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William Hurley

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NOTE

FAILURE OF NOTICE TO TERMS IN ONLINE CONTRACT FORMATION: A SOLUTION THAT INFORMS CONSUMERS OF THEIR OBLIGATIONS AND RIGHTS

William Hurley[†]

ABSTRACT

Due to the extensive use of the internet in everyday life, the concept of notice has become outdated. Where a consumer used to be confronted with a stack of papers to sign should he or she wish to enter into an agreement, the consumer now needs only to click a button to assent to such terms. Because assenting to hundreds of pages of terms has become a thoughtless endeavor for many Americans, companies have invented increasingly predatory terms for consumers to assent to. In many cases, the consumer does not actually realize what he or she is agreeing to, but the terms of the contract are nonetheless enforceable because of the broad legal fiction of constructive notice.

Constructive notice allows companies to create hyperlinks to their terms of service where predatory terms can be buried inside. Further, the consumer often does not have actual notice of what the terms are but merely has notice that terms exist. This cuts against an essential element of contract formation, mutual assent, by not telling the consumer what he or she is agreeing to while still being able to enforce terms that the consumer may not have agreed to had he or she known. However, while constructive notice can be predatory, it is necessary to preserve certainty in contracting. The problem is two-sided; consumers are not reading their contracts, so they do not know what they are agreeing to, but companies need to know that their contracts are enforceable. The judicial system sides firmly with companies, causing an erosion of consumer rights.

The judicial system currently promulgates the exploitation of consumers in order to promote certainty. However, this is an incorrect approach. The judiciary must interpret constructive notice more narrowly because of its

[†] J.D. Candidate, 2020, Liberty University School of Law. I'd like to thank my mother and father, Junga and Keith, for supporting me through my undergraduate education and making it possible for me to attend law school. I'd also like to thank Robert Robertson, J.D., for his encouragement through my senior year of college and Judge Paul Spinden for helping me to understand the policy considerations behind contract law which inspired me to write this note. Finally, I'd like to thank Ashley Pollard for her constant love and support as we push through law school together.

effect on consumers and because of the knowledge that consumers rarely read their online contracts. As online contracts become longer and are filled with an increasing amount of boilerplate language for the purpose of protecting companies, terms that affect consumers' rights are hidden in lengthy agreements that are overly cumbersome to read. Therefore, the judiciary or the legislature needs to take action to help consumers realize what they are agreeing to in the interest of consumer fairness, while maintaining certainty in the agreements that companies enter.

The proposed solution here has two steps. The first step is to adopt an approach that reduces the burden of constructive notice by giving the consumer a summary of contract terms that is feasible for the consumer to read and understand while allowing the company to maintain the full text of the contract should a legal dispute arise. This summary of terms is not intended to replace the contract. Its purpose is to promote consumer awareness of how the agreement would affect their legal rights and allow the consumer to pursue the matter further should the consumer see a term which may have an undesirable effect on his or her legal rights.

The second step is to encourage the consumer to read this new shorter summary of how his or her rights would be affected. While it is impossible to force the consumer to read the summary, presenting it such that the consumer is required to at least scroll through it and the contract separately in order to manifest effective assent to the contract would help the consumer become aware of the material terms of the contract. If the company fails to structure the agreement to adhere to these standards, the contract needs to be declared unenforceable to protect consumers.

The effect of combining these two steps would bring constructive notice more in line with actual notice and encourage companies to adopt more consumer-friendly contracts. Companies would be encouraged to adopt such contracts because of the influence of the collective bargaining power of the nation's new informed consumers as well as the ability to maintain certainty in contractual agreements for companies dealing with consumers.

I. INTRODUCTION

Genie: So what are your three wishes?

Marco: Only three? In the stories I heard, the genies granted unlimited wishes.

Genie: Ah, not again. Well, let me clarify this for you. I only provide the "Limited to three wishes" plan, also called the "Classic package." There were

certain gold and platinum plans offered in the past But those plans were discontinued around 2,300 years back.

— Varun Sayal
Time Crawlers¹

Perhaps Marco should have clicked on the light blue “terms” button before buying the lamp online.

While comical, this quote illustrates the problem with contracts today. Online contracts are designed to favor merchants’ legal rights, while consumers consider them to be just a hoop to jump through before making their next online purchase. These underappreciated legal documents create a dilemma for the courts. Failure to read a contract is no excuse to eliminate contractual obligations, but at the same time, most consumers do not read online adhesion contracts before entering into them.² Regardless, these individuals are bound to the terms of the contracts due to the doctrine of constructive notice.³ Contract reform is desperately needed to adapt the law to the digital age. Further, while contract reform in this area may primarily target protecting consumers, companies also stand to benefit from honesty and transparency with their customers.

II. BACKGROUND

A. *The Elements of a Contract*

A contract is a promise or set of promises that the court is willing to enforce.⁴ Generally, the court is willing to enforce promises that are supported by consideration.⁵ Consideration, the first requirement for an enforceable contract, is an act or forbearance that the promisee gives to the promisor in exchange for the promise.⁶ The second requirement for a contract to be enforceable is mutual assent. Mutual assent occurs when one party makes an offer that the other party accepts.⁷ For a party to manifest assent to terms, he must have reasonable notice of the terms.⁸ Justice Sotomayor stated, “[R]eceipt of a . . . document containing contract terms or

1. Varun Sayal, *Time Crawlers* (October 17, 2019, 3:15 PM), https://www.goodreads.com/author/quotes/18131196.Varun_Sayal.

2. See *infra* Section II.D.

3. *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 31 (2d Cir. 2002).

4. CHRISTINA L. KUNZ ET AL., *CONTRACTS* 1–2 (3d ed. 2018).

5. RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. a (AM. LAW INST. 1981).

6. RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981).

7. RESTATEMENT (SECOND) OF CONTRACTS § 24 (AM. LAW INST. 1981); KUNZ ET AL., *supra* note 4, at 67.

8. See *Specht*, 306 F.3d at 31.

notice thereof is frequently deemed . . . a sufficient circumstance to place the offeree on inquiry notice of those terms.”⁹ Thus, the law should reconsider what constitutes sufficient notice of the terms of a contract.

B. *Unconscionability*

1. *Williams v. Walker-Thomas Furniture Co.*

One of two arguments is usually used to avoid enforcement of certain terms of an online contract. The first is that certain disagreeable terms are unconscionable. The second is that there is no notice of the terms. *Williams v. Walker-Thomas Furniture Co.* discusses the former, largely ineffective, argument.

In *Williams*, the plaintiff operated Walker-Thomas Furniture, a retail furniture store that offered installment plans on the household items.¹⁰ When a customer purchased an item on installment, he or she agreed to purchase the item through a lease-to-own agreement.¹¹ If the customer missed a payment, Walker-Thomas Furniture was entitled to replevy all the items that the consumer purchased under installment.¹² In pertinent part, the contract provided that:

[T]he amount of each periodical installment payment to be made by [purchaser] to the Company under this present lease shall be inclusive of and not in addition to the amount of each installment payment to be made by [purchaser] under such prior leases, bills or accounts; and all payments now and hereafter made by [purchaser] shall be credited pro rata on all outstanding leases, bills and accounts due the Company by [purchaser] at the time each such payment is made.¹³

This clause had the effect that no item was paid off until all items were paid off, allowing replevy of all items if one payment was missed on any item.¹⁴ Williams purchased a stereo set after having almost paid off her existing

9. *Id.*

10. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 447 (D.C. Cir. 1965).

11. *Id.*

12. *Id.*

13. *Id.* (alterations in original) (emphasis omitted).

14. *Id.*

balance.¹⁵ Williams then defaulted on her payments, and Walker-Thomas sought to replevy the items.¹⁶

Williams argued that the term was unenforceable because it was unconscionable.¹⁷ The court stated that, generally, agreements should be enforced, but held that “when a party of little bargaining power . . . signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms.”¹⁸ The court stated that when deciding whether to sustain the equitable defense of unconscionability, “court[s] should consider whether the terms of the contract are so unfair that enforcement should be withheld.”¹⁹

The doctrine of unconscionability can effectively defend against terms of contracts that are unfairly oppressive to consumers, but this argument usually fails to defend against arbitration clauses. Unconscionability has been used to attack arbitration terms of online contracts with little success. A term is unenforceable when it contains elements of both procedural²⁰ and substantive²¹ unconscionability.²² While there are defenses against the enforceability of arbitration agreements that succeed, such as the one in *Global Client Solutions, LLC v. Ossello*,²³ the Federal Arbitration Act (FAA) usually causes courts to uphold arbitration clauses. Although many arbitration clauses may be procedurally unconscionable, they are generally not substantively unconscionable.

15. *Id.* at 447–48.

16. *Williams*, 350 F.2d at 447.

17. *Id.*

18. *Id.* at 449.

19. *Id.* at 450.

20. Procedural unconscionability is unconscionability in the formation of a contract. See *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 340 (2011). Procedural unconscionability arises where there is some form of either oppression or surprise due to unequal bargaining power. *Id.*

21. *Id.* Substantive unconscionability is unconscionability in the terms of the contract. Substantive unconscionability arises where the contract operates to create an either an overly harsh or a severely one-sided result. *Id.*

22. See *infra* Section II.B.3.

23. *Glob. Client Sols., LLC v. Ossello*, 367 P.3d 361, 369–70 (Mont. 2016) (The Montana Supreme Court held that the arbitration clause was unconscionable because the consumer was restricted to pursuing claims through arbitration, whereas Global Client Solutions had the right to sue and recover attorneys’ fees. Notwithstanding that the United States Supreme Court held that the Federal Arbitration Act preempted state rules regarding the general unenforceability of arbitration clauses, the Montana Supreme Court held that such clauses are unenforceable where they do not create mutual obligations).

2. The Federal Arbitration Act

The FAA preempts state law and does not allow courts to expand the grounds for judicial review provided in the FAA.²⁴ The relevant portion provides that written agreements to arbitrate shall be valid unless prohibited by law or found inequitable.²⁵ This leaves the window open for unconscionability in cases such as *Global Client Solutions* but generally makes it difficult to avoid arbitration agreements. For the proposed formatting to combat arbitration agreements, Congress may need to amend the FAA to allow laws that make arbitration agreements unenforceable for failure of notice if such agreements are not included in the summary page.

3. *AT&T Mobility, LLC. v. Concepcion*: Unconscionability

In *AT&T Mobility, LLC. v. Concepcion*, Concepcion brought a class-action lawsuit alleging that AT&T engaged in deceptive business practices.²⁶ AT&T moved to compel arbitration of each claim individually pursuant to a contract term that disallowed class-action arbitration.²⁷ The United States Supreme Court found that class action arbitration waivers are enforceable.²⁸ To prove that a term is unconscionable, the waiver must have both a substantive and a procedural element of unconscionability. When the court is deciding whether a contract is substantively unconscionable, the court examines whether the term itself demands an unconscionable obligation, whereas, when looking for procedural unconscionability, the court is concerned with contract formation.²⁹ Concepcion argued that a waiver of class action arbitration was unconscionable, citing a California law that prohibited the waiver of the right to bring class-action complaints.³⁰ The Court stated that the analysis was simple: Where a state law prohibits arbitration of a type of claim, the FAA preempts that law and requires enforcement of the arbitration clause.³¹ Further, the Court stated that state laws which demand procedure incompatible with arbitration are preempted;

24. 9 U.S.C. § 2 (1947).

25. *Id.*

26. *AT&T*, 563 U.S. at 337.

27. *Id.* at 337–38.

28. *AT&T*, 563 U.S. at 340–41, 352 (holding that the Discover Bank rule, [i.e. the rule that class action waivers are unconscionable] was preempted by the FAA).

29. *See id.* at 340. For example, offering to administer life-saving insulin to a diabetic in exchange for unreasonable payment would constitute procedural unconscionability. The procedural unconscionability would arise because the diabetic effectively had no choice but to assent to the contract.

30. *Id.* at 341.

31. *Id.*

therefore, no state body can enact a law which requires an arbitration term to be within the summary page.³²

State courts are likely unable to cabin constructive notice in a way that preserves the proposed formatting reform for contracts, unless they exempt arbitration agreements. The Supreme Court stated, “[A] court may not ‘rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.’”³³ Therefore, if courts attempted to cabin arbitration agreements, they would have to do so based upon notice, not unconscionability.

Lack of notice is a more successful argument to prove that an arbitration term is unenforceable. Thus, reforming what constitutes adequate notice would protect against unfair terms. State courts and legislatures may either change policy or enact laws, increasing the requirements of constructive notice without being preempted by the FAA. As illustrated in *AT&T*, enacting laws that deem arbitration unconscionable in some way violates the preemptive effect of federal law.³⁴ Thus, legislating that an arbitration clause is procedurally unconscionable because the summary page did not reference it is contrary to the Court’s finding in *AT&T*. Therefore, reformation of notice requirements is a better avenue to accomplish requirement of a summary page entry for arbitration clauses without being preempted by the FAA.

C. *Specht v. Netscape: The Requirement of Notice*

Specht v. Netscape thoroughly discusses the requirement for reasonable notice of terms in manifesting assent.³⁵ In the age of paper contracts, the enforcing party could easily show that the other party had reasonable notice of the terms. If the enforcing party proved that the party to be charged bargained for or signed a writing containing the disputed terms, those terms would generally be enforced.³⁶ However, as the world continues to march through the digital age, an increasing number of contracts are presented electronically.

In *Specht*, the plaintiffs were presented with two digital contracts.³⁷ The first contract was a set of license terms for “Netscape Communicator” and

32. *See id.*

33. *Id.* (quoting *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987)).

34. *AT&T*, 563 U.S. at 341.

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

36. RESTATEMENT (SECOND) OF CONTRACTS § 133 (AM. LAW INST. 1981).

37. *Specht*, 306 F.3d at 17, 22–23.

“Netscape Navigator.”³⁸ The second was a set of license terms for “SmartDownload Communicator.”³⁹ The first set of terms was presented as a clickwrap agreement.⁴⁰ The plaintiffs were shown a scrollable textbox which required them to click “Yes” to proceed with the download.⁴¹ After manifesting assent to the first set of terms, a webpage appeared prompting plaintiffs to “Download With Confidence Using SmartDownload!”⁴² It was not until scrolling further down the webpage, below the SmartDownload “download” button, that a new set of terms appeared for SmartDownload Communicator.⁴³ The majority held that, because the plaintiffs did not have notice of this second license agreement, the second contract was unenforceable.⁴⁴

D. *Online Adhesion Contracts*

The *Specht* court instructs that when one enters into a contract, that contract is only enforceable if the party to be charged has adequate notice of the terms of the contract at the time of signing.⁴⁵ Online contracts tend to give inadequate notice. Most people entering into electronic contracts do not read the terms that they are agreeing to prior to assenting to the contract. In fact, 7,500 people chose to grant Gamestation a license to their “immortal soul[s],” in lieu of receiving a five-pound discount on their purchase because they did not read the terms of the contract they were signing.⁴⁶ When about three-quarters of the people entering into an agreement choose to “sign their souls” away without reading the agreement, it is indicative of a serious problem. While most agreements do not result in the need to call Sam and Dean Winchester, lawyers cry out to the public telling them to read the terms. However, lawyers are hypocrites; Jessica R. Friedman, a lawyer who writes clickwrap agreements, admits that “even she doesn’t read the terms of

38. *Id.* at 22.

39. *Id.*

40. *Id.* at 21–22 n.4.

41. *Id.* at 21–22.

42. *Id.* at 22.

43. *Specht*, 306 F.3d at 23.

44. *Id.* at 35.

45. *Id.* at 22 n.4, 35.

46. Chris Matyszczyk, *Online Game Shoppers Duped into Selling Souls*, CNET (Apr. 16, 2010 10:28 AM), <https://www.cnet.com/news/online-game-shoppers-duped-into-selling-souls/>; *7,500 Online Shoppers Unknowingly Sold Their Souls*, FOX NEWS, <https://www.foxnews.com/tech/7500-online-shoppers-unknowingly-sold-their-souls> (last updated Jan. 11, 2016).

agreement for everything she buys online, even though she writes them.”⁴⁷ Legal professionals do not expect their clients to read these contracts. Douglas G. Baird stated, “If you read [these contracts], you don’t have a very interesting or productive life.”⁴⁸ Herein lies the problem: these contracts are so cumbersome to read that even lawyers, who know how the obligations these contracts impose can affect their lives, choose not to do so. To fix this, there must be reform.

E. *The Duty To Read*

People entering into contracts have the duty to read the contents of each contract. Not reading a contract is no defense as to the enforceability of the contract. This duty to read is essential to a key purpose of contracts: certainty.⁴⁹ If consumers were permitted to successfully defend against enforceability of contracts by simply stating that they did not read the contract, there would be no certainty in creating contracts.⁵⁰ This would completely dispose of the most prominent reason that people contract. The duty to read should remain; however, the court or the legislature needs to reduce the massive burden that comes with this duty.

F. *Software Development Has the Solution*

To balance the obligation imposed by the duty to read with reasonableness to the consumer, the amount of work required by the duty to read needs to be reduced in a way that retains the terms of the online adhesion contract while making the contract readable. Modernizing the legal industry would accomplish this daunting task. While it may not be stuck in the stone age, the legal industry must join the rest of the world in the digital age. While the ability to e-file complaints, answers, and other court documents exists in some places and will likely migrate to others in the near future, no one has proposed an adequate answer to the unreasonable time commitment of reading online adhesion contracts. The legal profession should look to software development for this answer.

The practice of the industry in consumer software development is to release “patch notes” whenever the software is updated.⁵¹ Patch notes are

47. Alina Tugend, *Those Wordy Contracts We All So Quickly Accept*, N.Y. TIMES (Jul. 12, 2013), <https://www.nytimes.com/2013/07/13/your-money/novel-length-contracts-online-and-what-they-say.html>.

48. *Id.*

49. *See, e.g., supra* Section II.A.

50. *See id.*

51. *See, e.g., V6.02 Patch Notes*, EPIC GAMES, <https://www.epicgames.com/fortnite/en-US/patch-notes/v6-02> (last visited Sept. 6, 2019).

usually broken down into bullet points and quickly convey what has changed in the update.⁵² If online adhesion contracts were condensed to the size of patch notes, perhaps consumers would be more likely to read them. However, most contracts cannot reasonably be reduced to a singular page; doing so would be unfeasible and would likely result in companies using the type of fine print depicted in cartoons where the characters pull out a comically large magnifying glasses to read contracts. Thus, contracts should instead have a cover page containing a short list of contractual terms. Condensing contracts down to a page of bulleted text would ease the burden of reading a lengthy contract. As such, contracts should contain their own type of patch notes. These patch notes would be in the form of a summary of material terms constructed such that they would satisfy the “Reasonable Communicativeness Test.”⁵³ This summary would take the most important terms from the body of the contract and place them on a “cheat-sheet” of sorts, which would give the consumer notice of their existence.

While initially litigation would likely increase to determine which terms would be required to be printed on a summary page, and how exactly the language should be communicated, the long-term benefit would be to reduce litigation. However, while some terms are less important, there are certain terms that would be necessary to include in the summary. Drafters must include terms such as arbitration clauses, forum-selection clauses, and choice-of-law provisions, as well as a summary of contractual duties.

For example, in the case of the three restrictive clauses mentioned above, the line item should be presented in two parts. First, a sentence at the top of the summary page stating, “This agreement affects your legal rights in various areas. This page is a summary, and it is not adequate to fully inform you of your legal rights.” Second, the page should state, “This agreement affects your rights regarding whether you may sue, where you may sue, and what law will apply to your lawsuit.” A summary like this would take the pages of boilerplate terms concerning these restrictive clauses and obligations and condense them down to a manageable one to two lines per term or group of similar terms. This summary would suffice because the boilerplate exists to protect the corporations in the event of a lawsuit by defining terms, not to communicate the existence of such terms to a consumer.

The purpose of the summary page is not to substitute reading the document, but to give consumers notice of rights beyond the legal fictions of constructive and inquiry notice. Summary pages would, in part, be designed to reduce litigation from consumers alleging that a contract is unconscionable or void as against public policy. The existence of the page

52. See, e.g., *id.*

53. See *infra* Section III.A.

would afford consumers no defense of insufficient notice of restrictive clauses and obligations. If courts or legislatures adopted this practice, it would increase consumer protection by shrinking constructive and inquiry notice to what the summary section contains. This protection would come at a nominal cost to corporations, because companies could pass on the costs of this reform to their consumers. The certainty this cost would afford would be well worth the investment.

G. *Mechanism of Enforcement*

The greatest challenge toward the implementation of this solution would be creating compliance. Companies may oppose the requirement to write contracts in this format because it would make it easier for consumers to escape the obligations of their contracts when such companies do not adhere to the proper contract form. Thus, courts would need to create a test to determine which terms would need to be included in the summary and the penalty for not including such terms. The penalty should be that such terms are unenforceable if they are not included in the summary page due to inadequate notice. This two-part objective test would be: when a term substantially affects a party's rights,⁵⁴ it must be (1) included in the summary page of the contract; (2) reasonably communicated to the party against whom enforcement is sought; and (3) be feasible to read taking into account the length of the contract and the number of substantial terms. Second, a term substantially affects a party's rights when it (1) imposes a payment or performance obligation, or (2) waives a legal right pertaining to maintenance of a lawsuit. This test would not demand that the entire text of the terms be on the summary page, but rather a simple summary of how the parties' rights will be affected by the contract.⁵⁵

H. *Example Lease Agreement*

When the contract is presented to the consumer, it should be in the following format: The most important terms should be bolded and in a larger font.⁵⁶ These would include terms such as arbitration agreements, choice of law provisions, class action waivers, and exculpatory clauses.⁵⁷ Additional important terms such as monthly payments and replevin or eviction terms should also be included.⁵⁸ The terms would then have a small explanation

54. These substantial rights would likely be the material rights and obligations under the contract as well as any terms which limit the rights the consumer would have by default.

55. See *infra* Section II.H.

56. See *infra* Section II.H.

57. See *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 403 (E.D.N.Y. 2015).

58. See *supra* Section II.B.1.

underneath them as well as a link to the actual portion of the contract.⁵⁹ Depending on the length of the summary page, it may be contained within a scroll box.⁶⁰ The reader must then scroll to the end of the scroll box and click “accept.”⁶¹ The “next” button would lead to the full contract, which the reader must also scroll through to accept.⁶² Acceptance of both pages would suffice to manifest assent to the terms of the contract.⁶³

A sample summary would read as follows:

**SUMMARY OF BASIC CONTRACTUAL RIGHTS AND
OBLIGATIONS**

THIS AGREEMENT AFFECTS YOUR LEGAL RIGHTS in various areas. This page is a summary, and it is not adequate to fully inform you of your legal rights.

YOU ARE ADVISED TO READ THE CONTRACT IN ITS ENTIRETY.

This Contract **WILL NOT ALLOW YOU TO SUE IN COURT.**

Any lawsuit you may wish to bring will instead be subject to arbitration.

This Contract affects **WHERE YOU MAY SUE** and **THE APPLICABLE STATE LAW.**

Lawsuits you wish to bring may only be brought in [State] applying [State’s] law.

This contract **FORBIDS YOU FROM BRINGING A LAWSUIT WITH MULTIPLE CO-PLAINTIFFS.**

You may not join a class-action lawsuit; any claim you bring must be your own.

[RENTAL COMPANY] IS NOT LIABLE FOR INJURIES you suffer.

This includes any injuries on the premises.

You **MUST PAY RENT** to [rental company] **ON THE FIRST OF EACH MONTH.**

59. See *infra* Section IV.D.

60. See *Applebaum v. Lyft, Inc.*, 263 F. Supp. 3d 454, 458–59 (S.D.N.Y. 2017).

61. See *id.* at 461.

62. *Id.*

63. *Id.* (The user was not required to scroll through the terms, but they should be when this form is used).

The amount payable is five hundred dollars (\$500) monthly for a term of twelve (12) months starting on [date] and ending on [date].

If you **MISS A RENT PAYMENT, YOU MAY BE EVICTED AT THE SOLE DISCRETION OF YOUR LANDLORD.**

If you are more than five (5) days late on a payment, [landlord] will begin the eviction process.

I HAVE READ AND AGREE TO THESE TERMS []

(“Next” button leading to the actual contract text)

As seen above, there is a short explanation informing the consumers that this information is provided for their convenience but that they should read the entire contract. The bolded portions draw the reader’s attention to important terms. The reader is likely to read the explanation because it is at the top.⁶⁴ Next, the arbitration clause is presented in large bolded letters informing the consumer that he or she is waiving his or her right to bring a lawsuit. This term should be placed at the top because of all its restrictive properties; thus, this “no lawsuit” term should be of utmost importance to the reader. It also has the benefit of triggering a sense of urgency within the consumer, prompting him to read the rest of the document. After this, the rest of the restrictive terms, should be presented. These terms are the choice of forum and law provisions as well any of the exculpatory or indemnity terms. Finally, the summary should list a simple list of obligations, including terms such as payment and penalties for not paying. The summary should list these terms last because they are the most likely to be discussed between an agent for the company and the consumer. Thus, the consumer is likely already aware of them. The company should strive to keep this summary a reasonable length with the knowledge that it would risk not satisfying the Reasonable Communicativeness Test should the summary be unreasonably long.⁶⁵

This summary and its formatting would give consumers (who, in the overwhelming majority of situations, will not have a lawyer for online adhesion contracts) constructive notice of terms that is closer to actual notice. This summary also protects companies by making it harder for consumers to bring successful lawsuits for contractual terms about which they should have known.

64. See *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 378–79 (E.D.N.Y. 2015).

65. See *id.* at 404.

III. THE GOGO MODEL: NOTICE THROUGH PAGE SETUP

A. *Gogo's Original Website*

The burden of notice is currently quite simple to meet, but courts are very particular about what constitutes adequate notice. Gogo LLC, and Gogo Inc. (Gogo) are sister companies that provide in-flight entertainment.⁶⁶ Gogo used a subscription-based service that misled customers into believing that they were signing up for a one-month subscription for the service, but in reality, signed them up for a recurring subscription.⁶⁷ In *Berkson v. Gogo LLC*, the court seemed to infer that the plaintiffs were “average internet users.”⁶⁸ The court used the reasonable person standard.⁶⁹ This average internet user is the objective reasonable person that the court lays out for offerees.⁷⁰ The general rule is “[w]here the assent to terms of a contract is ‘largely passive,’ as is often the case with electronic contracts of adhesion . . . ‘the contract-formation question will often turn on whether a reasonably prudent offeree would be on [inquiry] notice of the term[s] at issue.’”⁷¹ This echoes the *Specht* standard where the Second Circuit required that terms be clear and conspicuous when it is not obvious that the offeree is entering into a contract.⁷² This rule provides the basis for much-needed contract reform; offerees have a right to know which of their legal rights are affected by signing agreements. Currently, this right is practically non-existent due to the high burden of constructive notice. The *Berkson* court recognized this and held that the contract was unenforceable.⁷³

The court gave three specific reasons for holding that the contract was unenforceable for lack of adequate notice.⁷⁴ First, the hyperlink was not related to an in-person transaction and thus was not related to a situation where a cashier “cannot be expected to read legal documents to customers before ringing up sales.”⁷⁵ Second, because Gogo did not make a practice of emailing copies of contract terms to its customers, the plaintiff “never had a

66. *Id.* at 365.

67. *Id.*

68. *Id.* at 367.

69. *Id.* at 389.

70. *Berkson*, 97 F. Supp. 3d at 394.

71. *Id.* at 393 (quoting *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120, 126–27 (2d Cir. 2012) (alterations in original)).

72. *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 30 (2d Cir. 2002) (quoting *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 101 Cal. Rptr. 347, 351 (Cal. Ct. App. 1972)).

73. *Berkson*, 97 F. Supp. 3d at 403–04.

74. *Id.*

75. *Id.* at 403 (quoting *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997)).

[copy] in his possession to refer to.”⁷⁶ “Third, Gogo did not make an effort to draw [plaintiff’s] attention to its ‘terms of use.’”⁷⁷

Requiring a customer to read terms on his own is substantially different than when the customer faces an in-person transaction.⁷⁸ To require a cashier to read contract terms to consumers would make business untenable.⁷⁹ Even if cashiers were required to read the contracts to customers, customers would likely ignore the cashier or later claim that they did not understand the terms.⁸⁰ This is substantially different than in the instant case where the plaintiff could have read the terms had they been made available. The terms were essentially hidden from the plaintiff. Their obscurity could not be excused, because their placement in a visible area would not impede business.⁸¹

The second reason, while not discussed much in the opinion, seems to be part of a policy regarding “scroll wrap” agreements.⁸² The court generally seems to favor agreements where the terms are either integrated into the webpage or subsequently made available to the customer.⁸³ Thus, it seems as though the court is less concerned with the format, and more concerned with ensuring that the agreement is clearly presented to the customer. Scroll wrap agreements are popular because they save space.

The third, and most important, reason is that Gogo did not make an effort to draw Berkson’s attention to its terms of use.⁸⁴ The court applied *Carnival Cruise Lines, Inc. v. Shute* in its discussion of this reason.⁸⁵ The court stated, “*Carnival Cruise* should not be analogized to electronic websites’ contracts of adhesion” because in *Carnival Cruise*, respondents conceded that they had notice of the forum provision.⁸⁶ The court placed great emphasis on the “sign-in” button stating that because of the inviting nature of the “sign-in” button, it was unlikely that the plaintiff was aware that the button was connected to contractual terms.⁸⁷ The court explained that the terms were

76. *Id.*

77. *Id.*

78. *See Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148–49 (7th Cir. 1997).

79. *Id.* at 1149.

80. *Id.*

81. *See Berkson*, 97 F. Supp. 3d. at 385, 404.

82. A scroll wrap agreement is an agreement where a person views the terms by scrolling through a scroll box. *See, id.* at 398–99.

83. *See id.* at 400.

84. *Id.* at 403.

85. *Id.* at 403–04.

86. *Berkson*, 97 F. Supp. 3d. at 404.

87. *Id.*

hidden because of multiple “sign-in” buttons.⁸⁸ The language indicating that the terms existed was not attached to the “sign-in” button in a way that made it obvious to the customer that by clicking the “sign-in” button, he was manifesting assent to the terms of use.⁸⁹ The clause incorporating the terms was written in light grey on a white background, was not bolded, contained no use of capitalization for “terms of use” or “privacy policy,” and clicking on the sign-in button did not display the terms.⁹⁰ This means that a user could click the sign-in button at the top of the page, a location where sign-in buttons are customary, without having any notice of the existence of terms, much less with the intent to assent to such terms.⁹¹ The account creation page contained the same problems, albeit, with one “next” button below the greyscale text as opposed to two sign-in buttons where one was located nowhere near notice of terms.⁹²

While at first glance, the structure of this webpage appears to satisfy the traditional notions of constructive notice, the court states that notice requires the company do something more than merely place the terms on the webpage.⁹³ The company must attempt to draw the customer’s attention to the existence of the terms such that when the user satisfies the acceptance condition, the user does so knowing that taking that action will result in assenting to the terms of use.⁹⁴ Fortunately, the ABA has developed a test for what assenting to an electronic agreement entails.⁹⁵ The “Electronic Contracting Working Group of the ABA” suggests a four-part test to determine whether a user has reliably assented to the terms of an electronic agreement:

- (1) The user is provided with adequate notice of the existence of the proposed terms.
- (2) The user has a meaningful opportunity to review the terms.
- (3) The user is provided with adequate notice that taking a specified action manifests assent to the terms.

88. *Id.* at 373–74, 404.

89. *Id.* at 374, 404.

90. *Id.* at 373–74.

91. *Id.* at 374.

92. *Berkson*, 97 F. Supp. 3d at 374–75.

93. *Id.* at 404.

94. *Id.*

95. *Id.* at 384.

(4) The user takes the action specified in the latter notice.⁹⁶

“Unfortunately,” according to the court, “many courts have not followed [the recommendation but instead] . . . disregard[] [the fact] that notice requires both attracting user attention *and* providing at least some of the relevant information.”⁹⁷ Because both aspects are not, in practice, required by courts in electronic contracts, online consumers experience an erosion of rights.⁹⁸ The Internet Age causes courts to forget that contracts of adhesion are the norm, not the exception.⁹⁹ Courts have also forgotten that in adhesion contracts, the element of manifestation of mutual assent is essential to contract formation.¹⁰⁰ Courts are moving away from the principle that affirmative evidence of agreement is necessary to find a contract binding.¹⁰¹ Thus, the consumer is gradually being induced into increasingly predatory contracts without the consumer’s knowledge.

Berkson showed that the standard for constructive notice was much too high because of the evidence presented regarding eye-tracking software.¹⁰² In *Berkson*, the court looked to multiple studies showing what the average internet user reads when browsing a webpage.¹⁰³ While the court determined that the studies were inadequate for showing whether the user sees the “terms of use” button,¹⁰⁴ the studies were helpful for the purposes of notice. The three eye-tracking heatmaps in the opinion showed that consumers generally only read about twenty percent of the words on a webpage.¹⁰⁵ Of this twenty percent, the heat maps showed that most of these words were either headings or links in a search engine that were located at the top of the page.¹⁰⁶ Jakob Nielsen’s study showed that web users typically read in an “F” shaped pattern.¹⁰⁷ The study can be used as guidance for how the summary page needs to be set up to encourage the reading of terms. The summary page needs to be short with affected rights briefly laid out. It should be done in short headings with simple language such that it reasonably communicates to the offerees what their contractual rights are.

96. *Id.* (citation omitted).

97. *Id.*

98. *Berkson*, 97 F. Supp. 3d at 384.

99. *See id.* at 388–89.

100. *Id.* at 384.

101. *See* Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 459–60 (2006).

102. *Berkson*, 97 F. Supp. 3d. at 379.

103. *Id.*

104. *Id.* at 377.

105. *Id.* at 379.

106. *Id.*

107. *Id.* at 378–79.

In *Berkson*, the court discussed the Reasonable Communicativeness Test (“RC Test”).¹⁰⁸ The RC Test states that for a contract to have requisite inquiry notice:

- (1) The burden is on the offeror to impress upon the offeree the importance of the binding contract being entered into by the latter; and
- (2) The duty is on the offeror to explain the relevance of the critical terms governing the offeree’s substantive rights contained in the contract.¹⁰⁹

The RC Test lends further support to implement the requirement of summary pages. As previously stated, the declaration at the top of the summary page would sufficiently inform the offeree that the contract therein would impact their legal rights.¹¹⁰ Further, the RC Test would be satisfied by bulleting the substantial terms and by disposing of legalese in favor of plain English.¹¹¹ This transition to easily understandable text stops consumers from agreeing to terms they do not understand and fosters some basic level of understanding. The consumer, upon having the terms reasonably communicated to him or her, would have the opportunity to make an informed decision on whether to decline the offer and look to competitors for something more “fair.”

Ultimately, *Berkson* teaches that at least some courts are reluctant to allow clever companies to deceive unwitting consumers and demand a certain standard of fairness for communicating the terms of an agreement. The court in *Berkson* instructs that, in the context of wrap agreements, companies must do more than what was laid out in *Specht*; the companies must take reasonable measures to communicate terms, highlight the importance of the terms, and lead the consumer to knowledge of the terms under penalty of the court not enforcing the contractual terms.¹¹²

B. *Gogo’s Move Forward to Reasonable Communication*

After losing the first lawsuit, Gogo overhauled its website to a point where, should litigation come up again, it would win. It worked. Subsequent to

108. *Berkson*, 97 F. Supp. 3d at 382.

109. *Id.*

110. *See supra* Section II.F.

111. *Id.*

112. *Berkson*, 97 F. Supp. 3d at 402.

Berkson, Gogo faced another class action in *Salameno v. Gogo, Inc.*, which it won because of how plainly it disclosed the existence of its terms.¹¹³

Prior to *Salameno*, Gogo completely overhauled its sign-up webpage¹¹⁴ to be different than the webpage in *Berkson*.¹¹⁵ The *Salameno* webpage did away with the need to place an asterisk next to the checkbox indicating assent to the terms of use by using the next button to manifest assent to the clickwrap agreement.¹¹⁶ The terms of use remained hyperlinked in the clickwrap clause.¹¹⁷ After the customer manifested assent to the terms, Gogo took the extra step of emailing the consumer a confirmation email containing a link to the agreed-upon terms for the consumer's reference.¹¹⁸ Continuing its efforts to ensure that the consumer had notice of the terms of the agreement, Gogo also updated its sign-in webpage.¹¹⁹ The old sign-in webpage contained two sign-in locations, only one of which displayed the terms of use.¹²⁰ In contrast, the new sign-in webpage contained only one sign-in field where it gave both renewed notice of the existence of the terms to the consumer and hyperlinked them.¹²¹ This reaffirmation of acceptance of terms that the consumer must give at every sign-in¹²² cuts deeply against a claim advocating for the unenforceability of the agreement due to inadequate notice. The court made note of this and stated that, unlike in *Berkson*, the plaintiffs were repeatedly warned that their use of the service represented their assent to the terms of use.¹²³ Thus, the repeated notice was enough to satisfy the court, as well as the ABA-recommended rules that require that the defendant attract user attention and provide at least some relevant information.¹²⁴

Salameno provides a guideline as to what constitutes attracting user attention and providing relevant information. To require a company to disrupt the presentation of its webpage with glaring notices of a contract

113. *Salameno v. Gogo Inc.*, No. 16-0487, 2016 WL 3688435, at *1, *3 (E.D.N.Y. July 7, 2016).

114. *See Salameno*, 2016 WL 3688435 at *3, *Berkson*, 97 F. Supp. 3d. at 371.

115. *Berkson*, 97 F. Supp. 3d. at 371.

116. *Salameno*, 2016 WL 3688435, at *3.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Berkson*, 97 F. Supp. 3d at 374.

121. *Salameno*, 2016 WL 3688435, at *3 (The new sign-in webpage creates some question as to whether the consumer is ratifying his or her agreement and if each acceptance of the terms constitutes a renewed thirty-day notice period for opting out of the arbitration agreement).

122. *Id.* at *3-*5.

123. *Id.* at *5.

124. *Berkson*, 97 F. Supp. 3d. at 384.

would harm its business. However, like in *Salameno*, companies fulfill the proffered obligations to attract user attention and provide relevant information by repeatedly informing the consumer of the existence of terms and providing the consumer with the terms for his or her own reference.¹²⁵

IV. THE LYFT MODEL: SCROLL BOXES

A. Overview

While the *Gogo* cases show that the judiciary is taking steps in the right direction for notice of terms in the context of manifestation of assent, *Applebaum v. Lyft* takes another step toward protecting the rights of the consumer.

In *Lyft*, Applebaum brought a class-action lawsuit alleging that Lyft was unjustly enriched because it did not pass on E-Z Pass¹²⁶ discounts to those who used the service and instead, when faced with tolls, charged the customer the full standard amount of the toll.¹²⁷ Lyft filed a motion to dismiss and to compel arbitration pursuant to its terms of service.¹²⁸

When a consumer signs up to use the Lyft service, that consumer must first create an account with a verified phone number.¹²⁹ The consumer is presented with a page where he or she is prompted to add a phone number and then click a checkbox agreeing to Lyft's hyperlinked terms of service.¹³⁰ While consumers were required to provide a phone number and check a box, consumers did not have to click on the terms of service to be able to click the pink next button and continue with account creation.¹³¹ Contained within the terms of use was a mandatory arbitration agreement waiving both the right to sue and the right to bring class-action arbitration or litigation.¹³² Plaintiff contended that he was not given adequate notice because the hyperlink was not conspicuous and was deceptive as to what rights the terms concerned.¹³³ The court agreed in part, stating that the February terms were

125. *Salameno*, 2016 WL 3688435, at *3, *5.

126. E-Z Pass is a program where for a fee motorists may purchase an "E-Z Pass," a device that attaches to the inside of the windshield, that allows the motorist to pass through toll booths, usually through a lane that does not require stopping. Without paying a toll booth attendant, the motorist may pre-load money onto the device sort of like a gift card and expedite their trip without the hassle a standard user of the toll booth would face.

127. *Applebaum v. Lyft, Inc.* 263 F. Supp. 3d 454, 456–57 (S.D.N.Y. 2017).

128. *Id.* at 457.

129. *Id.* at 457–58.

130. *Id.* at 458.

131. *Id.*

132. *Id.* at 459.

133. *Lyft*, 263 F. Supp. 3d at 465–69.

not conspicuous, but that Lyft cured this when it introduced the September terms.¹³⁴

B. *The February Terms*

The court decided that the February terms were not enforceable.¹³⁵ When Lyft presented the terms and conditions, it failed to give adequate notice of the existence of the arbitration term.¹³⁶ The plaintiff testified that he had never clicked on the terms of service, and thus he had no actual knowledge of the existence of the arbitration term.¹³⁷

When there is no proof that a party has actually read the terms of service, the enforceability of the agreement is determined by whether the program would put a reasonably prudent user of that program on notice of the existence of contractual terms.¹³⁸ The mere fact that a consumer may have clicked that he agreed does not necessarily put the consumer on notice of all of the terms that would require further action to view.¹³⁹ Because the screen with the phone number, checkbox, and “next” button did not adequately warn the consumer of the gravity of inputting that information, the court held that the consumer was not given reasonable notice.¹⁴⁰ Further, the court dismissed the relevance of the link’s blue color, stating that color can be for aesthetic purposes, not only to indicate a hyperlink.¹⁴¹

The court strengthened consumer rights by stating that clicking “next,” without warning of the legal significance of clicking the “next” button, does not signify a physical manifestation of assent.¹⁴² Where clicking the “next” button is meant to operate as assent, it must be clear that clicking the button does so.¹⁴³ This policy is congruent with adopting the contract summary approach.

Condensing an infinitely long contract into a hyperlink is inadequate to inform consumers of what rights they are waiving. As mentioned earlier, a contract summary would inform consumers that manifesting assent would affect their legal rights and then would explain which rights are affected.¹⁴⁴

134. *Id.* at 469.

135. *Id.* at 467–69.

136. *Id.* at 469.

137. *Id.* at 465.

138. *Id.*

139. *Lyft*, 263 F. Supp. 3d. at 465.

140. *Id.* at 466.

141. *Id.* at 467.

142. *See id.* at 466, 68.

143. *Id.*

144. *See supra* Section II.F.

This is fundamentally different than what Lyft did, when it hid the entire contract in a series of next screens in which one contained the terms of the contract.

C. *The September Terms*

On September 30, 2016, Lyft updated its terms of service and changed its presentation of the terms.¹⁴⁵ First, Lyft reverted to its old model of presenting a pseudo-scroll wrap Terms of Service.¹⁴⁶ The Terms of Service were contained on a separate screen where the entire agreement was presented and was scrollable.¹⁴⁷ At the bottom of the screen, there was a pink “I accept” button indicating assent to the presented terms.¹⁴⁸ There was no indication that the consumer was required to scroll through the agreement before having the ability to click the “accept” button.¹⁴⁹ However, Lyft did specify at the top of the page, without any scrolling,¹⁵⁰ “[b]efore you can proceed you must read & accept the latest Terms of Service.”¹⁵¹ Lyft presented the new terms of service to every new and existing Lyft user and, additionally, required acceptance before any further use of the ride-sharing service was permitted.¹⁵² Because Lyft conspicuously presented the new terms of service to the consumer, the court held that plaintiff had notice of the arbitration term and granted Lyft’s motion to compel arbitration.¹⁵³

D. *Application of the District Court’s Decision*

Lyft’s presentation of the agreement should be the norm, not the exception to the general rule of how contractual terms are presented to consumers. To ensure that the consumer must at least look at the terms of the contract in order to accept it is a step in the right direction. However, the structure used in *Lyft* alone is not adequate, because even though such a structure encourages consumers to read online adhesion contracts, it does not make those contracts practically readable. The way that Lyft’s terms are presented needs to be combined with other measures to ensure that a consumer reads the contract. Lyft should have also required its users to scroll through the agreement in order to accept rather than just providing the opportunity to

145. *Lyft*, 263 F. Supp. 3d. at 460.

146. *Id.* at 461.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Lyft*, 263 F. Supp. 3d. at 461.

152. *Id.*

153. *Id.* at 468–70.

scroll. This requirement ensures that an infinitely long contract is not simply hidden behind a hyperlink. Scrolling through a contract allows the user to appreciate the length and the gravity of accepting the agreement, similar to how sitting at a table looking at a stack of paper in a printed contract would. Further, companies should be required to add the aforementioned summary page to the start of their contracts.¹⁵⁴ The assent to the contract would then be broken up into two parts. First, the consumer would be required to scroll through the summary page. Next, the consumer would then be required to click an acceptance button at the bottom of this page. Then, the consumer would be presented with the full text of the contract, on a second page, which the consumer would be required to scroll through. Finally, the consumer would then either accept or refuse to accept the contract terms. Acceptance of this second screen would satisfy the requirement of a physical manifestation of assent and create an enforceable contract provided that the terms of the contract are reasonably communicated.¹⁵⁵

V. THE ERROR OF THE SECOND CIRCUIT IN *UBER*: DISALLOWING HYPERLINKS IN THE CONTRACT

In *Meyer v. Uber Technologies, Inc.*, the Second Circuit incorrectly analogized the instant case to *Carnival Cruise* in its interpretation of reasonable notice, and by doing so, misapplied the reasonable notice standard.¹⁵⁶ In *Meyer*, plaintiff argued that Uber's¹⁵⁷ terms of service were unenforceable because, inter alia, there was no reasonably conspicuous notice of the terms of service or of the arbitration agreement.¹⁵⁸ The Second Circuit disagreed stating that, "[c]licking [a] hyperlinked phrase is the twenty-first century equivalent of turning over the cruise ticket."¹⁵⁹ In both cases, the consumer is prompted to examine terms that are located somewhere else."¹⁶⁰ This analogy does not satisfy the proposed standard of reasonable notice and further directly cuts against the standard set forth in *Lyft*.

Hiding the contract behind a hyperlink is unfair to the consumer and does not constitute reasonable conspicuous notice. There is value in knowing the length of a contract; this value is lost when pages of text can be hidden behind

154. See *supra* Section II.H.

155. *Lyft*, 263 F. Supp. 3d at 465.

156. *Meyer v. Uber Tech., Inc.*, 868 F.3d 66 (2d Cir. 2017).

157. Uber is a ridesharing company where users agree to terms in order to be able to summon a person to drive them somewhere for a lower fee than a taxi would charge.

158. *Meyer*, 868 F.3d at 72.

159. *Id.* at 78.

160. *Id.*

a hyperlink.¹⁶¹ Further, an indication of the ability to find the text of the terms and conditions elsewhere is not the same as telling a consumer what he or she is agreeing to. A consumer should be compelled to at least scroll through the terms to be able to accept them. Allowing consumers to accept terms that they do not even see is the opposite of conspicuous notice; it is hiding the terms behind a small hurdle. While that hurdle merely requires a consumer to visit another webpage, consumers have clearly demonstrated that they will not do this.¹⁶² Therefore, this simple scroll box is needed to protect consumers from both themselves and companies. Turning over the proverbial ticket is not conspicuous enough. The consumer should be presented with a scroll box, like the one in *Lyft*, that they need to scroll through to accept the terms of service for any online contract.

In *Meyer*, the Second Circuit stated that the consumer had inquiry notice because, in part, the dispute resolution section of the contract heading was bolded.¹⁶³ The court stated that the location of the arbitration clause within the Terms and Conditions was not a barrier to the existence of conspicuous notice of the term.¹⁶⁴ This should not be the standard. Setting the bar for inquiry notice to the existence of the term within the Terms and Conditions, regardless of length, destroys the notion of conspicuous notice. A company can bury a term deep inside of a contract so long and cumbersome that even a consumer of above-average prudence would decide to simply accept the contract and move on with his or her day.¹⁶⁵ Thus, setting the bar here does not encourage real mutual assent; rather, it encourages the expansion of boilerplate in order to bury terms material to the consumer's rights. The court needs to restrict what constitutes constructive notice to prevent the exploitation of consumers.

VI. *SGOUROS*: ENSURING THAT SCROLL BOXES ARE ADEQUATE AND NOT ABUSED

Although the scroll box in *Sgouros v. TransUnion Corp.* was deceptive, the Seventh Circuit showed great understanding of notice by recognizing that scroll boxes do not necessarily open the door to deception.¹⁶⁶ In *Sgouros*, the Seventh Circuit held that the existence of the scroll box was used to deceive

161. See *supra* Section IV.D.

162. See Matyszczyk, *supra* note 46, and Tugend, *supra* note 47.

163. *Meyer*, 868 F.3d at 79.

164. *Id.*

165. See *supra* Section II.D.

166. See *Sgouros v. Transunion Corp.* 817 F.3d 1029, 1033–1035 (7th Cir. 2016).

the promisee, not to convey the terms of the contract.¹⁶⁷ Thus, the contract was unenforceable.¹⁶⁸

In *Sgouros*, the plaintiff purchased a “‘credit score’ package” from TransUnion intending to use the information to facilitate the purchase of a car.¹⁶⁹ When plaintiff arrived at the dealership, his actual credit score was 100 points lower than what was given to him by the website.¹⁷⁰ TransUnion sought to enforce an arbitration agreement against Sgouros where the scroll box was strategically placed by TransUnion next to another block of text representing assent to use the service.¹⁷¹ The “accept” button was apparently designed to accept both agreements. The Seventh Circuit held that when a website states that a click represents assent to one agreement, the click does not also represent assent to another agreement.¹⁷²

Further, it stated that courts cannot assume a person has notice of the terms of the entire website when they agree to the contents of one page.¹⁷³ Thus, the Seventh Circuit understood the distinction between paper and web-based contracts. The court stated, “a person using the Internet may not realize that she is agreeing to a contract at all, whereas a reasonable person signing a physical contract will rarely be unaware of that fact.”¹⁷⁴

While people entering into contracts may not be aware that the action they are taking is legally significant, the fact that a contract is written down helps a person to understand its significance. People comprehend printed text better than text on a computer screen.¹⁷⁵ Thus, people are more likely to understand what they are agreeing to if, in order to assent, they must sign a printed contract. However, this would significantly increase costs in the industry. Therefore, the web-based contract is necessary, and the requirement of drawing the reader’s attention to the terms of the contract is proper.¹⁷⁶ However, what lacks in this requirement is impressing upon the consumer that this printed contract is legally significant and important to read, not just the fact that the terms exist and are open to read. Confronted

167. *Sgouros v. TransUnion Corp.* 817 F.3d 1029, 1036 (7th Cir. 2016).

168. *Id.* at 1036.

169. *Id.* at 1030.

170. *Id.*

171. *Id.*

172. *Id.* at 1035.

173. *Sgouros*, 817 F.3d at 1034–35.

174. *Id.* at 1035.

175. Anne Mangen, Bente R. Walgermo, et al., *Reading Linear Texts on Paper Versus Computer Screen: Effects on Reading Comprehension*, 58 INT’L J. OF EDUC. RES. 61, 61–68 (2013).

176. *See supra* Section II.H.

with the impossibility of reproducing the proverbial dropping a stack of paper in front of a consumer, companies should be required to replicate this impact in another way. This is what the proposed summary page and formatting would accomplish.

When a contract is written separating the summary page and the body of the contract, it creates the effect of putting multiple pieces of paper in front of the consumer. The summary page would be short, allowing the reader to view the information on as few screens as possible. This would help with reading comprehension both because the summary text would be in plain English and because limiting initial scrolling would help a reader to comprehend the conveyed information. It does this because scrolling interferes with spatial recognition of text.¹⁷⁷ Combining this with forcing the reader to scroll through the contract would ensure that the consumer appreciates the length of what it is he or she is agreeing to and cause the consumer to appreciate that the document is a legal document that is important to read.

VII. THE ERROR IN *FTEJA*: THE ENTIRE CONTRACT SHOULD BE ON ONE WEBPAGE

While the Seventh Circuit understands that consumers are more wary of written contracts and may not realize the significance of web-based contracts, the Second Circuit misunderstands the distinction. In *Fteja v. Facebook, Inc.*, the Second Circuit did not understand how the average user navigates the internet and thus did not apply the RC standard.¹⁷⁸ The court reasons that placing terms on another webpage does nothing to make a consumer less likely to read a contract.¹⁷⁹ It states that each is essentially a multipage contract because each hyperlink takes a person to a new page of the contract.¹⁸⁰ This is incorrect, as demonstrated in the case of the online shoppers agreeing to “sell their souls”; people generally neglect reading terms and conditions even when they do not have to go out of their way to navigate to another webpage.¹⁸¹ Perhaps if the consumer had to individually click through each webpage, representing a single page of the contract, that would help, but at the same time, that would annoy consumers who would then likely try to skip through the pages as fast as possible without reading them.

Additionally, each webpage is capable of displaying hundreds of paper pages worth of text. The website needs to put the contract on the same page

177. Mangan & Walgermo, et al., *supra* note 172.

178. *See generally*, *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d. 829 (S.D.N.Y. 2012).

179. *Id.* at 840.

180. *Id.*

181. *See Specht*, 306 F.3d at 23.

as the button, which represents the consumer's assent. Otherwise, inconvenience would cause consumers not to read the contents of the contracts, leading to the same problems discussed herein. To place the contract and summary page on the webpage would not clutter the page. The company can place the entire contract in two scroll boxes on subsequent pages ensuring that the consumer knows of the contract. This would make it more difficult for the consumer to bring a lawsuit that survives a motion to dismiss.

Another concern is that the nature of how the internet works makes it cumbersome to treat clicking the "next" button the same as flipping a page on a paper contract. Having to wait for each individual webpage to load in order to read the contract would be time consuming and inefficient. Further, treating each hyperlink as simply flipping one page of a multipage contract allows companies to easily incorporate other legal documents into the original agreement, which they do.¹⁸² For example, Apple's iTunes terms of use contain multiple hyperlinks to other sets of terms which they incorporate into the initial contract.¹⁸³ Scrolling down just one page contains hyperlinks incorporating terms for gift cards and general privacy.¹⁸⁴ Treating hyperlinks the same as flipping a page allows companies to hide additional terms in their contracts and would defeat the concept of meaningful notice. These hyperlinks inconvenience the consumer and encourage him or her to not read the entire contract because of the myriad of webpages that he or she would have to navigate through to read the full agreement.

The proposed format would combat these problems. Because webpages are more than capable of containing the entire text of the agreement, companies should not be allowed to hyperlink to other sets of terms. The companies would be required to make them a part of the contract presented to the consumer. Because the consumer would be required to scroll through each contract to accept it, the consumer would be able to appreciate the entirety of the contract and recognize that it is a real legal document just as if it were printed on paper. The consumer likely would still skip the main contract. However, the summary page, which would tell him or her of the most important terms, would be enough to direct a consumer's attention to anything which he or she would like to investigate further.

182. *Apple Media Services Terms and Conditions*, APPLE, <https://www.apple.com/legal/internet-services/itunes/us/terms.html> (last visited Sept. 11, 2019).

183. *Id.*

184. *Id.*

VIII. DISCORD ARBITRATION AGREEMENT UPDATE: COMPANIES MAY
BENEFIT FROM TRANSPARENCY

Late in 2018, a voice-over internet protocol¹⁸⁵ company named Discord updated its terms of service changing its arbitration agreement.¹⁸⁶ Discord's new terms of service included a class-action waiver and the new dispute resolution prescribed arbitration in lieu of going to court.¹⁸⁷ The users of the program were outraged because their ability to sue the company would be revoked if they continued to use the service.¹⁸⁸ However, Discord included the ability to opt out of the arbitration agreement.¹⁸⁹ Discord also released a blog post to communicate to its userbase the changes that were to take place and why they were going to take place.¹⁹⁰ The blog post also re-informed everyone that they had the ability to opt out.¹⁹¹ The general response to this blog post was very negative.¹⁹² Many users criticized the company for sneakily trying to take away their right to sue and threatened to discontinue use of the program.¹⁹³ The issue was that Discord was not upfront about the changes to their terms of service, and it looked like the blog post was only released because Discord "was caught with its hand in the cookie jar."

Discord could have avoided this whole public relations issue by informing its user base before making changes to the terms of service. While Discord acted in the wrong order, the way the company explained itself, albeit after the fact, is the approach that companies should take when contracting with consumers. This formatting proposal for contracts encourages this approach. Consumers want companies they deal with to be open and honest with them as well as forthcoming with information that affects them. If companies were to include summary pages in plain English explaining their contracts to laypeople, those people would appreciate the chance to understand their

185. Voice-over internet protocol is technology that enables a person to communicate to another through the internet much like a phone call.

186. Rebekah Valentine, *Discord Updates Terms of Service To Force Arbitration over Lawsuits*, GAMESINDUSTRY.BIZ (Oct. 18, 2018), <https://www.gamesindustry.biz/articles/2018-10-18-discord-updates-terms-of-service-to-revoke-right-to-sue>.

187. Nelly, *Terms of Service Feedback and Changes*, DISCORD (Oct. 19, 2018), <https://blog.discordapp.com/terms-of-service-feedback-and-changes-c58a530c7693>.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Latest ToS Update Revokes Your Right To Sue Discord*, REDDIT (Oct. 18, 2018), https://www.reddit.com/r/discordapp/comments/9p5uyy/latest_tos_update_revokes_your_right_to_sue/.

193. *Id.*

agreements before entering into them.¹⁹⁴ The brand loyalty that companies could create by taking this approach would cause consumers to stick with transparent companies instead of their competitors.¹⁹⁵ Additionally, loyal and well-treated consumers may not bring causes of action and instead turn to the company to solve disputes without even requiring arbitration.

IX. PROPOSED SOLUTION

Because consumers have a right to reasonable conspicuous notice as to the terms of contracts that they enter into, companies should be required to include summary pages as an attachment to the front of their contracts. These summary pages should be structured such that they contain terms such as arbitration and forum selection clauses while also giving a basic outline of the parties' contractual obligations. They should also be kept reasonably short, taking into account the length of the contract and the complexity of the agreement. The most important terms should be placed at the top, and the formatting should be similar to the example contained in Section II.H.¹⁹⁶

The contract should be broken up into two sections: the summary page, and the actual contract, each with its own "accept" button. Further, to accept these contracts, the consumer should be required to at least scroll through both the summary page and the contract itself. Neither the summary page nor the contract itself should be allowed to contain hyperlinks to other webpages. This is to help the consumer appreciate the extent of the obligations to which he or she is agreeing. After the consumer agrees to the contract, the company should email the consumer a copy of the contract as well as include a hyperlink to the contract near the "sign-in" button.

These requirements would be present only when a large company¹⁹⁷ is dealing with an individual because of the concern of unequal bargaining power. Companies would benefit consumers by helping their consumers understand what legal obligations or forbearances they agree to undertake as well as what the terms of the contract mean. Companies would benefit because consumers would have a much harder time establishing that they did

194. *Why Transparency is the Key To Building Brand Loyalty*, CISION (Dec. 13, 2017), <https://www.cision.com/us/2017/12/transparency-key-to-brand-loyalty/> (citing LABEL INSIGHT, DRIVING LONG-TERM TRUST AND LOYALTY THROUGH TRANSPARENCY, (2016), http://www.labelinsight.com/hubfs/2016_Transparency_ROI_Study_Label_Insight.pdf?hsCtaTracking=1ca86907-bde6-493d-92df-65b02a48a837%7C9357b528-9aa6-484e-ac6f-bf8df0c0704d).

195. *Id.*

196. *See supra* Section II.H.

197. This would be determined later but would likely be based upon net worth or objectively measurable criteria.

not have reasonably conspicuous notice to contract terms, thus saving companies resources which would otherwise be spent on litigation.

X. CONCLUSION

Written contracts have evolved from being contained in a neat, yet imposing, stack of 8.5×11-inch paper to being hidden behind a few seemingly innocent words of blue hyperlink text. Whereas paper contracts seem threatening and important to read, online contracts incorporating terms by linking different webpages in multiple places on the website are rarely read by consumers and easily clicked past. Either the court needs to cabin the doctrine of constructive notice as it applies to contracts to be more protective of consumers, or the legislature needs to create laws that prescribe mandatory guidelines for companies contracting with individuals. If the Supreme Court rules that this violates the preemptive effect of the FAA, Congress would need to amend the FAA to allow courts to enforce a heightened standard of notice to arbitration terms. Congress can do this by requiring a summary of the important contractual terms contained within a contract to be presented in plain English as a cover page to the contract. Further, like in *Lyft*, online contracts should move to scroll wrap agreements that must be scrolled through to be accepted, thus promoting reading the document.¹⁹⁸ The summary page should be kept separate from the rest of the contract in a series of two webpages requiring the consumer to accept each. This would promote the consumer's special understanding of the information presented and make the contract easier to read and understand. Further, it would embody the "flipping a page" concept that the Second Circuit, in *Fteja*, discussed where the summary page could be used as an index to lookup concerning terms in the body of the actual contract.¹⁹⁹

Consumers would benefit from being able to understand what it is that they agree to, whereas companies would benefit from the creation of loyalty and trust in their customers. This would potentially lead to customers being willing to pay more for certain products that are backed by a transparent company. Reform would also reduce litigation between companies and consumers who claim that they had no notice. If companies started implementing summary pages,²⁰⁰ any cause of action alleging that the consumer had no notice of the contractual terms would be met with a swift dismissal or loss on summary judgment, reducing legal costs for companies in the long term because conforming contracts would per se pass the RC Test. If the consumer informed at the start of the summary page that they need to

198. See *supra* Section III.B.

199. See *supra* Section IV.D.

200. See *supra* Section IV.D.

read the summary and the contract, the consumer would not have a leg to stand on, and thus, this communication would save the company legal costs.

Contracts are vital to facilitate efficiency in running a business; this is not a cry to make it easy to evade an otherwise enforceable agreement, but reform needs to happen in order to bring fairness back to consumers in the age of digital contracts. As it stands, the burden of constructive notice in contract law is overreaching and unreasonably burdensome upon the consumer. Thus, the current state of the doctrine of notice is flawed law and should be changed to be more consumer friendly.