The Computer & Internet Lawyer

Volume 38 ▲ Number 6 ▲ June 2021

Ronald L. Johnston, Arnold & Porter, Editor-in-Chief

Survey of Enforceability of Consumer Electronic Acceptance: A Practitioner's Guide to Designing Online Arbitration Agreements and Defending Them in Court – Part VI

By Elie Salamon

As businesses continue to face unprecedented challenges navigating the global pandemic and depressed consumer spending and demand, companies are looking for cost-saving measures across the board to stay afloat and to maintain corporate profits. Many businesses have shifted to adding arbitration agreements with binding class action waivers to the sale of goods and use of services to consumers to flatten company annual litigation defense spending. These agreements require consumers to bring any claim arising out of their purchase or use of a product or service in arbitration rather than in court, and prevent consumers from bringing such claims as part of a class or consolidated action.

The first part of this article, published in the January issue of *The Computer & Internet Lawyer*, discussed why an arbitration clause can be a powerful tool in a company's litigation defense arsenal; the enforceability of arbitration agreements under the Federal Arbitration Act; the two most common types of web-based contracts (a "clickwrap" or "clickthrough" agreement and a "browsewrap" agreement); and best practices for drafting those web-based contracts; and elements that attorneys defending a company's arbitration agreement in court should incorporate into any motion to compel arbitration.

Subsequent parts of this article published in *The Computer & Internet Lawyer* surveyed recent decisions (in chronological order based on date of publication) over the past year or so across all jurisdictions involving the enforceability of consumer electronic acceptance of arbitration agreements. This part continues the survey.

The summaries below are focused principally on the question of contract formation, that is, whether the consumer had notice of the arbitration agreement and manifested their agreement to it, and the arguments plaintiffs have invoked in an effort to evade a finding of mutual assent to arbitrate any disputes. The summaries include imagery of the corporate website and app presentations of the arbitration agreements at issue in each case, and explain how those agreements fared when tested in court. For example, eBay's arbitration agreement at issue in *Anderson v. Amazon, Inc.*, illustrates a strong modified

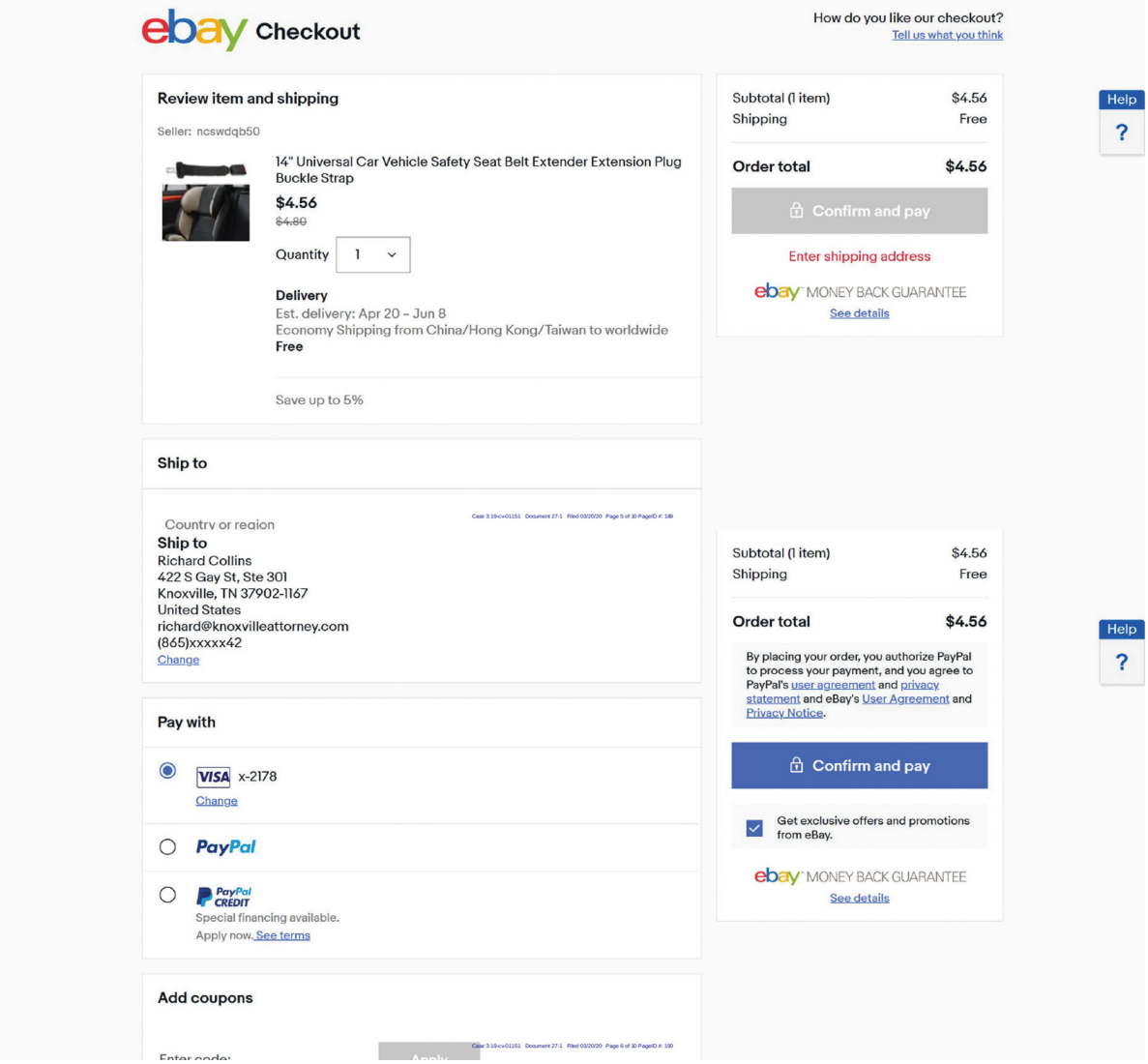
Elie Salamon, a senior associate at Arnold & Porter, focuses his practice on complex commercial litigation and product liability litigation for major corporations. He may be contacted at elie.salamon@arnoldporter.com.

clickwrap agreement. Here, the plaintiff argued that the agreement was procedurally unconscionable because eBay's webpage did not require him to review it before making his purchase and could only be accessed by clicking on a separate weblink. The court explained that the arbitration clause was available on the same screen in which the plaintiff was asked to confirm his assent to the arbitration provision, and the arbitration clause could be accessed "[i]n one click of a mouse" through a blue underlined hyperlink immediately above a large blue button by which the plaintiff confirmed his agreement to the terms; that was sufficient to render the agreement in accordance with the law. The *Anderson* decision also serves as a reminder to pay equal care to the design of the arbitration agreement as to the initial interface presenting the agreement to the user. The plaintiff in *Anderson* sought to evade arbitration by contending that the agreement was inaccessible because it was on the twelfth page of the terms and conditions in single-spaced, small font. The court found the argument meritless because users were tipped off about the existence of the arbitration provision in bold font on the very first page in the table of contents. And *Bell v. Royal Seas Cruises, Inc.*, exemplifies another instance of the goalposts moving; that is, of an arbitration agreement design found to provide reasonable inquiry notice, but a court nevertheless ordering a bench trial to resolve factual issues created by a plaintiff's declaration. Here, Royal Seas submitted time stamped evidence showing the time and date on which the plaintiff had visited the company's website, entered her personal information, and agreed to the terms and conditions. But because the plaintiff denied in an affidavit that she had ever visited the company's website and asserted that she had never authorized anyone to visit the site on her behalf, the court held that a trial was needed to decide if the plaintiff or her agent, as opposed to someone else, had visited Royal Seas' website and entered the plaintiff's personal information.

⋆ ⋆ ⋆

***Anderson v. Amazon.com, Inc.*, 2020 WL 4586173 (M.D. Tenn. Aug. 10, 2020) (Richardson, J.) (applying Tennessee and Utah law)—**Plaintiffs brought this putative class action against eBay, Amazon, and Walmart, claiming that the companies fraudulently misled consumers regarding the proper usage and safety ratings of seatbelt extenders sold on eBay's website. eBay moved to compel arbitration of the only plaintiff that asserted claims against it (Walmart moved to compel arbitration against a second plaintiff who bought their seatbelt extenders from Walmart, which motion was resolved by the district court in a separate, subsequent order in *Anderson v. Amazon.com, Inc.*, 2020 WL 5797973 (M.D. Tenn. Sept. 29, 2020)). That plaintiff had purchased a seatbelt extender online from eBay, and eBay submitted evidence establishing that the plaintiff had selected the "Buy Now" option, and then made the selection to "Check out as a guest." At the final "**Checkout**" screen, eBay's website provided plaintiff with a notice in black text encircled by a gray textbox that read, "By placing your order, you authorize PayPal to process your payment, as you agree to PayPal's user agreement and privacy statement and eBay's User Agreement and Privacy Notice." Below that notice was a large blue button that said "Confirm and pay" that had to be clicked to complete the purchase. The four policies listed in the notice were underlined and in blue font, and hyperlinked to the relevant policies. eBay's User Agreement, if clicked on, would direct the user to an arbitration agreement. The arbitration agreement included an opt-out provision, providing that new users could reject the arbitration agreement by mailing eBay a written and signed opt-out notice postmarked no later than 30 days after the date of acceptance of the user agreement for the first time, and that procedure was "the only way [users] c[ould] opt out of the Agreement to Arbitrate."

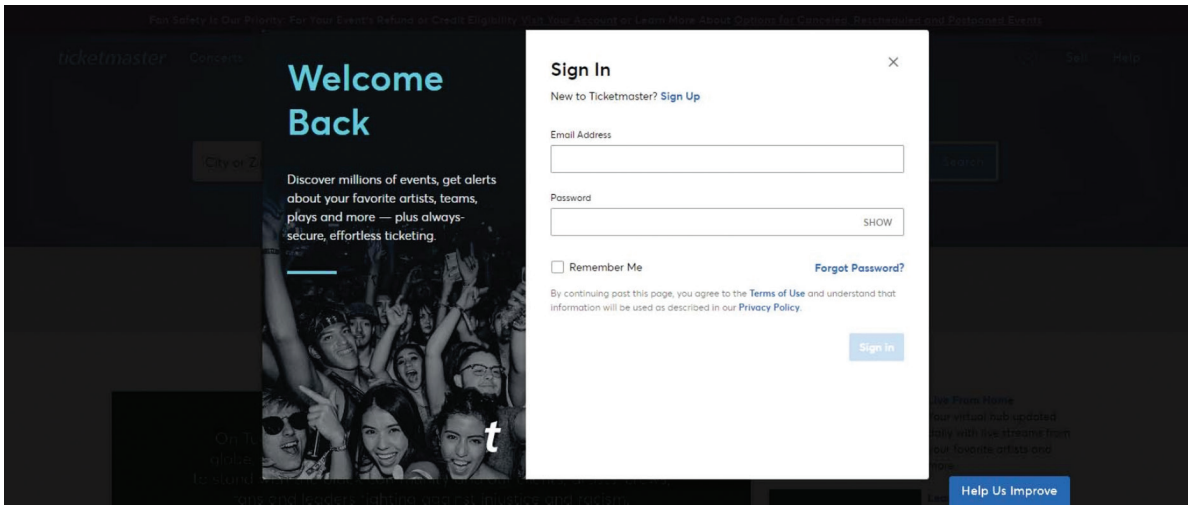
Plaintiff argued that he effectively opted out of the arbitration agreement within the prescribed time period and thus could not be governed by its terms because he filed suit against eBay within 30 days of accepting the agreement, which he claimed constituted substantial performance of the arbitration agreement's opt-out procedure. Plaintiff argued that filing suit constituted effective notice and that failing to send eBay's legal department a signed, physical opt-out notice was a technical defect that the law forgives. The district court disagreed, and observed that the filing of suit against eBay did not provide "much of the information requested through the opt-out procedure" and that "[t]he Arbitration Agreement's unambiguous terms indicate[d] that an individual may only opt out of the Arbitration Agreement by following the prescribed specific steps mentioned above." *Id.* at ⋆6. The district court reasoned that eBay had "bargained for these terms," i.e., it had "bargained not just for some technical mode of receiving opt-out forms, but also for the right essentially to receive notice of opting out prior to any lawsuit – prior notice that theoretically could help Defendant eBay avoid the very kind of in-court litigation its Arbitration Agreement was designed to avoid in the first place." *Id.* at ⋆7. Given the specificity of the Arbitration Agreement's opt-out procedure, the court found that the filing of the lawsuit did not constitute substantial performance of the opt-out procedures.

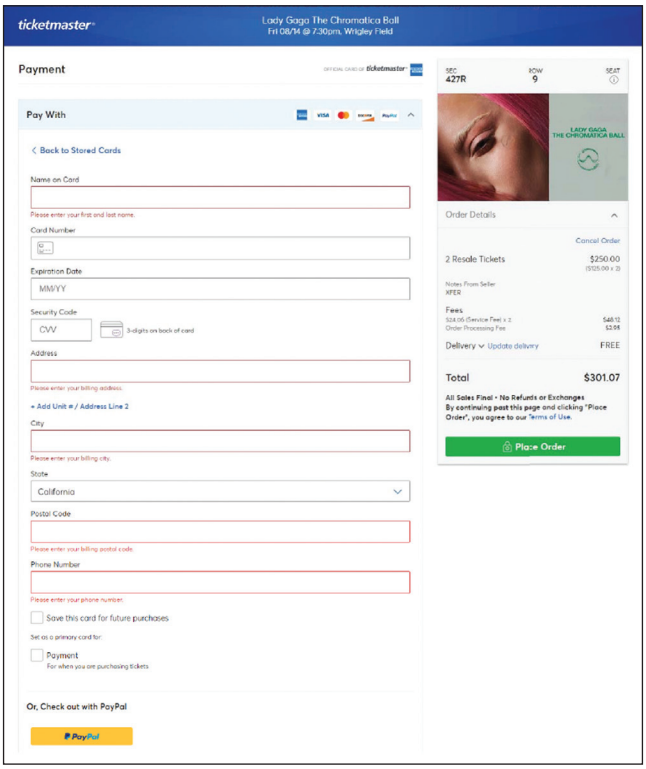


Plaintiff also argued that the arbitration agreement was procedurally unconscionable because no reasonable consumer would give up their right to a jury, to sue eBay in court, or to file a class action suit simply because they clicked a button that said "Confirm and Pay," particularly given that the User Agreement could only be accessed by clicking a separate link. But the district rejected plaintiff's argument. The court observed that federal courts have consistently upheld such clickwrap agreements, and that the hyperlink to the User Agreement in this case "was available on the same screen in which [plaintiff] was asked to confirm the agreement, and that, "[i]n one click of a mouse, Plaintiff Cooper would have been able to access the User Agreement and its Arbitration Agreement." *Id.* at *8.

Last, plaintiff maintained that the arbitration agreement was inaccessible to most users because it was located on page 12 of a 17-page, single-spaced, small font document that users were not required to scroll through before acceptance. The district court, however, explained that "information regarding the existence of [that] agreement c[ould] be found in bold font on the first page," and "a party's failure to read a contract he or she signed is not a valid indicator of procedural unconscionability nor a defense to enforcement." *Id.* at *9. The court thus granted eBay's motion to compel arbitration.

***Ajzenman v. Office of the Comm'r of Baseball*, 2020 WL 6031899 (C.D. Cal. Sept. 14, 2020) (Fischer, J.) (applying California law)**—Plaintiffs brought this putative class action against numerous defendants, including Ticketmaster and Major League Baseball, claiming violations of California state law after MLB canceled fan-attended baseball games due to the

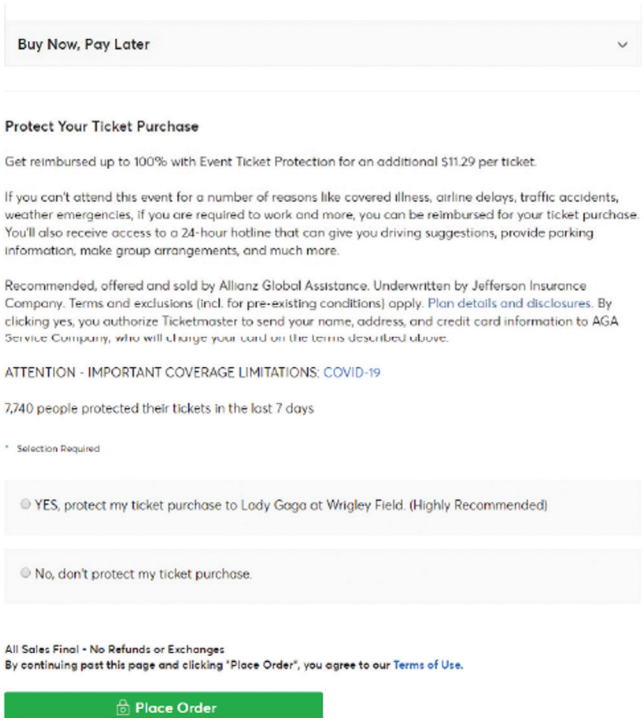




COVID-19 pandemic, but had not issued any ticket refunds to fans. Ticketmaster moved to compel one of the plaintiff's claims to arbitration who purchased her tickets through Ticketmaster's website.

To make a purchase on Ticketmaster's website, users were required to sign into their account. The sign-in page presented a pop-up screen for users to enter their email address and password and then click a blue "Sign In" button. Immediately above that button, Ticketmaster advised that, "By continuing past this page, you agree to the **Terms of Use** and understand that information will be used as described in our **Privacy Policy**." The phrases "Terms of Use" and "Privacy Policy" were in bolded blue text and hyperlinked to the full policies, the former of which included an arbitration agreement.

In addition, when purchasing tickets on Ticketmaster's website, users were presented with a Payment screen



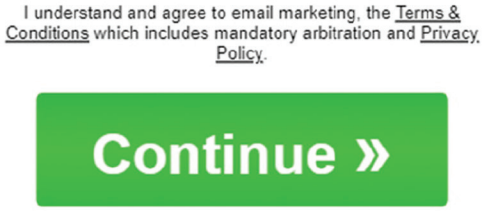
to enter their payment and personal information before clicking a large green "Place Order" button that appeared twice, in the upper-right-hand side of the Payment screen and again at the bottom of the Payment page. Directly above the button in both locations was a notification in bold font stating that "**All Sales Final - No Refunds or Exchanges[.] By continuing past this page and clicking 'Place Order', you agree to our Terms of Use.**" The phrase "Terms of Use" was in bolded blue text and hyperlinked to the full text of the terms, which included an arbitration clause.

Moreover, at the bottom of numerous pages of the Ticketmaster website, including the website homepage and seat selection page for events, Ticketmaster included a link in white font across the bottom of the page that read: "By continuing past this page, you agree to our **Terms of Use**." The phrase "Terms of Use" was in bold typeface and hyperlinked to the applicable terms.

The district court found that the Ninth Circuit's recent decision in *Lee v. Ticketmaster L.L.C.*, 817 F.App'x 393 (9th Cir. 2020), was instructive and held that plaintiff assented to the arbitration provision. Plaintiff argued that the district court should ignore *Lee* because it was unpublished, non-precedential, and did not address identical webpages to those presented to plaintiff. But the district court found this argument "unpersuasive," noting that *Lee* was still "guidance . . . provided" by the Ninth Circuit on the issue, and "though the pages differ[ed] slightly, the Ticketmaster sign-in and purchase pages filed in *Lee* [were] almost identical to those here," as "[a]ll use[d] the same or similar language and present[ed] 'Terms of Use' in text that [was] blue and hyperlink[ed] to the full Terms of Use." *Ajzenman*, 2020 WL 6031899, at *4.

***Bell v. Royal Seas Cruises, Inc.*, 2020 WL 5639947 (S.D. Fla. Sept. 21, 2020) (Ruiz, J.) (applying Florida law)**—Plaintiff filed a putative class action, alleging violations of the Telephone Consumer Protection Act after receiving several telemarketing calls from Royal Seas Cruises. Royal Seas Cruises moved to compel plaintiff's claims to arbitration, arguing that plaintiff had agreed to an arbitration provision governing the dispute.

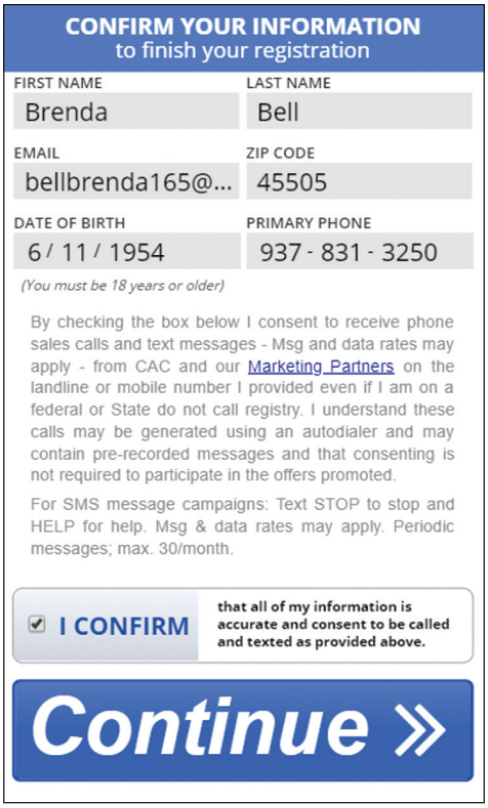
Royal Seas Cruises submitted an affidavit in support of its motion to compel arbitration, showing that plaintiff visited Royal Seas Cruises' website on September 11, 2018 at 11:09 a.m. eastern where she provided her personal information on the website's registration page and clicked on a large green "**Continue >>**" button. Immediately above that button was a notice stating in black boldface, "**I understand and agree to email marketing, the Terms & Conditions which includes mandatory arbitration and Privacy Policy**." The phrases "Terms & Conditions" and "Privacy Policy" were both underlined and hyperlinked to the applicable terms, the former of which included an arbitration agreement.



After a user clicked on the "Continue >>" button, they were asked to confirm their personal information and complete their registration by checking a box next to a statement that "**I CONFIRM that all of my information is accurate and consent to be called and texted as provided above**," which appeared immediately above a large blue "Continue >>" button.

In a declaration submitted in opposition to Royal's motion, plaintiff denied that she ever visited the website prior to the filing of the motion to compel arbitration and claimed she never authorized anyone to visit the site on her behalf.

Applying Florida law, the district court found inquiry notice based on the Florida District Court of Appeal's decision in *MetroPCS Communications, Inc. v. Porter*, 273 So. 3d 1025 (Fla. Dist. Ct. App. 2018), which explained that browsewrap agreements, such as Royal Seas Cruises', are enforceable only "when the purchaser has actual knowledge of the terms and conditions, or when the hyperlink to the terms and conditions is conspicuous enough to put a reasonably prudent person on inquiry notice," *id.* at 1028, and do "not require an explicit statement informing the user that his use of the service, or any other act on behalf of the user, would constitute acceptance and render the agreement enforceable," *Bell*, 2020 WL 5639947, at *5. The district court found that, while plaintiff claimed she had no actual knowledge of Royal Seas Cruises' terms and conditions, the website's design with the hyperlink to the terms and conditions was sufficiently conspicuous to provide inquiry notice. The court observed that "[t]he sentence regarding the applicability of the Terms and Conditions . . . include[d] a hyperlink to the Terms and Conditions and [was] placed directly above the 'Continue' button that any user must click to proceed with using the website." *Id.* at *6. The district court further noted that, "[b]ecause it [was] nearly impossible that any user would not see" the statement that "**I understand and agree to email marketing, the Terms & Conditions which includes mandatory arbitration and Privacy Policy**" "before hitting 'Continue,' this design [was] a far cry far from those wherein the hyperlink to the terms and conditions is buried at the bottom of the page, and the website never directs the user to review



them." *Id.* (internal quotation marks omitted). The court further found that "a reasonable person would understand that by clicking 'Continue' directly under a sentence that begins 'I understand and agree[,] . . .' the user [was] assenting to the statements or conditions that follow," and that "[t]he affirmative act of clicking the 'Continue' button present[ed] at least as much, if not more, compelling evidence of assent than that which was present in *MetroPCS*, where the court held that the appellee's mere continued use of the company's services after receiving the text messages with the hyperlinked terms and conditions constituted assent." *Id.* (internal quotation marks omitted).

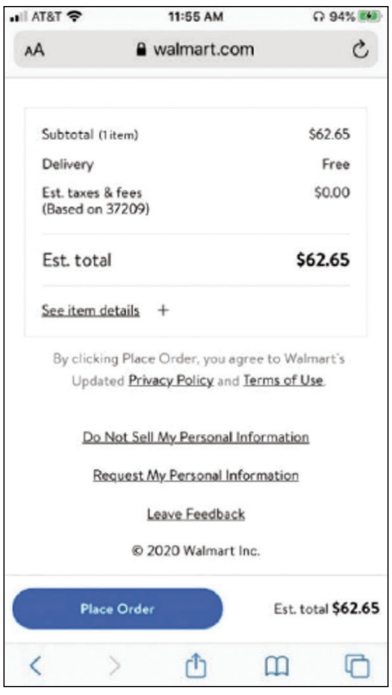
Although the district court concluded that the hyperlink to the terms and conditions was conspicuous enough to put a reasonably prudent user on inquiry notice of the Terms and Conditions, and that a user's clicking "Continue" was sufficient to constitute assent to the Terms and Conditions, the court found that a factual question remained regarding whether plaintiff or someone authorized by plaintiff actually visited the website in question and clicked the "Continue" button on September 11, 2018. Accordingly the district court ordered a bench trial to be held on this narrow question pursuant to 9 U.S.C. § 4.

***Anderson v. Amazon.com, Inc.*, 2020 WL 5797973 (M.D. Tenn. Sept. 29, 2020) (Richardson, J.) (applying California and Tennessee law)**—In

a follow-on order to the district court's order granting eBay's motion to compel arbitration of the eBay purchaser plaintiff's claims in *Anderson v. Amazon.com, Inc.*, 2020 WL 4586173 (M.D. Tenn. Aug. 10, 2020), the district court considered a separate motion to compel arbitration filed by Walmart against a second plaintiff who had purchased two seat belt extenders on Walmart's website.

To purchase an item through Walmart's website, customers must complete a checkout process. The last page of the checkout process contained information about the order followed by a notice in gray text stating "By clicking Place Order, you agree to Walmart's Updated Privacy Policy and Terms of Use." The phrases "Privacy Policy" and "Terms of Use" were in black typeface and underlined and were hyperlinked to the relevant policies, the latter of which included an arbitration agreement. To complete the order, a customer must click on a large "Place Order" button at the bottom of the screen.

Plaintiff argued that the agreement was procedurally unconscionable because he was not required to check a box saying "I agree" and was not required to scroll through Walmart's Terms of Use before making his purchase. According to plaintiff, because he was not required to affirmatively indicate his agreement to the Terms of Use, he did not assent to arbitrate any disputes with Walmart. But the district court found that "[t]he hyperlink was prominently displayed directly above the 'Place Order' button which was required to complete a purchase," and that, "[w]ith just a single click of a mouse



before placing his order, Plaintiff . . . would have been able to access the Terms of Use, as well as the Arbitration Clause." *Anderson*, 2020 WL 5797973, at *7.

Plaintiff also argued that the Terms of Use were unconscionable because they required clicking on a separate link and the arbitration clause was buried on page 16 of the 17-page document. But the district court noted that "the information regarding the existence of the clause [was] located in two places on the first page: at the top of the page and in the middle in bold and all capital letters," and that "the reality is that a party's failure to read a contract he or she signed is not a valid indicator of procedural unconscionability nor a defense to enforcement." *Id.* Accordingly, the district court held that the parties had agreed to arbitrate by the Terms of Use, and granted Walmart's motion.

***Edmundson v. Amazon.com, Inc.*, 2020 WL 5819870 (N.D. Ill. Sept. 30, 2020) (Durkin, J.) (silent regarding applicable law)—**This was a putative class action filed against Amazon, alleging that Amazon sold plaintiff unsafe and recalled products from third-party retailers in violation of Illinois state law. Amazon moved to compel plaintiff's claims to arbitration.

In support of its motion, Amazon submitted a declaration from its Associate General Counsel, stating that every customer who created an account with Amazon and made a purchase on Amazon's website was required to accept Amazon's Conditions of Use. When making a purchase, customers were required to indicate their express acceptance by confirming their orders by clicking a "Place your order" button that appeared next to a statement that said "By placing your order, you agree to Amazon.com's privacy notice, conditions of use and all of the terms found here." The declaration stated that the blue underlined text provided a hyperlink to the full Conditions of Use, which included an arbitration clause. At the direction of the district court, plaintiff was ordered to disclose to Amazon his email address, and Amazon's declarant stated that Amazon's business records showed that plaintiff had made his purchases on August 26, 2019 and that he had agreed to Amazon's Conditions of Use. While Amazon attached to its motion a copy of the Conditions of Use applicable to plaintiff's purchase, Amazon never attached a screen shot of its interface or presentation of the agreement to plaintiff.

Plaintiff did not argue that he did not agree to the Conditions of Use; rather, he contended that Amazon had failed to identify the particular version of the Conditions of Use to which he had agreed when he created his Amazon account. But the district court found that was irrelevant because, "[a]s Amazon's affidavit state[d], and [plaintiff] does not

challenge, Amazon customers agree to Conditions of Use every time they make a purchase." *Id.* at *1. The relevant Conditions of Use, the court explained, were those to which plaintiff had agreed when he made the purchases at issue, not those when he created his Amazon account. Accordingly, the court held that Amazon had satisfied its burden of establishing an agreement to arbitrate.