SURVEY OF THE LAW OF CYBERSPACE:

ELECTRONIC CONTRACTING CASES 2005-2006

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I. Introduction

Today, electronic transactions are routine. Communication by e-mail, somewhat novel ten years ago, is now part of our daily lives. The same can be said for the purchase of goods on the Internet. As persons contract in new ways, courts are called upon to rule on the legal effects of these new modes of communication. The cases that we discuss in this article show the continuing development of contract law in the electronic environment.

The cases surveyed in this article show a maturation of the law of electronic contracts. Two of the cases remind us that while an electronic record signed electronically *can* constitute an enforceable contract, the electronic record does not always create a binding obligation.² Another pair of cases addresses the enforceability of

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¹ We use the term "Internet contracting" to refer to cases that involve the anonymous bazaar that is the Internet. We use "electronic contracting" to refer to both Internet cases and those that involve parties who are not strangers to each other (an example is a contract (arguably) concluded by the exchange of e-mails.)

² CSX Transportation, Inc. v. Recovery Express, Inc., 415 F. Supp. 2d 6 (D. Mass. 2006); Brantley v. Wilson, 2006 U.S. Dist. LEXIS 17722 (W. D. Ark. 2006).

web site terms and conditions when those terms and conditions are purportedly incorporated by reference into a binding agreement. One court ruled that such incorporation was effective³ and the other held that the web site terms had not been effectively incorporated into the agreement in question.⁴

Cases involving electronically delivered contract terms have been challenging courts since the late 1990s. In the early years of these disputes, the judges focused on whether those terms, generally labeled "click-wrap" and "browse-wrap," were enforceable. Today, it is well-settled that electronic terms can be enforced, so long as certain conditions are met. One of the opinions that we discuss below⁵ is notable for its recognition that online terms cannot necessarily be neatly characterized as "click-wrap" or "browse-wrap." While the case involved the certification of a class action and did not decide whether the electronically delivered terms at issue were enforceable, it contains a thoughtful discussion of electronic contracting.

As we did in our last survey,⁶ we discuss here several cases dealing with the enforceability of forum selection (including arbitration) clauses in electronic agreements.

³ Hugger-Mugger, L.L.C. v. NetSuite, Inc., No. 2:04-CV-592 TC, 2005 U.S. Dist. LEXIS 33003 (C.D. Utah Sept. 12, 2005).

⁴ Affinity Internet, Inc. v. Consolidated Credit Counseling Services, Inc., 920 So. 2d 1286 (Fl. Court of Appeal 2006).

Hotels.com, L.P. v. Canales,, No. 04-05-00315-CV, 2006 Tex. App. LEXIS 803 (Ct. App. Feb. 1, 2006).
 Juliet M. Moringiello & William L. Reynolds, Survey of the Law of Cyberspace: Internet Contracting Cases 2004-2005, 61 Bus. LAW. 433 (2005).

These cases are notable for a variety of reasons. In one,⁷ the court, following the leading case of *ProCD*, *Inc. v. Zeidenberg*, ⁸ applied the Uniform Commercial Code to a software contract and, like the Seventh Circuit in *ProCD*, rejected the "battle of the forms" argument. In two of them,⁹ the courts focused on whether the web sites at issue adequately communicated the contract terms in question. In the fourth case, the court refused to enforce the choice of forum clause against a consumer because the clause imposed an "unreasonable geographical barrier[]."¹⁰

Another case¹¹ centered on the question of whether a contract provision that requires notices to be given "in writing" allows such notices to be provided electronically. The case raises an intriguing question which, unfortunately, the court did not analyze.

The last case merits mention in part because it applied the Uniform Commercial Code ("UCC") to a software licensing problem, albeit without discussion and with the

⁷ Salco Distributors, L.L.C. v. ICode, Inc., No. 8:05-CV-642-T-27TGW 2006 U.S. Dist. LEXIS 9483 (M.D. Fla. Feb. 21, 2006).

⁸ 86 F.3d 1447 (7th Cir. 1996).

⁹ Hubbert v. Dell Corp., 835 N.E. 2d 113 (Ill. App. Ct. 2005); Hotels.com, L.P. v. Canales, 2006 Tex. App. LEXIS 803 (2006).

¹⁰ Aral v. Earthlink, Inc., 134 Cal. App. 4th 544, 548 (2005). In last year's survey, we discussed *Scarcella v. America Online, Inc.*, 798 N.Y.S. 2d 348 (N.Y. City Civ. Ct. 2004) in which a Small Claims Court in New York refused to enforce a forum selection clause because doing so would frustrate the public policy behind small claims courts. That case was affirmed, largely for the same reason, Scarcella v. America Online, Inc., 11 Misc. 3d 19 (N.Y. App. Term 2005), although the reviewing court also noted the inadequacy of the small claims remedy in Virginia, the state chosen under the forum selection clause.

 $^{^{11}\} Seagate\ US\ LLC\ v.\ CIGNA\ Corp.,\ No.\ C\ 05-4272\ PVT,\ 2006\ WL\ 1071881\ (N.D.\ Cal.\ Apr.\ 21,\ 2006).$

consent of the parties.¹² In applying the UCC, the court was required to decide whether terms appearing on a web page were conspicuous.

II. INTENT TO FORM A CONTRACT ONLINE

Statutory law now makes clear that a contract cannot be denied enforcement *solely* because it is in electronic from or signed electronically.¹³ The statutes do not resolve all disputes that may arise from the form of an electronic contract. Two of the cases that we reviewed this year, *CSX Transportation, Inc. v. Recovery Express, Inc.*, ¹⁴ and *Brantley v. Wilson*, ¹⁵ illustrate some of the problems that lawyers need to consider when entering into electronic transactions.

The electronic transactions statutes define an electronic signature as "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." The Official Comments to UETA make clear that a person's name in an e-mail communication can suffice as a

¹² Recursion Software, Inc. v. Interactive Intelligence, Inc., 425 F. Supp. 2d 756 (N. D. Tex. 2006). In last year's survey, we discussed other cases that applied the U.C.C. to software contracts. *See generally* Moringiello & Reynolds, *supra* note 6, at 441-42.

¹³ The two most important statutes are the Uniform Electronics Transaction Act, ("UETA"), 7A U.L.A.§701; and the Electronic Signatures in Global and National Commerce Act ("E-Sign"), 15 U.S.C. §§7001-7031 (2000).

¹⁴ 415 F. Supp. 2d 6 (2006).

¹⁵ Civil No. 05-5093, 2006 U.S. Dist. LEXIS 17722 (W.D. Ark. Feb. 22, 2006).

¹⁶ UETA § 2(8); 15 U.S.C. § 7006(5).

signature if the person whose name appears in the e-mail has the intent to sign the record. 17

The effect of a person's name in an e-mail communication was at issue in both CSX Transportation and Brantley v. Wilson. In CSX Transportation, a seller argued that a corporation's domain name in an e-mail address constituted an electronic signature; in Brantley, a buyer of real estate argued that the seller's name in an e-mail constituted the required signature. Both cases illustrate the pitfalls that may await those who enter into transactions electronically, and both cases remind lawyers that the same level of care that is necessary in the paper world is also necessary in the electronic world.

In Brantley v. Wilson, prospective buyers of a parcel of real estate exchanged a series of e-mail messages with its owner. When the sellers decided not to sell the parcel to the buyers, the buyers sued for specific performance, and the sellers moved for summary judgment. In support of their motion, the defendants argued that they did not intend to form a contract through their e-mail messages, ¹⁸ and that any agreement resulting from their electronic exchange would not satisfy the statute of frauds. ¹⁹ The court denied the summary judgment motion, finding that there were genuine issues of material fact regarding (1) whether the sellers intended to consummate their transaction

 ¹⁷ UETA § 2, Official Comment 7.
 ¹⁸ 2006 U.S. Dist. LEXIS 17722 at *6
 ¹⁹ *Id.* at *11.

electronically, and (2) whether the seller intended her typed name on her e-mails to constitute her signature.²⁰

The e-mail messages exchanged by the parties contained the price of the property, the financing terms, a proposed allocation of the closing costs, and a description of the land. The sellers argued that the e-mails were merely negotiations in anticipation of a contract that eventually would be embodied in a paper agreement, a contention that was supported by the fact that several of the e-mail messages referred to a forthcoming paper contract.²¹

The court noted that the parties' communications *could* have formed an enforceable electronic contract under the Arkansas version of UETA, but that UETA applies only when parties have agreed to conduct transactions by electronic means.²² Under UETA, whether the parties have agreed to transact electronically is determined from the context and the surrounding circumstances.²³ Because the existence of such an agreement was in dispute, summary judgment was inappropriate.

Brantley v. Wilson contains an important lesson for lawyers: if you don't want your e-mails to form a contract, make that clear in the electronic messages. The seller in Brantley could have avoided litigation had she not assumed that her communications with the prospective buyer would not bind her absent a paper contract. Because the electronic

²⁰ *Id.* at *16-17. ²¹ *Id.* at *8. ²² *Id.* at *13. ²³ UETA § 5(b).

transactions statutes allow electronic communications to result in binding obligations that satisfy the statute of frauds, it is particularly important for communicating parties to make their intentions known at the outset of their correspondence. Although this lesson is hardly a new one, or unique to electronic communications, it is one about which constant reminder seems necessary.

CSX Transportation v. Recovery Express²⁴ reminds us that while an e-mail address can constitute a binding signature, it might be foolish for contracting parties to rely solely on an e-mail address as a signature. In that case, a buyer named Albert Arillotta sent CSX an e-mail message expressing an interest in buying out-of-service railroad cars. Arillotta represented himself to be from "interstate demolition and recovery express" [sic], and his e-mail address was albert@recoveryexpress.com. Arillotta's check bounced, however, and CSX attempted to recover the purchase price from Recovery Express. After CSX filed its breach of contract claim against Recovery Express, the latter moved for summary judgment.²⁵

Arillotta had never worked for Recovery Express, but he was affiliated with Interstate Demolition. The two companies shared office space and the employees of the two companies shared e-mail services. Len Whitehead, who entered into the contract on behalf of CSX, claimed that he believed that Arillotta was authorized to transact business

 $^{^{24}}$ CSX Transportation, Inc. v. Recovery Express, Inc., 415 F. Supp. 2d 6 (2006). 25 *Id.* at 7-8.

for Recovery Express. ²⁶ This belief was based in large part on Arillotta's e-mail address, which, of course, contained the phrase "recovery express."

In granting the motion for summary judgment motion filed by Recovery Express, the court chided CSX for allowing itself to be duped by Arillotta. CSX had argued that, by giving Arillotta an e-mail address in the recoveryexpress.com domain, Recovery Express had granted Arillotta apparent authority to transact business on its behalf. The court noted the flaws in this reasoning, observing that CSX's argument would mean that, "every subordinate employee with a company e-mail address – down to the night watchman – could bind a company to the same contracts as the president."²⁷

The court also noted that the question presented in the case was really not a question of first impression. In doing so, it cited by analogy cases from the world of paper contracting where apparent authority was not automatically conferred by the use of business cards, company cars, and letterheads.²⁸ Because the wise business executive looks behind the claim of authority, the CSX court was able to hold, as a matter of law, that failure to do so cancelled the claim of reliance.

As the court in CSX stressed, there were a number of ways that CSX could have protected itself. Given the anonymity of the Internet, a company in a significant

²⁶ *Id.* at 8. ²⁷ *Id.* at 15.

²⁸ Id. at 11-12. The court might also have cited *Parma Tile Mosaic &Marble Co. v. Estate of Short*, 663 N.E. 2d 633 (N.Y. 1996) (signature requirement not satisfied "because the fax machine had been programmed...to identify each page" with the name of the sender). See generally E. ALLAN FARNSWORTH, THE LAW OF CONTRACTS §§ 6.7-.8 (3d ed. 1999).

transaction should not rely solely on an e-mail address as the signature of a contracting party; instead, it should request a more reliable form of authentication. ²⁹ CSX learned that lesson the hard way.

III. WHEN DOES A CONTRACT INCLUDE TERMS POSTED ON A WEB SITE?

It is a well-established rule of contract law that a written agreement may incorporate other written agreements by reference.³⁰ Many cases discuss this rule as it applies to contracts that are written on paper and signed in ink, ³¹ but few apply it to electronic contracts. Two cases decided in the last year, *Hugger-Mugger*, *LLC* v.

NetSuite, Inc.³² and Affinity Internet, Inc. v. Consolidated Credit Counseling Services,³³ discuss the requirements that must be satisfied in order for a written contract to include terms posted on a web site.

In both cases, the parties entered into written agreements that referred to terms posted online. The written contract in *Hugger-Mugger* contained the following language:

²⁹ See generally Jane Kaufman Winn, *Open Systems, Free Markets and Regulation of Internet Commerce*, 72 TUL. L. REV. 1177, 1179-1184 (1998) (discussing the need for reliable authentication procedures in electronic commerce).

³⁰ Crabtree v. Elizabeth Arden Sales Corp., 110 N.E. 2d 551 (N.Y. 1953); E. ALLAN FARNSWORTH, CONTRACTS § 6.8 (4th Ed. Supp. 2004).

³¹ See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 19.33 (5th Ed. 2003) (listing cases).

³² No. 2:04-CV-592 TC, 2005 U.S. Dist. LEXIS 33003 (C.D. Utah Sept. 12, 2005).

³³ 920 So. 2d 1286 (Fla. Dist. Ct. App. 2006).

In consideration of the license fee paid by Customer [Hugger-Mugger] and subject to the terms of this agreement and the Terms of Service posted at www.NetSuite.com, or successor Web site, NetSuite grants Customer, its employees, and agents a nonexclusive, nontransferable license to use the Service for internal business purposes . . . This Agreement and Incorporated Terms of Service represent the entire agreement of the parties. 34

The written agreement in *Affinity Internet* contained similar language, stating that the contract was "subject to all of SkyNetWEB's terms, conditions and acceptable user policies located" at a web site named in the contract.³⁵ In both of the cases, the online terms contained an arbitration provision that the defendant in each case wanted to enforce.

Both *Hugger-Mugger* and *Affinity Internet* involved business-to-business contracts, but the two courts came to different conclusions about the terms of those contracts. While both courts relied on the same basic principles in their decisions, the court in *Hugger-Mugger* ruled that the web site terms became part of the contract and the court in *Affinity* held that they did not.

 $^{^{34}}$ Hugger-Mugger, 2005 U.S. Dist LEXIS 33003 at *4-5 (emphasis added).

³⁵ Affinity Internet, 920 So.2d at 1287.

The two courts set forth somewhat different tests for determining whether or not the writings sufficiently incorporated the web site terms by reference. The court in *Hugger-Mugger* used a three-part test for incorporation by reference: the reference to the outside document must be "clear and unequivocal," the offering party must bring that reference to the terms to attention of the other party who then must consent, and the terms of the document sought to be incorporated must be "known or easily available to the contracting parties." Applying this test, the court found that the language of the agreement in question clearly identified, referred to, and incorporated the web site terms. The court explained that the consent element was met because Hugger-Mugger signed the writing and therefore was bound by the provisions of the writing regardless of whether anyone at Hugger-Mugger had read the terms. Here, the court conceded that its holding might have been different had the contract been one of adhesion, but finding no inequality in bargaining power, the court was satisfied that Hugger-Mugger had agreed to the incorporated terms.

The application of the first two parts of the test set forth in *Hugger-Mugger* is not unique to Internet transactions. Parties who attempt to incorporate terms on a web page should pay special attention to the third part of the test, however. Under that part, the terms claimed to be incorporated must be known or easily available to the offeree at the time that it signs the written contract. In *Hugger-Mugger*, NetSuite was able to show that

³⁶ Hugger-Mugger, 2005 U.S. Dist. LEXIS at *14.

³⁷ *Id.* at *15-16.

its Terms of Service were available on the Internet in the form relevant to the written document at the time that the parties signed the written document.³⁸

The court in Affinity also relied on the law of paper contracts. The court ruled that, "[a] mere reference to another document is not sufficient to incorporate that other document into a contract, particularly where the incorporating document makes no specific reference that it is 'subject to' the collateral document."³⁹ In other words, the contract had to do more than simply state that it is subject to another document. 40 Rather, the seller either had to provide the document to the buyer⁴¹ or had to "sufficiently describe the document or so much of it as is referred to, is to be interpreted as part of the writing.",42

How the court reached that conclusion is not known; there simply is no reasoning in the opinion. The question, of course, is whether the collateral agreement is "available" (to use the court's term) when it can be found on line and the link is plainly mentioned in the paper contract. Was there some reason why a business buyer of computer equipment

³⁸ Hugger-Mugger also raised the issue of apparent authority. The employee who "clicked" was not shown to have had actual authority to bind Hugger-Mugger. Nevertheless, the company was bound to the deal because NetSuite reasonably believed that the employee was authorized to conclude the deal. The court noted that the employee had conducted most of the negotiations for the software purchase, had been given the task of implementation, and that he was authorized to obtain a password and access to the account That conclusion seems correct.

³⁹ Affinity Internet, 920 So. 2d at at 1288

⁴⁰ *Id*.

⁴¹ The court seemed to suggest that the collateral document might be binding if given to the buyer "subsequent to the signing." Id. The court did not explain how terms delivered after formation could affect what was in the deal.

⁴² *Id*.

could not refer to the web site to learn the terms posted there? None was shown. Was doing so any more difficult than reading sheets of paper attached to the written agreement? We are not told of any. In other words, is there something about electronic documents that makes them different from paper documents? If not, there is no good reason not to hold that the website document was not "available" to the buyer, and thus binding on it.

IV. THE (IR)RELEVANCE OF THE CLICK-WRAP - BROWSE-WRAP DISTINCTION

The electronic age has spawned several new methods of delivering contract terms. Before courts were asked to opine on the enforceability of terms delivered over the Internet, they were faced with software licenses delivered in shrink-wrapped boxes of computer software. Courts and commentators dubbed these agreements "shrink-wrap" agreements. When terms delivered over the Internet started to appear in court, the courts pointed to these shrink-wrap terms as analogies and christened Internet terms "click-wrap" if the offeree was required to click an "I agree" icon to accept the offered terms or "browse-wrap" if the terms provided the offeree was bound simply by using, or "browsing" the web site. ⁴³

⁴³ See Specht v. Netscape Commns. Corp., 306 F.3d 17, 22 n. 4 (2nd Cir. 2002); Christina L. Kunz, Maureen F. Del Duca, Heather Thayer and Jennifer Debrow, *Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent*, 57 Bus. Law. 401, 401 (2001) (explaining the term "click-wrap"); Christina L. Kunz, John E. Ottaviani, Elaine D. Ziff, Juliet M. Moringiello, Kathleen M. Porter and Jennifer C. Debrow, *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 Bus. Law. 279, 279-280 (explaining the term "browse-wrap").

While the distinction between click-wrap and browse-wrap terms has been important in the electronic contracting world, the court in *Hotels.com v. Canales*⁴⁴ correctly discounts the labels given to online terms. *Hotels.com* involved the certification of a class-action; one issue in the case was whether Ms. Canales' claims were based on the same legal theories as those of the other class members. Typicality was an issue because Ms. Canales made her Hotels.com reservation over the telephone while the majority of the other class members made theirs through the Hotels.com web site.

The question of whether Ms. Canales satisfied the typicality requirement turned on the enforceability of the Hotels.com User Agreement. The User Agreement contained an arbitration provision, which was not binding on Ms. Canales because she had made her reservations over the telephone. Therefore, in order to certify the class, the court had to determine whether the arbitration provision in the User Agreement was binding on those who made reservations through the Hotels.com web site. 45

The Hotels.com reservation page required its users to click on a button that said "I Agree to the Terms and Conditions Book Reservation" [sic] in order to complete their reservations. ⁴⁶ Above the "I agree" button, the web page had the following statement: "By proceeding with this reservation, you agree to all Terms and Conditions, [including]

⁴⁴ No. 04-05-00315-CV, 2006 Tex. App. LEXIS 803 (Ct. App. Feb. 1, 2006).

⁴⁵ *Id.* at *18.

⁴⁶ *Id.* at *17-18.

all terms contained in the User Agreement."⁴⁷ The words "User Agreement" were underlined and hyperlinked to the agreement itself.

Because the terms of the User Agreement were not presented on the reservation page with the "I agree" button, the court noted that the agreement could not be "neatly characterized as either a 'click-wrap' or 'browse-wrap' agreement." As a result, the court focused not on the click-wrap/browse-wrap distinction but rather on whether the users of the web site had adequate notice of the terms in question. In its analysis of the notice issue, the court discussed three well-known Internet contracting cases, *Specht v. Netscape*, Register.com v. Verio, and Barnett v. Network Solutions, and in its short explanation of each decision, the Hotels.com court focused on the discussion in those precedents of whether the offerees had notice of and an opportunity to read the offered terms.

The court in *Hotels.com* remanded the case so that the trial court could analyze whether the consumers who made their hotel reservations over the Internet were provided with adequate notice of the arbitration provision. In doing so, it correctly rejected the approach of a number of early Internet contracting cases that held that a click signified

⁴⁷ *Id.* The Hotels.com web page today presents its terms differently. See <u>www.hotels.com</u> (last visited June 6, 2006).

⁴⁸ One of us has advocated this approach to electronic contracts. *See* Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307, 1330-1331 (2005) (criticizing decisions that hold that a click *always* signifies assent).

⁴⁹ 306 F.3d 17 (2nd Cir. 2001).

⁵⁰ 356 F. 3d 393 (2nd Cir. 2004).

⁵¹ 38 S.W. 3d 200 (Tex. App. 2001).

agreement regardless of the physical presentation of the click or the terms purportedly agreed to.⁵² This approach is correct because it incorporates the longstanding rule regarding the enforceability of paper standard form terms. When paper standard form terms do not require a signature, such terms are enforceable if they meet a "reasonable communicativeness" test.⁵³

V. FORUM SELECTION CLAUSES

Forum selection clauses⁵⁴ are a recurring problem in contract law generally, and in electronic contracting specifically. It is not hard to understand why; the situs of litigation can confer significant advantages to a party in terms of ease of access, expense, familiarity with the courts, and substantive law. The choice of situs, therefore, can determine whether litigation takes place at all. The battle over forum-selection clauses can prove to be the most important aspect of the case; no wonder it is often a hard-fought affair. There are four such cases in this year's review.

The first of those cases, *SalcoDistributors, LLC v. iCode, Inc.*, ⁵⁵ is worth noting only because it confirms what has become well-established law. *Salco* is a click-wrap

⁵² Such cases include *Caspi v. Microsoft Network, LLC*, 732 A. 2d 528 (N.J. Super. Ct. App. Div. 1999), *I. Lan Systems, Inc. v. Netscout Service Level Corp.*, 183 F. Supp. 2d 328 (D. Mass. 2002) and *Forrest v. Verizon Communications, Inc.*, 805 A. 2d 1007 (D.C. 2002). For an extended discussion of these cases, *see* Moringiello, *supra* note 46 at 1323-1333 (questioning the click-wrap/browse-wrap distinction).

⁵⁴ We include arbitration clauses in this category. Although those clauses certainly are different in some respects, judicial analysis in the cases under review has not focused on that distinction.

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⁵³ Moringiello, *supra* note 46, at 1337-1340.

⁵⁵ No. 8:05-CV-642-T-27TGW 2006 U.S. Dist. LEXIS 9483 (M.D. Fla. Feb. 21, 2006).

case.⁵⁶ Plaintiff ordered software from defendant by sending signed purchase orders to the defendant. The purchase orders stated that they were "subject to the conditions of the Software's End User License and Service Agreements."⁵⁷

When the software arrived in the form of a CD, Plaintiff inserted the CD into its computer. When the plaintiff did so, the terms of the End User License Agreement were displayed on the computer screen. The instructions on the CD required plaintiff to click its assent to the terms of the agreement before installing the software. It did so. The agreement it had assented to with that click contained a forum selection clause.⁵⁸

When the inevitable litigation arose, plaintiff claimed that the forum selection clause was a material alteration under UCC §2-207, and, therefore, not part of the contract that had been formed by the purchase orders. The court, following Judge Easterbrook's landmark (and widely accepted) opinion in *ProCD*,⁵⁹ rejected that argument and analyzed the case under § 2-204 of the U.C.C., which provides that a

⁵⁶ The case also involved a shrink-wrap problem, but that issue was not discussed by the court.

⁵⁷ 2006 U.S. Dist. LEXIS 9483, *2. The plaintiffs also argued that the click-wrap terms were not adequately incorporated by reference into the purchase orders, but the court was not persuaded by the argument. *Id.* at *12-13.

⁵⁸ SalcoDistributors, 2006 U.S. Dist. LEXIS 9843 at *4-5.

⁵⁹ See, e.g. Hill v. Gateway 2000, 105 F.3d 1147 (7th Cir. 1997) (following *ProCD*); Meridian Project Sys. v. Hardin Constr. Co., L.L.C., 426 F. Supp. 2d 1101, 1107 (E.D. Ca. 2006) (finding the *ProCD* reasoning "compelling"); Schultz v. AT&T Wireless Servs., 376 F. Supp. 2d 685, 691,692 (N.D.W.V. 2005) (agreeing with *ProCD* analysis; but see); Michael J. Madison, *Rights of Access and the Shape of the Internet*, 44 B.C. L. REV. 433, 457 (2003)(criticizing the court's reliance on the formal "contract-as-assent" metaphor); Roger C. Bern, "Terms Later" contracting, Bad Economics, Bad Morals, and a Bad Idea For a Uniform Law, Judge Easterbrook Notwithstanding, 12 J. L. & POL'Y 641 (2004); Maureen A. O'Rourke, Fencing Cyberspace: Drawing Borders in a Virtual World, 82 MINN. L. REV. 609, 688-689 (1998) (noting that "the result in the *ProCD* case is controversial).

"contract for the sale of goods may be made in any manner sufficient to show agreement," including conduct by both parties which recognizes the existence of a contract."60 It found, not surprisingly, that when plaintiff clicked its assent after having the opportunity to review the agreement, the forum selection clause became part of the agreement.

The plaintiff in Salco had clearly been given the opportunity to read the terms of the license agreement, a fact that was important to the court's decision. Not only did the terms of the agreement appear on the plaintiff's computer screen when he inserted the CD into the computer, but the agreement was also printed on the software envelope. These facts caused the court to characterize as unpersuasive the plaintiff's argument that it did not expressly accept the terms of the agreement.

The second case, *Hubbert v. Dell Corp.*, 61 was similarly routine, although the court's analysis had some interesting language. The term in dispute (an arbitration clause) could be found in seller's Terms and Conditions of Sale. The Terms could be found by using hyperlinks found on each of five web pages containing forms that the buyer had to fill out to complete the contract—and the last three forms made clear that the contract was conditioned on agreement with the Terms. 62

The plaintiffs argued that they had not agreed to the arbitration provision because they were not required to click an "I accept" box. The court rejected this argument (and

⁶⁰ U.C.C. § 2-204. ⁶¹ 835 N.E. 2d 113 (III. App. Ct. 2005)

⁶² *Id.* at 117-118.

thus any legal distinction between click-wrap and browse-wrap terms) and focused instead on whether the plaintiffs had received adequate notice of the disputed terms. It recognized that people who routinely use computers know what how hyperlinks are presented and what they mean, and therefore that, a prominently displayed hyperlink can adequately communicate the terms to be found behind the link. The key language embodied judicial common-sense at its best:

The blue hyperlinks on the Defendant's web pages, constituting the five-step process for ordering the computers, should be treated the same as a multi-page, written, paper contract. The blue hyperlink simply takes a person to another page of the contract, similar to turning the page of a written paper contract. Although there is no conspicuousness requirement, the hyperlink's contrasting blue type makes it conspicuous. *Common sense dictates that because the plaintiffs were purchasing computers online, they were not novices when using computers.* A person using a computer quickly learns that more information is available by clicking on a blue hyperlink.⁶³

The next case, Aral v. Earthlink, Inc., 64 was not as interesting from an electronic point of view but nevertheless reminds us that sometimes contracts between a business and a consumer are treated differently from those between two businesses. The

⁶³ *Id.* at 121 (emphasis added).

⁶⁴ 134 Cal. App. 4th 544 (2005).

agreement at issue in *Aral* was a click-wrap software license that contained a class action waiver and an arbitration clause. The court refused to enforce the two clauses, holding that class action waivers "are unconscionable where the class involves allegations that a large number of consumers have been cheated out a small sum of money," and that a forum selection clause that imposes "unreasonable geographical barriers" is unenforceable. Although that holding is important, it merely tracks the decisional law of the California Supreme Court. The lesson in the case for parties questioning the enforceability of Internet contracts is that when a consumer is involved, notice of terms might not be sufficient. The terms themselves must also be reasonable.

More interesting was the novel question raised, but not addressed by the case: Do the terms of a click-wrap agreement bind the employer of a software engineer who installed software he bought from the defendant by using alternative means of installation that enabled him to avoid clicking his assent to the terms of sale that accompanied the software?

Resolution of that issue seems fairly easy when the world of paper commerce is considered. One who consciously avoids reading part of an agreement cannot escape being bound by the terms she skipped.⁶⁶ If that were not so, the law of contracts would be seriously undermined. The engineer in Aral should be treated similarly. As an expert in the field he surely knew (or should have known) that his installation method permitted

65 Id. at 548-549.

⁶⁶ PERILLO, *supra* note 31 at § 9.41.

him to ignore the need to click his assent to the terms of sale proposed by the vendor.⁶⁷ He also knew that his assent to those terms was a condition of the sale of the software. He was aware, in other words, that he was trying to impose a deal on Earthlink different from its proposal, and one about which Earthlink knew nothing. The law should not condone that kind of practice in the electronic world any more than it does in the paper world.

VI. "WRITTEN" NOTIFICATION

A life insurance policy provides that the insured can change a designated beneficiary only by giving "written notice." The insured sent a notice of change of beneficiaries by electronic communication. Is that notice effective under the insurance contract? That was the situation presented in *Seagate US LLC v. Cigna Corp.* ⁶⁸

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⁶⁷ As the court in *Hubbert* noted: "Common sense dictates that because the plaintiffs were purchasing computers online, they were not novices when using computers." 835 N.E. 2d at 121.

⁶⁸ No. C 05-4272 PVT, 2006 WL 1071881 (N.D. Cal. Apr. 21, 2006).

⁶⁹ Arguments concerning the language of the contract and ordinary usage were also made; we will not discuss them here, however.

⁷⁰ 15 U.S.C. § 7001 (b)(2).

."⁷¹ At first glance, those provisions seem contradictory; when the purpose behind the adoption of E-Sign is considered, however, the two clauses may be reconciled.

E-Sign (and its companion, UETA) were adopted to ensure that electronic communications were not denied legal effect simply because of their electronic form. The communications were made equally effective by those statutes, in the eyes of the law. To be sure, the parties could always require either form of communication - - hence, the insurance company's argument that it is not required to accept electronic communications - - but that is a decision for the parties to make and not one required by the law. Thus, if there is some reason -- and we can't think of one -- why email notification of a change in beneficiary should not be effective, then the burden should be on the insurance company to make that clear in the contract.

Otherwise, the statutory goal of placing electronic and paper communications on a par with each other would not be met.

Because the opinion is on a motion to dismiss, the court in *Seagate* did not decide whether the term "written notice" includes electronic notice. The court refused to dismiss the case so that the meaning of the phrase "written notice" could be determined. While

⁷¹ 15 U.S.C. § 7001 (a)(1).

⁷² Patricia Brumfield Fry, *Introduction to the Uniform Electronic Transactions Act: Principles Policies and Provisions*, 37 IDAHO L. REV. 237, 245-46 (2001); Robert A. Wittie & Jane K. Winn, *Electronic Records and Signatures Under the Federal E-Sign Legislation and the UETA*, 56 Bus. LAW. 293, 297-99, 331-37 (2000).

this might seem to be a novel issue in the E-Sign age, courts have been refining the meaning of "written notice" for years. 73

VII. CONSPICUOUS WEB SITE TERMS

One of the claims in Recursion Software, Inc. v. Interactive Intelligence, Inc., 74 was for breach of the implied warranties of merchantability and fitness for a particular purpose. An employee of Interactive Intelligence had downloaded a Recursion software program from a web site. In order to receive the software, the employee was required to accept the terms of the online License Agreement. The license page displayed the terms of the License Agreement in a window in which only part of the agreement was visible. The page allowed users to scroll through the terms of the agreement.⁷⁵

The court applied the Uniform Commercial Code to the license. Under the UCC, a seller can disclaim the implied warranties of merchantability and fitness for a particular purpose if it does so in a conspicuous manner. ⁷⁶ According to the UCC, a conspicuous term is one that is displayed in such a way that a reasonable person "ought to have noticed it."⁷⁷

⁷³ See Clyburn v. Allstate Ins. Co., 826 F. Supp. 955 (D. S.C. 1993) (holding that information on a computer diskette constituted a writing for the purpose of a statute that required that notice of cancellation of insurance policies be given in writing); Suzanna Sherry, Haste Makes Waste, Congress and the Common Law in Cyberspace, 55 VAND. L. REV. 309, 358-363 (2002) (criticizing E-Sign as unnecessary).

⁷⁴ 425 F. Supp. 2d 756 (N. D. Tex. 2006).

⁷⁵ *Id.* at 783,

⁷⁶ U.C.C. § 2-316(b). 77 U.C.C. § 1-201(10).

The court found that the disclaimer at issue was conspicuous because it was written in capital letters and because the License Agreement was relatively short.⁷⁸ While this might not seem to be an earth-shattering pronouncement, it is significant because it applies the paper-world standard for conspicuousness to electronic contracts.

VIII. CONCLUSION

Most of the cases we have discussed were decided sensibly. That is due, in part, to the fact they were mostly business-to-business cases that did not involve consumers. The courts seem willing to treat businesses as fully capable of protecting themselves, absent some form of trickery. In addition, however, the courts showed remarkable willingness to treat Internet and paper transactions as equals—similar results should be reached unless there is a reason to treat them differently. That was the goal of E-Sign and UETA, and it reflects one of the basic goals of the common law—like cases should be treated in like fashion. Judges no longer are scared of electronic cases. The decisions are getting better.

⁷⁸ 425 F. Supp. 2d 756, 786.

The unwillingness of the *Affinity Internet* court to keep that argument in mind probably explains the bad result in that case. *See* notes 39 - 42 *supra* and accompanying text.