); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (“[T]he FAA does not require parties to arbitrate when they have not agreed to do so.”).

²⁴ See *Van Tassell*, 795 F. Supp. 2d at 788 (citing *Carey v. Richards Bldg. Supply Co.*, 367 Ill.App.3d 724 (2006)).

²⁵ See Dan Streeter, *Into Contract's Undiscovered Country: A Defense of Browse-Wrap Licenses*, 39 SAN DIEGO L. REV. 1363, 1388 (2002) (noting 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).

²⁶ See *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.”).

²⁷ See *Granite Rock Co. v. Int'l Brod. Of Teamsters*, 561 U.S. 287, 299 (2010) (noting that the “[a]rbitration 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 18 at 90 (noting that “[c]ontracts that exist in computerized format are not necessarily unenforceable” unless there is a lack of assent).

²⁸ See 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”); *LLan Sys., Inc. v. Netscout Serv. Level Corp.*, 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’”); *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).

agreement's terms.²⁹ With such notice demonstrated by these affirmative acts, courts need not enter into the muddied waters of determining what exactly constitutes constructive notice for click-wrap agreements. For browse-wrap agreements, however, the finding of assent to an agreement's terms becomes more difficult.³⁰ 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.³¹

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 near impossible for browse-wrap agreements because this would require the online consumer, usually the party arguing the unenforceability of such a contract, to admit 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 a neutral third-party arbitrator. Also, given the fact that hyperlinks at the very bottom of retail webpages contain these agreements, very few online consumers will likely have actual knowledge of these terms.

²⁹ Tasker & Pakcyk, *supra* note 18 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.").

³⁰ See Streeter, *supra* note 25 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.'").

³¹ See *Be In, Inc. v. Google Inc.*, 2013 WL 5568706 (N.D. Cal. Oct. 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. 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. "); *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.").

Although courts uniformly fail to find actual knowledge in browse-wrap cases, the decisions pertaining to constructive knowledge are not as uniform.³² With this lack of uniformity regarding constructive knowledge analysis, the enforceability of online retailers' browse-wrap agreements depends on different judges' individual determinations. With the crux of the assent analysis for browse-wrap agreements turning on a finding of constructive knowledge, courts ought to have some guidance from their state legislatures or their state's highest court to help determine what an online retailer must do to put an online consumer on constructive knowledge as a matter of law. Such guidance would create a uniform standard and would 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 decide a dispute,³³ has become increasingly utilized in many different contracts including online contracts. This increasing use can be attributed to arbitration's benefits, such as its cost and time savings.³⁴ Not only do businesses engaged in

³² Compare *Ticketmaster L.L.C. v. RMB*, 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."), *Molnar v. 1-800-Flowers.com, Inc.*, 2008 WL 4772125 (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')."), *E.K.D. ex rel. Dawes*, 885 F. Supp. 2d at 901 (finding Facebook's Terms of Service (TOS) reasonably put plaintiffs on notice since 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), 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.

³³ BLACK'S LAW DICTIONARY 712 (9th ed. 2009).

³⁴ Will Proyer, *Alternative Dispute Resolution*, 61 SMUL REV. 519, 522 (2008) ("Arbitration became popular when anyone with a concern that litigation was just too expensive and too inefficient, began to turn to arbitration as a

arbitration benefit from this improved efficiency but they also limit their exposure to risk because of the confidentiality that arbitration provides.³⁵ When disputes arbitrate, neutral third parties decide 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.³⁶ Consumer products, services, employment, and even medical contracts of adhesion have all been littered with arbitration provisions.³⁷ A 2008 empirical study revealed that 76.9% of the consumer contracts studied contained mandatory arbitration provisions,³⁸ and, as a result of the upward trend in these agreements' use, this percentage has likely increased over time. Within the broad category of consumer contracts, these provisions appear in contracts covering a wide array of industries, including "auto purchase/lease, auto insurance, health insurance, airline, auto rental, hotel, department store, Internet service, long distance telephone service, cell phone, general credit card, airline-affiliated credit card, department store-affiliated credit card, banking, grocery store, restaurant, and theme park,"³⁹ just to name a few.

means of controlling litigation costs and limiting exposure."); 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.").

³⁵ Michael 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.").

³⁶ See Proyer, *supra* note 34.

³⁷ See *In re Knepp*, 229 B.R. 821, 827 (Bankr. N.D. Ala. 1999); *Allstar Homes, Inc. v. Waters*, 711 So. 2d 924, 933 (1997) (Cook, J. concurring) ("The reality is that contracts containing [arbitration] provisions appear with increasing frequency in today's marketplace.").

³⁸ This empirical study looked at 26 consumer contracts and 164 non-consumer contracts. The various consumer contracts looked at for the study were from companies listed in *Fortune* magazine's top 100 annual rankings or well-known companies within their various sectors. Some of these companies included: Cablevision, Verizon, Time Warner, Comcast, Chase, American Express and AT&T. The results found that twenty out of the twenty-six, or 76.9%, of the consumer contracts between these businesses and their customers 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, 982-83 (2008).

³⁹ Demaine & Hensler, *supra* note 3.

Although the spread of arbitration provisions throughout different industries⁴⁰ provides individuals with arbitration's benefits, various disadvantages accompany these benefits. This Comment divides these disadvantages into two groups: (1) lack of information disadvantages and (2) waiving of rights disadvantages.

Arbitration can be detrimental to some, usually consumers rather than businesses, due to the lack of notice that the absence of court documents supplies to future or current litigants. The absence of court records of 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."⁴¹ With this lack of explanation and no public access to the results of prior disputes between a retailer and its customers, future buyers 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 more frequently discussed disadvantage: the waiving of an individual's right to a civil jury trial. Arbitration provisions waive an individual's right to a civil jury trial in certain cases within the Constitution's Seventh Amendment and many individual state constitutions.⁴² When one waives his right to a civil jury trial, he also waives all other derivative benefits of having his case heard

⁴⁰ An empirical study looked at 167 different consumer industries that used 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, those implementing the study collected 161 different arbitration provisions in 2001, thus finding that looking at the 167 different industries broken into eight larger sub-groups, 35.4% of the industries studied arbitration provisions within their consumer contacts. Although this percentage seems low, the information for the study was collected almost fourteen years ago. Surely this test, if done again today, would yield very different results. Dermaine & Hensler, *supra* note 3 at 60, 63.

⁴¹ *Wilko v. Swan*, 346 U.S. 427, 436 (1953); *see also* *Bernhardt v. Polygraphic Co. of America*, 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.").

⁴² *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 rises as a putrid odor which is overwhelming to the body politic.").

within the courts. These benefits include time for extended discovery⁴³ and the right to subpoena witnesses to testify.⁴⁴ Despite these rights being waived, challenges often lose under the Federal Arbitration Act when a party claims improper waiver.⁴⁵

Congress enacted the Federal Arbitration Act (FAA) in 1925 to reverse any longstanding judicial hostility toward arbitration agreements and to “place arbitration agreements upon the same footing as other contracts.”⁴⁶ Under the FAA, courts must treat arbitration provisions as any other contractual provision and not fashion rules hostile to arbitration.⁴⁷ Although the text of the FAA remains mostly unchanged since its enactment in 1925, the same cannot be said for its interpretation by the Supreme Court, which became vastly more expanded from the 1950s to the present.

The Supreme Court has interpreted § 2, the “primary substantive provision”⁴⁸ 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.⁴⁹

⁴³ FED. R. CIV. P. 26–37.

⁴⁴ FED. R. CIV. P. 45.

⁴⁵ 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.”).

⁴⁶ 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*, 131 S. Ct. 1740, 1745 (2011) (“The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements.”).

⁴⁷ 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.”).

⁴⁸ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

⁴⁹ 9 U.S.C. §2 (1925).

Section 2 has been broken down into two general clauses, the “command clause” and the “savings clause.”⁵⁰ The first part of § 2 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.⁵¹ 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 Corporation v. Flood & Conklin Manufacturing Company*,⁵² where the Court introduced what later became known as the doctrine of severability. With the plaintiff wishing for the court to hear the contractual dispute between the parties and the defendant wishing to compel arbitration, 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.’”⁵³ 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 in this case, however, established that even when particular contract formation problems render a contract otherwise unenforceable, the arbitration provision housed within a contract may be separated and enforced by courts.⁵⁴

⁵⁰ Arpan A. Sura & Robert A. DeRise, *Conceptualizing Conception: The Continuing Viability of Arbitration Regulations*, 62 U. KAN. L. REV. 403, 410–11 (2013).

⁵¹ *Id.*

⁵² 388 U.S. 395 (1967).

⁵³ *Id.* at 403 (quoting FAA § 4).

⁵⁴ Essentially, this holding alerted lower courts and future litigants of the power inherent in the FAA. If a party wished to void a contract on grounds of a formation defect 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*.

Expansion 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 dictum in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*,⁵⁵ and later restated it as part of the holding of *Southland Corporation v. Keating*.⁵⁶ In *Southland*, Chief Justice Burger wrote that the FAA trumps any state law pertaining to arbitration provisions under the Supremacy Clause.⁵⁷ Justice O'Connor in the dissent 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*.⁵⁸ Justice O'Connor's view remains unrecognized to this day.⁵⁹ The Court also found in *Southland* that the FAA trumps all state laws, such as California's Franchise Investment Law, that outright prohibited the use of arbitration provisions.⁶⁰

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 *Southerland*, (2) require unequal treatment of arbitration provisions and thus creates hostility towards them,⁶¹ or (3) conflict with the FAA's purpose.⁶²

⁵⁵ 460 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.”).

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

⁵⁷ The Supreme Court relied on the *Erie* Doctrine to assert that in diversity jurisdiction cases, federal courts apply their own procedural laws but state substantive laws apply. 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 *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁵⁸ *Southland Corp.*, 465 U.S. at 21 (O'Connor, J., dissenting).

⁵⁹ See *Sura & DeRise*, *supra* note 50 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.”).

⁶⁰ *Southerland Corp.*, 465 U.S. at 3–5.

⁶¹ See *Doctor's Assoc., 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 since it conflicts with the FAA since the state statute “solely” targeted arbitration provisions).

⁶² See *Sura & DeRise*, *supra* note 50 at 411.

This expansion of the FAA’s power spanned throughout the 1980s⁶³ and the 1990s⁶⁴ and continued to the Supreme Court’s 2011 case of *AT&T Mobility LLC v. Concepcion*.⁶⁵ In an opinion written by Justice Scalia, the Supreme Court held that § 2 of the FAA preempts a California state law known as the *Discover Bank* rule,⁶⁶ which classifies “most collective-arbitration waivers in consumer contracts as unconscionable.”⁶⁷ The California Supreme Court had previously upheld the validity of this state rule⁶⁸ as applied to waivers in either judicial or arbitral fora. Also, “§ 2’s saving clause preserves generally applicable contract defenses.”⁶⁹ 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.”⁷⁰ 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 now the Supreme Court’s 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.⁷¹

⁶³ See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (holding that arbitration provisions are still enforceable when the issue to be decided by an arbitrator involves enforcement of a federal law).

⁶⁴ See, e.g., *Casarotto*, 517 U.S. at 681 (holding that laws specifying that arbitration provisions only must appear a certain way within contracts or any other state law regulating the use of arbitration provisions are trumped by the FAA; even if an arbitration provision violates an applicable state law, the provision will still be enforced under the FAA).

⁶⁵ 131 S. Ct. 1740, 1740 (2011).

⁶⁶ *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

⁶⁷ *Concepcion*, 131 S.Ct. at 1746.

⁶⁸ 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, and it essentially made it so class-action waivers in certain consumer contracts under certain circumstances were unconscionable under California contract law and as a result, fell under § 2’s savings clause.

⁶⁹ *Concepcion*, 131 S. Ct. at 1748.

⁷⁰ *Id.*

⁷¹ Alliance for Justice, *One Year Later: The Consequences of AT&T Mobility v. Concepcion*, JUSTICE WATCH (April 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

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 the process, to business-to-consumer contracts.⁷² With the Supreme Court’s blessing, many well-known companies placed these mandatory arbitration provisions in their consumer contracts, including: Verizon, Sprint, DIRECTV, AT&T, Sony, Dell, Gateway, and Toshiba.⁷³ After courts found that contracting parties could indicate acceptance of an agreement’s terms by mere actions rather than necessitating a signature, companies began to include arbitration provisions in their online contracts with consumers.⁷⁴ This trend quickly spread and explains why today many popular online retailers use arbitration provisions in their online contracting, including: Amazon, Barnes & Nobles, Netflix, Microsoft, Groupon, and eBay, and Dell.⁷⁵ These provisions allow

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 *Concepcion* “broadly validat[ed] arbitration provisions containing class action waivers”).

⁷² *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1636 (2005) (noting that great increase in use of binding arbitration provisions within consumer context is attributed to a series of U.S. Supreme Court decisions).

⁷³ PUBLIC CITIZEN, *Forced Arbitration Rogues Gallery*, <http://www.citizen.org/forced-arbitration-rogues-gallery> (last visited Sept. 19, 2014); *see also* Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997) (upholding the enforceability of an arbitration provision found within the warranty brochure included with computer purchase; thus showing that arbitration provisions made their way into contracts for consumer goods).

⁷⁴ *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, 62 (5th Cir. 1987) (stating that “a party may be bound by an agreement to arbitrate even in the absence of his signature”); *Linea Navira 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.”).

⁷⁵ PUBLIC CITIZEN, *supra* note 73. 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, except that you may assert 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.

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 the arbitration provision.

IV. The Seminal Case of *Specht*⁷⁶

Case law regarding online contracts in general is still sparse and rather new.⁷⁷ In particular, case law revolving around browse-wrap agreements is even newer; in fact, no court addressed the enforceability of such agreements prior to 2000.⁷⁸ The 2002 Second Circuit case of *Specht v. Netscape Communications Corporation*,⁷⁹ which some courts have relied upon for guidance, ought to be followed by many other courts for its guidance in constructive knowledge analysis.

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

EBAY, *eBay User Agreement*, <http://pages.ebay.com/help/policies/user-agreement.html?rt=nc> (last visited Oct. 15, 2014).

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

Your purchase of services is pursuant to this Agreement and any applicable service agreement and by purchasing the service offering you are bound by those terms including a requirement that you individually arbitrate any dispute relating in any way to this transaction including any use of any service under any warranty or service offering.

DELL, *Consumer Terms of Sale*, <http://www.dell.com/learn/us/en/uscorp1/terms-of-sale-consumer?c=us&l=en&s=corp&cs=uscorp1> (last visited Sept. 19, 2014).

⁷⁶ See *Van Tasell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 791 (N.D. Ill. 2011) (describing *Specht* as the "seminal browse-wrap case").

⁷⁷ See *Tasker & Pakcyk*, *supra* note 18 at 82–83.

⁷⁸ See *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 982 (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-Conomy?*, 78 WASH. L. REV. 265, 266-67 (2003) ("Prior to 2000, no court had addressed the issue.").

⁷⁹ 306 F.3d 17 (S.D.N.Y. 2005).

Netscape when plaintiffs initiated the downloads.⁸⁰ In the district court, defendant Netscape moved to compel arbitration under Netscape’s 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 at the very bottom of the webpage, plaintiffs needed to scroll past an enticing “Download” button that plaintiffs clicked to obtain the free software.⁸¹ 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.⁸²

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 containing the arbitration provision.⁸³ Since the downloaders denied actual knowledge of the browse-wrap’s terms, the court needed 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* (either actually or constructively) their presence at all.⁸⁴ 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.”⁸⁵ The *Specht* court found that a reasonably prudent user would not have scrolled past an enticing “Download” button to find the hyperlink of the

⁸⁰ *Id.*

⁸¹ *Id.* at 23.

⁸² “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 there is a hyperlink that then would direct a user to the page entitled “License & Support Agreements” to read the agreement terms. *Id.* at 23-24. The agreement required users of the website to read its terms and agree to the terms prior to downloading any software. *Id.* at 24.

⁸³ *Id.* at 17.

⁸⁴ *Id.* at 23.

⁸⁵ *Specht*, 306 F.3d at 20.

browse-wrap agreement at the bottom of Netscape’s webpage. Therefore, with a lack of either actual or constructive notice by the website’s users, no constructive knowledge exists.⁸⁶

Although the *Specht* court’s reasoning involved a website user downloading free software, the case has been relied upon in situations involving online retailers and consumers.⁸⁷

The Ninth Circuit recently applied *Specht*’s reasoning in analyzing the enforceability of an online retailer’s browse-wrap agreement in *Nguyen v. Barnes & Nobles, Inc.*⁸⁸ In *Nguyen*, the plaintiff-consumer purchased a tablet from Barnes & Nobles’ website during a sale but later found out that the retailer could no longer deliver the item due to excessive demand.⁸⁹ The consumer brought a putative class action against the retailer alleging deceptive business practices

⁸⁶ 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”).

⁸⁷ Three of the main cases relying on *Specht* involve the 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 its customers returning items a \$30 “restocking” fee. 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 the 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 have arbitration provisions housed within browse-wrap agreements found in a hyperlink at the bottom of defendants’ websites. 795 F. Supp. 2d 770, 770 (N.D. Ill. 2011). Just like in *Overstock.com*, the court relied on *Specht* in 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 at 1058. To avoid a class action lawsuit, the defendant, Zappos, moved the court to compel arbitration in response to its arbitration provision housed in the browse-wrap agreement housed within the hyperlink labeled “Terms of Use.” *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, but 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 for an online retailer’s browse-wrap agreement.

⁸⁸ 763 F.3d 1171 (9th Cir. 2014).

⁸⁹ *Id.* at 1173.

and false advertising, but the defendant moved to compel arbitration under its browse-wrap agreement's arbitration provision.⁹⁰ 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.⁹¹ The court found no constructive notice because the online retailer made the terms of its agreement available only by hyperlink on the bottom of every webpage. 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.⁹²

Although a series of cases⁹³ involving the enforceability of browse-wrap agreements containing arbitration provisions have relied upon *Specht*, those courts have not further explored the psychological reasoning behind *Specht*. In understanding why courts should adopt *Specht*'s reasoning as a rule of law⁹⁴ to eliminate inconsistent results surrounding what constitutes constructive knowledge of a browse-wrap agreement's terms, courts must not 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 simply because psychological studies support its holding.

⁹⁰ *Id.* at 1174.

⁹¹ *Id.* at 1177.

⁹² *Id.* at 1179.

⁹³ *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 the Law Consumer Contracts, Proposed Draft No. 1, §2 (October 28, 2014) (internal citation omitted). However, "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.*

⁹⁴ 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 adopts its reasoning and the reasoning 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.

V. Why States Should Rely on *Specht* for Guidance: A Psychological Analysis⁹⁵

i. The Power of the Impulse Buy

Online retailing cases adopting the reasoning in *Specht*, as well as psychological studies involving online shoppers, document that online shoppers do not scroll past enticing items for sale in order to find a hyperlink containing the online retailer's browse-wrap agreement. A majority of purchases made by today's consumers, approximately 75 to 80%, are categorized as impulse buys.⁹⁶ These impulse buys occur frequently and cost consumers large amounts of money.⁹⁷ An impulse buy occurs when a consumer has a sudden urge to buy something and acts upon that sudden impulse.⁹⁸ Although not all online shoppers visit websites with the intent to make a purchase,⁹⁹ eventually many of these consumers give in to impulse buys because of strategies implemented by many online retailers.¹⁰⁰ Online retailers will place sale items or

⁹⁵The field of psychology and the study of 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").

⁹⁶ See Pranjali Gupta, *Shopping Impulses, Online vs. Off*, N.Y. TIMES (Dec. 2, 2011), <http://www.nytimes.com/roomfordebate/2011/12/01/save-america-shop-at-work/shopping-impulses-online-vs-off> (finding impulse buying to be increasingly common and resulting in two thirds of all purchases); see also Veronika Svatošová, *Motivation of Online Buyer Behavior*, J. COMPETITIVENESS 14, 21 (2013) ("Experience and global [research] show that only 20% of all purchases are planned, the remaining 80% are impulsive[.]"); see also Brad Tuttle, *Millennials Are Biggest Suckers for Selfish Impulse Buys*, TIME, <http://business.time.com/2012/04/27/millennials-are-biggest-suckers-for-selfish-impulse-buys/> (last updated Apr. 27, 2012) (citing a finding by brand-research firm, the Integer Group, that Millennials, or those born between 1980 and 1995, are the most likely to engage in impulse buying).

⁹⁷ 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 are impulse buys include: "food, clothing, magazines, wine, books, DVDs, shoes, trips, beer, and toiletries, home furnishings, music, clothes for the kids, jewelry, accessories, gadgets, garden accessories, flowers, toys, and day trips." Mpacheco, *Is impulse buying destroying your finances?*, MVELOPES, <http://www.mvelopes.com/is-impulse-buying-destroying-your-finances/> (last updated Sept. 3, 2013).

⁹⁸ Jim Wilkins, *How Proper Marketing Tactics Can Attract More Impulse Buyers*, DMN3, <http://www.dmn3.com/dmn3-blog/how-proper-marketing-tactics-can-attract-more-impulse-buyers> (last updated Aug. 8, 2013) ("Impulse buying is an unplanned, spur-of-the-moment action/behavior.").

⁹⁹ For example, an individual may visit different webpages to compare prices for a given item. See Jiafeng Li, *Study: Online Shopping Behavior In The Digital Era*, IACQUIRE BLOG, <http://www.iacquire.com/blog/study-online-shopping-behavior-in-the-digital-era> (last updated May 10, 2013) ("39% of online shoppers strongly agree that 'for relatively expensive items, I'll shop at different stores to make certain I get the best price.'").

¹⁰⁰ See *infra* Part V.ii.

popular items on their homepages in hopes of encouraging those online browsers who have no immediate intention of purchasing anything to give in to the powerful urge of the impulse buy.

Traditional brick-and-mortar stores are notorious for impulse sales triggered by techniques such as strategically placing low-priced items close to checkout stations. As online shopping increased in popularity,¹⁰¹ online retailers learned how to replicate the techniques used in brick-and-mortar stores in the online context by placing particular items on homepages or right before online checkout. The phenomenon of the impulse buy 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.¹⁰²

The concept of impulse buying on an online retailer's page is not the only reason to support the *Specht* court's finding of no constructive notice and therefore no constructive knowledge. "Eye tracking" studies also show that, generally, online consumers have a tendency to pay very little attention to the bottom of a retailer's webpage.¹⁰³ Such studies use either remote or head-mounted monitoring devices to record eye movement by a website's viewers.¹⁰⁴ The eye-tracking devices then compile the results to show researchers where online viewers

¹⁰¹ See Li, *supra* note 99 ("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[.]"); see also Tongxiao (Catherine) Zhang et al., *The Value of IT-Enabled Retailer Learning: Personalized Product Recommendations and Customer Store Loyalty in Electronic Markets*, MIS QUARTERLY 859, 860 (Dec. 2011) (noting that according to Census Bureau of the Department of Commerce (2008), e-commerce sales in 2007 increased by 19% from previous year to equal \$136.4 billion).

¹⁰² See Dhanila Veena Parboteeah, *A Model of Online Impulse Buying: An Empirical Study* (August 2005) (unpublished Ph.D dissertation, Washington State University) (on file with the Washington State University Department of Information Systems).

¹⁰³ 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 items in areas with the highest visual traffic. See Kara Pernice and Jakob Nielson, *How to Conduct Eyetracking Studies*, NIELSON NORMAN GROUP (2014), available at <http://www.nngroup.com/reports/how-to-conduct-eyetracking-studies/>.

¹⁰⁴ See EYETRACKING, *About Us: What is Eyetracking?*, <http://www.eyetracking.com/About-Us/What-Is-Eye-Tracking> (last visited Oct. 28, 2014).

looked and for what period of time.¹⁰⁵ Many of these eye-tracking studies performed using online retailers' webpages demonstrate the validity of the *Specht* court's reasoning that online consumers rarely find the terms of a given provision housed at the bottom of a webpage. These studies show that online consumers focus attention on items initially listed on a retailer's webpage and their attentions begin to trail off as the consumers continue to scroll down. 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 needing to scroll.¹⁰⁶ Even if the online consumer does scroll "past the fold," he gives this area of the website only one-fourth the attention he gave to the area "above the fold."¹⁰⁷ Most browse-wrap agreements will be housed below the fold in hidden hyperlinks where consumers' attention spans wane.¹⁰⁸ The findings of both eye-tracking studies and psychological studies revealing that online consumers do not likely scroll or even view the bottom of a webpage support *Specht*'s holding that browse-wrap agreements at the bottom of a webpage do not provide sufficient constructive notice.

ii. Online Recommendation Systems Increase the Likelihood of Impulse Buys

Although impulse buys occur online without the use of product recommendation systems (PRSs),¹⁰⁹ the likelihood of an impulse buy occurring increases exponentially when online

¹⁰⁵ *Id.*

¹⁰⁶ *How People Read on the Web*, CENTER FOR PARENT INFORMATION AND RESOURCES (Aug. 2012), <http://www.parentcenterhub.org/repository/web-reading/>; Jaan-Matti Lillevälja, *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/#>; 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/>.

¹⁰⁷ *Id.*

¹⁰⁸ In a personal study conducted for the purpose of this Comment, the websites of the top retailers of 2014 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; these browse-wraps were not visible without scrolling to the bottom of the webpage.

¹⁰⁹ For example, Wal-Mart and Target have offered "deals of the day" to entice their online shoppers into impulse purchases. With these deals offered as soon as an online shopper enters the website, this is enticing the customer to click the item and purchase right away. The online retailers do not show these items to particular shoppers because

retailers use such systems.¹¹⁰ 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.¹¹¹ An online retailer can now use technology to its advantage by highlighting an item the consumer has shown an interest in and thereby creating an easier buying situation for that consumer, who now just needs to click to purchase an item rather than navigate through a retailer's website.¹¹²

These recommendation systems work by studying saved and aggregated historical data of an individual consumer based on his prior visits to the retailer's website, including prior purchases and previously viewed products.¹¹³ These systems then employ algorithms using this collected data to determine an individual's potential interests by comparing her prior activity to other visitors of the retail website with similar tastes.¹¹⁴ The product recommendations will 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.¹¹⁵ 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

of their prior purchase or browsing history, but these are just 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>.

¹¹⁰ Gupta, *supra* note 96 (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. 1, 1 (2013) (noting that one main reason for online retailers to use these recommendation systems is to influence a customer's purchasing behavior and essentially trying to cause impulse buys).

¹¹¹ Parboteeah, *supra* note 102, at 39 (noting the "positive relationship between the ease of buying and impulse buying").

¹¹² See Parboteeah, *supra* note 102, 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.").

¹¹³ See Daniel Baier & Eva Stüber, *Acceptance of recommendations to buy in online retailing*, J. RETAILING AND CONSUMER SERVICES 173, 174 (2010) ("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.").

¹¹⁴ See Susan Gregory Thomas, *Getting to Know You.com*, EBSCOHOST (1999), <http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=2447180&site=ehost-live&scope=site>.

¹¹⁵ Gustafson, *supra* note 109 ("Stores like Pottery Barn send recommendations based on past purchases and encourage shoppers to pull the trigger on abandoned digital shopping carts.").

can immediately purchase the item.¹¹⁶ PRSs are just one of the many different personalization tools that online retailers use to increase the likelihood of impulse buys.¹¹⁷

Many online retailers, including SkyMall,¹¹⁸ Bluefly,¹¹⁹ and eBay,¹²⁰ followed the pioneer of recommendation systems, Amazon,¹²¹ to make these recommendation systems “quietly ubiquitous” by 2010.¹²² As the use of the recommendation systems increased, so too did online retailers’ sales. In 2012 Amazon reported that a 29% sale increase during its second fiscal quarter could be attributed to the company’s use of recommendation systems that prompt consumers to make purchases they did not originally intend on making.¹²³

Now online retailers can not only place popular items in front of their visitors, but can also place items with high likelihoods of being purchased by a given visitor in front of that person in particular.¹²⁴ 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* which encouraged Netscape’s visitors to click to download free software. By clicking in both situations, the online user enters into a

¹¹⁶ See Gustafson, *supra* note 109.

¹¹⁷ Even 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, which “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 114.

¹¹⁸ Thomas, *supra* note 114.

¹¹⁹ *Id.*

¹²⁰ Tsao, *supra* note 110.

¹²¹ See Baier & Stüber, *supra* note 113; 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>.

¹²² Grossman, *supra* note 121.

¹²³ JP Mangalindan, *Amazon’s recommendation secret*, *FORTUNE* (Jul. 30, 2012), <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.”).

¹²⁴ See Zhang et al., *supra* note 101 (“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.”); Sylvain Senecal & Jacques Nantel, *The influence of online product recommendations on consumers’ online choices*, *J. RETAILING* 159, 166 (2004) (finding an empirical study to show that consumers who consulted a product recommendation were more likely to make a purchase than those who did not, concluding that “online product recommendations greatly influenced subjects’ product choices”).

browse-wrap agreement, most likely including a mandatory arbitration provision, without having any reason to scroll down to the bottom of the webpage.¹²⁵ As a rule of law, courts ought to find constructive knowledge lacking in these online retailing situations. Adopting the Second Circuit's reasoning in *Specht*, there is no constructive knowledge since no reasonable online consumer would scroll past an enticing items for sale in order to find a hyperlink hidden at the bottom of a webpage.

VI. Suggestions for Online Retailers

The need to create rules of law for what constitutes constructive knowledge for 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 2017.¹²⁶ Second, the use of arbitration provisions within these browse-wrap agreements by online retailers has also increased,¹²⁷ leaving naïve consumers to experience the disadvantages of mandatory arbitration.¹²⁸ 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 requires prompt action by the courts.

¹²⁵ Clicking on a product while online shopping merely places the item in a customer's virtual shopping cart. However, in completing the purchase, the online consumer again clicks an enticing "Checkout" button without having to scroll down to the bottom of a webpage where the hyperlink housing the browse-wrap agreement is located. This "Checkout" button again becomes analogous to the "Download" button in *Specht*. In a study conducted for purposes of this Comment, again 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 108, none mentioned its terms and conditions in an area above the "Checkout" button. The only hyperlink of terms that some retailers, such as Ralph Lauren and Sports Authority, placed above the "Checkout" button as to place customers on constructive notice were for the websites' privacy policies.

¹²⁶ See discussion *supra* note 101.

¹²⁷ See discussion *supra* note 74.

¹²⁸ See discussion *supra* Part II.i.

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 regarding what online retailers can do 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.¹²⁹ 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.¹³⁰ The most common suggestions from legal scholars encompass two extreme and opposite approaches: (1) courts should enforce only click-wrap agreements¹³¹ or (2) courts should enforce all browse-wrap agreements even if hidden at the bottom of the webpage.¹³² 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 on only click-wrap agreements where consumers need to affirmatively check a box or click an "Agree" button prior to entering a retailer's webpage, consumers would likely become frustrated. Even if this simple affirmative act takes merely

¹²⁹ See, e.g., Robertson, *supra* note 78 at 265; Streeter, *supra* note 25 at 1363.

¹³⁰ 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 Websites or software, or clients who need to know whether they are bound by the terms of a Web site they may have viewed.").

¹³¹ See Robertson, *supra* note 78 at 267 (insisting that courts "enforce online contracts only where users have adequate notice of the terms and conditions and affirmatively agree to be bound by such terms").

¹³² See Streeter, *supra* note 25 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.").

seconds to perform, consumers could also become weary of an online retailer's policies if the retailer used click-wrap agreement. Click-wrap agreements, an unorthodox contracting method for online retailers,¹³³ could lead consumers to take their business elsewhere.¹³⁴ 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.¹³⁵ By studying over thirty of 2014's top online retailers as reported by the National Retail Federation, none of the online retailers used click-wraps but rather relied on browse-wrap contracts.¹³⁶ As a result, many online retailers would surely prefer browse-wrap agreements to click-wrap agreements for this reason and perhaps would lobby against any state law requiring the use of click-wrap agreements.¹³⁷

Similarly, an approach finding all browse-wrap agreements enforceable would be easier to apply than a middle-ground approach, but unjust for online consumers. As suggested throughout this Comment, browse-wrap agreements hidden at the bottom of a retailer's webpage do not put a reasonable consumer on notice of the agreement's terms. While online retailers would push for 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 FAA¹³⁸

¹³³ See *supra* note 108.

¹³⁴ See Tasker & Pakcyk, *supra* note 18 at 91.

¹³⁵ See Chih-Chien Wang et al, *The Impact of Knowledge and Trust on E-Consumers' Online Shopping Activities: An Empirical Study*, J. COMPUTERS 11, 12 (vol. 4 2009) (The results of this empirical study revealed that "trust in online shopping is positively associated with online shopping activities.").

¹³⁶ *Supra* note 108.

¹³⁷ Even with a state law requiring all of its online retailers to use click-wrap agreements, online consumers may still be angry. Such a law would not prevent all other online retailers incorporated in other states from using browse-wrap agreements, thus putting online retailers in the given state with the applicable law at a supposed disadvantage over other online retailers.

¹³⁸ 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 that the FAA and how the Supreme Court has interpreted the statute over the years has been complied with.

as well as the Uniform Commercial Code (U.C.C.)¹³⁹ in determining an approach for dealing with online browse-wrap agreements containing arbitration provisions. All states except Louisiana and the District of Columbia¹⁴⁰ have adopted the U.C.C., including Article 2, which governs the sale of “goods.”¹⁴¹ Although individual states have adopted the U.C.C. with variations by their state legislatures, these variations are minor and “the similarities of all states’ U.C.C.[.] provisions . . . far outweigh the differences.”¹⁴² 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.¹⁴³

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 of their websites. Online consumers read from top to bottom, so following the website’s homepage from top to bottom, the customer would presumably come across this hyperlink before being persuaded to click on the enticing items for sale.¹⁴⁴ This recommendation avoids the problems

¹³⁹ U.C.C. (1952).

¹⁴⁰ Thompson Publishing Group, *Section 400: Short-Term 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.”).

¹⁴¹ The U.C.C. Article 2 applies to the sale of goods that must be “movable.” U.C.C. §2-105(1). Clearly, online retailers sell good to online consumers that fit this description.

¹⁴² Thompson Publishing Group, *supra* note 140.

¹⁴³ *See* discussion *supra* note 141.

¹⁴⁴ Studies have shown that an individual’s tendency to read from top to bottom in sequential order 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, the reader was 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 1, 11 (June 2013), available at <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.”).

noted in *Specht* and highlighted through the psychological and eye-tracking studies noting 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 terms of the agreements *above* the “Complete Purchase” button on their webpages.¹⁴⁵ Again, keeping in mind a consumer’s tendency to read from top to bottom,¹⁴⁶ having this hyperlink above the enticing “Complete Purchase” button would put a reasonable online consumer on constructive notice and therefore constitutes constructive knowledge of the agreement’s terms prior to purchasing an item.¹⁴⁷

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 provisions¹⁴⁸ and therefore must comply with the

¹⁴⁵ This second suggestion implements the reasoning from *Specht* as well as the cases that have followed *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.

¹⁴⁶ Karminska & Foulsham, *supra* note 144, 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.”).

¹⁴⁷ This second suggestion is very similar to what happened in *Fteja v. Facebook, Inc.* 841 F. Supp. 2d 829 (S.D.N.Y. 2012). In that case, the court enforced a browse-wrap 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 838–40. The only difference that this Comment suggests for online retailers is to place the hyperlink above instead of below the enticing button that the website’s users are prompted to click. This recommendation stems from the psychological information contained within this Comment regarding an online shopper’s willingness to click in order to complete an impulse buy.

¹⁴⁸ *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.”).

FAA since this Act trumps all state laws regarding arbitration provisions.¹⁴⁹ 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.¹⁵⁰ Under these three circumstances, the Supreme Court has found state laws regarding arbitration provisions unenforceable, but because the middle-ground approaches of this Comment do not violate these three requirements, the FAA should not trump state laws adopting these approaches.

The recommendations of this middle-ground approach also must comply with Article 2 of the U.C.C since 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.¹⁵¹ 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;"¹⁵² however, this definition still leaves ambiguity for individual courts to decide what exactly constitutes conspicuousness in a particular situation.¹⁵³ In order to be safe, online retailers ought to have the hyperlinks to agreements containing disclaimers of warrant (regardless of the hyperlinks'

¹⁴⁹ See generally *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681 (1996).

¹⁵⁰ See *Sura & DeRise*, *supra* note 62.

¹⁵¹ 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 both the FAA, as well as the U.C.C, the terms of their browse-wrap agreements will be enforced. See also *Restatement of the Law Consumer Contracts*, Proposed Draft No. 1, §5 (October 28, 2014).

¹⁵² U.C.C. §1-201 (1952).

¹⁵³ *Id.*

placement on the retailers' webpages), 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.¹⁵⁴

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. Even under the FAA and its 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 entice such purchases support the conclusion that the *Specht* court's decision should be applied to all online retailer browse-wrap agreements. Due to the analogous nature between the facts in *Specht* and an online shopper's enticement to click on a desired item to make a purchase without needing to scroll any further, states should adopt the reasoning in *Specht* for all online retailers' browse-wrap agreements as a rule of law. To avoid courts finding a retailer's browse-wrap agreement unenforceable due to a lack of constructive knowledge of the agreement's terms, this Comment recommends that online retailers either place the hyperlink containing the browse-wrap agreement at the top of their webpages or above the "Complete Purchase" button.

¹⁵⁴ 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_Reading2013.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.").

Although this Comment makes suggestions for state legislatures and the highest courts of the states to adopt when dealing with constructive knowledge of browse-wrap agreements, the suggestions of this Comment are intended to apply only to online retailers.¹⁵⁵ The suggestions in this Comment, however, are not limited to online retailers' browse-wrap agreements containing arbitration provisions. Arbitration provisions have become increasingly popular over time and most disagreements regarding the enforceability of browse-wrap agreements revolve around one party not wanting to enforce an arbitration provision.¹⁵⁶ As a result of the increased need for guidance in this area of law, this Comment focuses on browse-wrap agreements containing arbitration agreements in particular, but the analysis applies equally to online retailers' browse-wrap agreements not containing such provisions. By states adopting the suggestions of this Comment when dealing with online retailers' browse-wrap agreements, decisions within given jurisdictions will yield consistent, uniform results.

¹⁵⁵ A major reason why this Comment focuses just on online retailing websites is (1) because these websites are the most analogous to *Specht* and also, (2) online shopping has increased drastically over the past decade, making the need for uniformity in court decisions regarding the enforceability of these online agreements crucial at this time. See Banjo & Fitzgerald, *supra* note 1.

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