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HOW *CONCEPCION* KILLED THE PRIVACY CLASS ACTION

Jessica L. Hubley†

I. INTRODUCTION

In its 2011 *AT&T v. Concepcion* opinion,¹ the Supreme Court may have given the web industry a lightweight but impenetrable shield against most privacy-based user claims. To understand why, one must understand the nature of the activity that gives rise to such claims, the contracts that govern such claims, and the legal industry that brings such claims.

An ever-increasing portion of our daily lives and our daily commerce occurs over the Internet. We have no choice but to rely upon online service providers to facilitate that conduct, and those providers often fund operations through advertising. That advertising is increasingly sophisticated, targeted, and conducted by multiple third parties. Those third parties and first-party providers alike must know who we are and what we like to generate revenue from targeted advertising.

A quilt of facts about ourselves and our context fuel such advertising, including our names, email addresses, locations, IP addresses, gender, browsing histories, social security numbers, hardware fingerprints, expressed preferences, sexual orientation, and consumer selections, to name a few. Online service providers use sophisticated technological mechanisms to gather and analyze this information, and this need not be a bad thing. Disclosure, too, can be utterly innocuous under many circumstances. Yet disclosure to the wrong parties under the wrong circumstances can embarrass us, result in identity theft, result in harassment, or unexpectedly destroy the reputations we've spent a lifetime building.

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1. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

In many cases, in order to interact with the Internet, we must agree to give a service provider personal or sensitive information, and with that gift we assume a certain risk of loss or disclosure. Even a service provider who makes every effort to keep confidential every snippet it knows about you can be hacked. In many cases, the service provider must (or feels it must) tell some of the information it knows about you to others, whether to bill you or to serve you ads.² There are restrictions on what the provider can do under *some* circumstances with *some* information, and the Federal Trade Commission has made a practice of bringing enforcement actions against companies it feels have used personal information in a way that is unfair or deceptive.³ However, there is no statute preventing a provider from disclosing any personal information about you in a way that causes you harm; preventing such harm is normally the purview of common law.

If a stockholder loses money because the company misbehaved, the stockholder can join other stockholders and sue the company, even if she lost only a penny. Users of websites and Internet services presently try to remedy providers' misconduct through similar collective means: the privacy class action. Realistically, however, lawyers will not agree to represent a disgruntled stockholder or user who can't pay legal fees in exchange for a potential reward of one-third of a cent. This is why nearly every enduring stockholder derivative suit eventually becomes a class action, and likely why almost every "privacy" suit has as well.

Yet online privacy claims have one key distinguishing feature from shareholder derivative actions: they arise under terms dictated unilaterally by the web provider, and few users read (much less agree with) these terms.⁴ We've accepted this, societally and judicially, as necessary to make the conduct of business online economically efficient. After all, if a provider tries to make us unwittingly agree to something truly egregious, we are at liberty to argue that such terms

2. Service providers often outsource functions such as billing, shipping, server storage, customer support, or analytics on the website. While many of these functions could theoretically be performed by the service provider itself, the service provider often finds it more cost effective to use a specialist third party to handle such functions. Ad service is a slightly different concern, since a website could serve ads on its own behalf without sharing any information with the advertiser. However, advertisers are routinely willing to pay more for targeted ads that reference the users' demographic information than they are for banner ads that are user-agnostic. Web companies often deem profits from targeted advertising necessary to the profitable administration of their business.

3. Namely, under section 45(b) of the Federal Trade Commission Act of 1914. 15 U.S.C. § 45(b) (2010).

4. See *infra* notes 56-59 and accompanying text.

were unconscionable and therefore unenforceable contracts.

In 2011, however, the Supreme Court's opinion in *AT&T v. Concepcion* made clear that it did *not* consider an agreement to arbitrate on an individual basis in form terms of service unconscionable.⁵ If a provider required the individual arbitration of disputes in its form agreement, the consumer is required to abide by that procedure absent the applicability of another contract defense. As a practical matter, this means that each claim of a website's user must be brought to an arbitrator as a single action and resolved; an aggrieved user cannot join her action with that of other similarly-situated users to aggregate damages. Therefore, an aggrieved user, harmed by disclosure of her personal information in an uncertain way or relatively small measure, must spend significant legal fees that grossly exceed her potential recovery to bring a claim at all. She is not likely to do so, nor is there likely to be a lawyer who would accept a contingency arrangement for that case. From the lawyer's perspective, the case is not worth her time.

This article explains how the ruling in *AT&T v. Concepcion* combined with a provider's relatively painless insertion of a single paragraph in form terms—which few read and fewer contest—may act to immunize that provider from all privacy class action suits.

II. THE OKCUPID EXAMPLE

To ground this discussion, I refer to the as yet unfiled case of OKCupid. OKCupid.com is a free dating website where users fill out profiles about themselves, under fake handles that need not reflect real names, in an attempt to find a mate.⁶ A user can provide his or her age, preferences regarding children, education level, drinking frequency, drug use frequency (which drugs are not specified by the form), income, religion, and smoking frequency, among other items.⁷ As a free site, OKCupid functions in part by serving ads to its users.⁸ To do so, OKCupid shares, by way of cookie transmission, a user's age, whether they have cats or dogs, preferences regarding children, drinking frequency, drug use frequency, country, gender, ethnicity,

5. *Concepcion*, 131 S. Ct. 1740. As discussed at length *infra* Parts V-VII, this decision dealt with a form agreement but not online terms. However, it has been applied to cases brought under form online terms in its short history.

6. See OKCUPID, <http://www.okcupid.com> (last visited Aug. 1, 2012).

7. See OKCUPID, <http://www.okcupid.com/profile> (last visited Aug. 1, 2012) (free signup required).

8. See *id.*

education level, income, job sector, language proficiencies, religion, smoking frequency, state and ZIP code—each with at least one third-party advertiser.⁹ In the case of “drug use,” a user’s answer can imply medical information if his or her state has legalized medical marijuana. If populated by a user, this information is visible to other OKCupid users logged into the service, but as associated with a sometimes-anonymous handle.

To be clear, I have not discovered publicity of any specific harm to any specific individual because of disclosure to these advertisers. Nor is there any suggestion that either has used this information for any purpose other than to serve ads. But there is also no suggestion that the advertisers are restricted from other uses. There may be an increased likelihood of future harm to OKCupid users if one of the many advertisers or OKCupid chooses to, for example, sell this information to insurance providers who use it to hike premiums.

OKCupid does not disclose this sharing in its privacy policy,¹⁰ nor does it obtain express permission to share customer data in its terms of service.¹¹ OKCupid’s terms of service do not currently require users to arbitrate disputes with the website.¹² Without alleging any wrongdoing on OKCupid’s part, I’ve used this practice for illustrative purposes in this article.

III. THE PRESENT LANDSCAPE OF PRIVACY-BASED CLASS ACTIONS

Both statutory and common law claims may fall under the broad umbrella of “privacy” actions. At common law, such actions are generally tort claims for invasion of privacy, false light, disclosure of confidential information, and violations of constitutional privacy rights.¹³ State and federal statutes additionally impose certain privacy

9. Jonathan Mayer, *Tracking the Trackers: Where Everybody Knows Your Username*, THE CENTER FOR INTERNET AND SOCIETY (Oct. 11, 2011, 8:06 AM), <http://cyberlaw.stanford.edu/node/6740>.

10. See *Legal Information*, OKCUPID, <http://www.okcupid.com/legal/privacy> (last visited Aug. 1, 2012).

11. See *id.*

12. See *id.*

13. See, e.g., *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010) (holding that plaintiffs “alleged a credible threat of real and immediate harm stemming from the theft of a laptop containing their unencrypted personal data,” which included their names, addresses, and social security numbers); *Fraleigh v. Facebook, Inc.*, No. 11-CV-01726-LHK, 2011 WL 6303898 (N.D. Cal. Dec. 16, 2011) (denying motion to dismiss); *Low v. LinkedIn Corp.*, No. 11-CV-01468-LHK, 2011 WL 5509848, at *4-6 (N.D. Cal. Nov. 11, 2011) (plaintiff’s general allegation that the data collection industry considers consumer information valuable was insufficient to establish standing where he failed to allege what personal information of his was

obligations upon the public and upon industry.¹⁴ State statutes, for example, may generally ensure a right to privacy and proper use of some items of personal information, such as likeness, or those related to consumers' rights generally.¹⁵ Claims under federal statutes in privacy-based actions may fall under a number of statutes governing specific items of personal information,¹⁶ or specific means of communicating or disclosing personal information.¹⁷

As a practical matter, claimants offended by some disclosure of their personal information—which may include their names, addresses, email addresses, likeness, ID numbers, social security numbers, credit card numbers, browsing histories, video viewing histories, etc.—sue on multiple statutory and common law grounds.¹⁸

purportedly collected by a third party and how such collection deprived him of the economic value of his data); *In re iPhone Application Litig.*, No. 11-MD-02250-LHK, 2011 WL 4403963, at *5-6 (N.D. Cal. Sept. 20, 2011) (plaintiffs' mere "general allegations" about the mobile device market for apps and about abstract concepts such as "lost opportunity costs" and "value-for-value exchanges" were insufficient to establish a concrete theory of injury); *Cohen v. Facebook, Inc.*, 798 F. Supp. 2d 1090, 1094-96 (N.D. Cal. 2011); *LaCourt v. Specific Media, Inc.*, No. SACV 10-1256, 2011 WL 1661532, at *4-6 (C.D. Cal. Apr. 28, 2011) (plaintiffs' reference to "academic articles concerning the nature of Internet business models driven by consumers' willingness to supply data about themselves" was insufficient, on its own, to establish standing in the absence of "some particularized example of their application in this case" (internal quotation marks, citations, and alterations omitted)); *Doe 1 v. AOL LLC*, 719 F. Supp. 2d 1102, 1109-12 (N.D. Cal. 2010) (holding that plaintiffs were injured by defendant's collection and publication of "highly sensitive personal information," including credit card numbers, social security numbers, financial account numbers, and information regarding plaintiffs' personal issues, including sexuality, mental illness, alcoholism, incest, rape, and domestic violence); *In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 326-27 (E.D.N.Y. 2005) (rejecting plaintiffs' attempt to recover the loss of the economic value of their personal information as a contract damage where airline disclosed their personal data to a third-party data mining company in violation of airline's privacy policy); *In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 525 (S.D.N.Y. 2001) (rejecting argument that the economic value of the collection of demographic consumer data is an economic loss to the individual consumer).

14. See generally DANIEL J. SOLOVE & PAUL M. SCHWARTZ, *PRIVACY LAW FUNDAMENTALS* (2011).

15. See, e.g., CAL. CIV. CODE § 3344 (West 2012) (California's right of publicity statute); CAL. BUS. & PROF. CODE §§ 17200-09 (West 2012) (California's unfair competition law).

16. See, e.g., Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501-06 (2010); Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2010); Video Privacy Protection Act of 1988, 18 U.S.C. §§ 2710-11 (2010); Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-25 (2010).

17. See, e.g., Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510-22, 2701-09 (2010); Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 201 *et seq.* (2010) (lacking a private right of action); Gramm-Leach-Bliley Act of 1999, 15 U.S.C. §§ 6801-09 (2010).

18. Few suits have yet addressed specifically the disclosure of more "sensitive" information, such as health information or sexual orientation information. For one example, see *Doe 1*, 719 F. Supp. 2d at 1109-11.

In most instances, these cases have been brought in California courts, presumably due to choice of forum and law provisions in the terms of service governing offending websites predominately headquartered in California.¹⁹

Such cases face numerous challenges, among them the difficulty of proving standing where alleged damages are either very small or very difficult to ascertain—based on embarrassment, humiliation, “injury,” without further description, or the unquantified, inherent economic value of one’s personal information.²⁰ However, for purposes of this article, the small measure of damages available under any such claims is relevant. In recent cases, plaintiffs have generally alleged damages based upon (1) the disclosure of their names, addresses, IDs, or other similar information to a third party, usually an advertiser, often via cookies,²¹ or (2) the use of their personal information for impermissible purposes such as advertisement of other’s goods.²² While plaintiffs have been creative in their assertions of the value of personal information (but not necessarily the value of that information remaining secret),²³ such cases have not generally alleged large measures of individual damages.²⁴

This does not necessarily mean that there is no public interest in preventing online businesses from haphazardly disclosing users’ personal information. A number of societal harms threaten: the business’ employee accessing user information in order to do the user some harm or simply sign them up for an offensive magazine subscription; a third-party advertiser’s gaining the capacity to place unwanted, even malicious, code on users’ machines; a hacker

19. See *supra* note 13.

20. See, e.g., *Low v. LinkedIn Corp.*, No. 11-CV-01468-LHK, 2011 WL 5509848, at *2 (N.D. Cal. Nov. 11, 2011); *Cohen v. Facebook, Inc.*, 798 F. Supp. 2d 1090, 1097 (N.D. Cal. 2011); *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 714-15 (N.D. Cal. 2011).

21. Such actions have not generally survived a motion to dismiss. See, e.g., *Low*, 2011 WL 5509848, at *2; *In re iPhone Application Litig.*, No. 11-MD-02250-LHK, 2011 WL 4403963, at *14 (N.D. Cal. Sept. 20, 2011) (finding no loss of money or property where plaintiffs, users of mobile devices, alleged that defendants violated their privacy rights by allowing third-party application developers to collect and make use of their personal information for commercial purposes, without user consent or knowledge); *Thompson v. Home Depot, Inc.*, No. 07cv1058 IEG (WMC), 2007 WL 2746603, at *3 (S.D. Cal. Sept. 18, 2007) (finding no loss of money or property where plaintiff alleged that defendant required customers to provide their personal information as a condition to performing a credit card transaction and used such information for marketing purposes).

22. See, e.g., *Fraley v. Facebook, Inc.*, No. 11-CV-01726-LHK, 2011 WL 6303898 at *20 (N.D. Cal. Dec. 16, 2011).

23. See, e.g., *Low*, 2011 WL 5509848, at *3-6.

24. See *supra* note 13.

accessing and making purchases based upon payment information stored with the provider (perhaps by way of information in an ill-advised cookie); or an insurer crawling a user's cookies for information about their illnesses or drug use and changing premiums based on that information. However, as with these harms, many potential harms would not occur but for the actions of parties other than the user and the online business. This is but one difficulty with claims based upon existing privacy statutes. These potential harms could cause significant monetary damage to the user in the future. But it is substantially harder to elucidate the monetary damage proximately caused by the online business' mere disclosure. When plaintiffs have succeeded securing standing and defeating a motion to dismiss by describing potential damages sufficiently, the damage to each individual involved in the action is admittedly rather small—well under \$5,000.²⁵ Yet a lawyer billing \$250 an hour will spend many times that amount to simply prepare and file a complaint.

With such *de minimis* individual damages, it is only economically feasible for a law firm to bring such claims on contingency in two circumstances: (1) where the pursuit of the claim on a class wide basis can result in aggregate claims that would make the thirty to forty percent contingency award cover and exceed the firm's expenses in litigating the claims; or (2) where the lawyer or plaintiff is willing to spend money she can't recoup as a matter of principle. It seems the incidence of the second circumstance is quite small. Therefore, practically speaking, claims based merely on the disclosure (and, at times, the mishandling) of users' personal information are unlikely to be brought other than as a class action. In the absence of class relief, it is reasonable to expect that such claims will never be filed.

IV. THE ENFORCEABILITY OF ONLINE TERMS OF SERVICE

Most Americans now do some business over the Internet—whether making purchases or participating in a community at the pleasure of a forum host. When we do, we are almost always presented (clearly or opaquely) with contractual terms governing our use of the site. The rules of enforceability of these contracts stem from the rule created in *Carnival Cruise Lines v. Shute*,²⁶ which is that form contracts are not unenforceable as contracts of adhesion

25. See, e.g., *Fraleigh*, 2011 WL 6303898, at *16 (describing damages claims no greater than a \$750 minimum statutory penalty).

26. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-94 (1991).

because the cost of negotiating agreements with each and every customer is onerous and industry must be able to use forms to do business efficiently.²⁷

The two polar categories of online terms—between which there are many variations—are “clickwrap” and “browsewrap” agreements. Clickwrap agreements loosely refer to the assent process by which a user must click “I agree” or some variation of it to enter or use the software or website. Browsewrap agreements refer more generally to the circumstance where an online host dictates that assent is given merely by using the site. Alternately, a user may receive an email notifying him or her of terms or changes thereto, or may be forced to check a box indicating assent to certain terms before being allowed to use the site—processes closer to the “clickwrap” variation.

The clickwrap version of online terms, where a user acts affirmatively to indicate assent and has been given clear presentation of the terms, is generally held to be enforceable.²⁸ Such decisions turn on the presence of (1) reasonable notice of the terms and (2) a reasonable opportunity to review them.²⁹ In *Feldman*, for example, a

27. *Id.* See also *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996) (“Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than the details of individual transactions.”).

28. See, e.g., *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229 (E.D. Pa. 2007); see also *In re RealNetworks, Inc., Privacy Litig.*, No. 00 C 1366, 2000 WL 631341, at *1, *5-6 (N.D. Ill. May 11, 2000) (finding reasonable notice of clickwrap agreement terms existed where the user had to agree to the terms in order to install software, the agreement came in a small pop-up window, in the same font-size as words in the computer’s own display, and with the arbitration clause located at the end of the agreement); *Forrest v. Verizon Commc’ns, Inc.*, 805 A.2d 1007, 1010-11 (D.C. 2002) (holding that adequate notice was provided of clickwrap agreement terms where users had to click “Accept” to agree to the terms in order to subscribe, an admonition in capital letters was presented at the top of the agreement to read the agreement carefully, the thirteen-page agreement appeared in a scroll box with only portions visible at a time, and the forum selection clause was located in the final section and presented in lower case font); *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 530, 532-33 (N.J. Super. Ct. App. Div. 1999) (finding that reasonable notice of the terms of a clickwrap agreement was provided where the user had to click “I agree” before proceeding with registration, the agreement was presented in a scrollable window, and the forum selection clause was presented in lower case letters in the last paragraph of the agreement); cf. *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000) (finding that reasonable notice of the terms of a browsewrap agreement was not provided when a hyperlink to the terms appeared in small gray print on a gray background).

29. See *Feldman*, 513 F. Supp. 2d at 237 (“That the user would have to scroll through the text box of the Agreement to read it in its entirety does not defeat notice because there was sufficient notice of the Agreement itself and clicking ‘Yes’ constituted assent to all of the terms. The preamble, which was immediately visible, also made clear that assent to the terms was binding. The Agreement was presented in readable 12-point font. It was only seven paragraphs long—not so long so as to render scrolling down to view all of the terms inconvenient or

court ruled that this enforceability was not destroyed by the absence of a price term.³⁰ It also was unconcerned, as earlier decisions had been, with the clickwrap's adhesive nature.³¹ However, some of the dicta in *Feldman* suggested that certain provisions might be unconscionable in form terms in other circumstances, for example where the provision prevents a litigant from enforcing a constitutionally-protected right.³² It also assessed whether certain mitigating factors would render the terms unenforceable—including fraud, overreaching, coercion, and deprivation of a judicial venue—but found that none did in the case at hand.³³ There is no requirement that a user actually read the terms or any part of the terms, however, as long as the user had notice that there were terms and she had a reasonable opportunity to review them.³⁴

In practice, such rulings have created a sliding scale of enforceability:³⁵ the more notice of the terms and the opportunity the user is afforded to review them, the more likely a court will deem those terms enforceable. Some online companies appear to care more about this than others. Most readers will have noticed the constant pop-up terms that accompany every update to a piece of Apple software. Most will also have visited at least one website whose only notice of the terms is a link to them in six-point font, tucked at the

impossible. A printer-friendly, full-screen version was made readily available. The user had ample time to review the document.”).

30. *Id.* at 238 (citing *Portnoy v. Brown*, 243 A.2d 444 (Pa. 1968)). *See also* 1 WITKIN, SUMMARY OF CAL. LAW, CONTRACTS § 142 (2006) (“[T]he complete absence of any mention of the price is not necessarily fatal: The contract may be interpreted to mean the market price or a reasonable price.”).

31. A contract of adhesion is a form or standardized contract prepared by a party of superior bargaining power, to be signed by the party in the weaker position, who only has the opportunity to agree to the contract or reject it, without an opportunity to negotiate or bargain. *See Armendariz v. Found. Health Psychcare Servs.*, 24 Cal. 4th 83, 113 (Cal. 2000); *cf. McNulty v. H&R Block, Inc.*, 843 A.2d 1267, 1273 (Pa. Super. Ct. 2004). As of *Feldman*, the opinion left some ambiguity as to whether the contract could be proved adhesive, unconscionable, and unenforceable if all vendors of that service had a “similar process.” *Feldman*, 513 F. Supp. 2d at 237.

32. *Feldman*, 513 F. Supp. 2d at 243 (citing *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 266 (3d Cir. 2003) (finding unreasonable a 30-day limitations period for any claim arising out of an employment agreement)). Note, however, that a severability clause, in which the agreement states than any provision found unenforceable will not affect the enforceability of the entire agreement but will rather be deemed extracted from it, could fix this issue for the drafter of online terms.

33. *See id.* at 246-48.

34. *See id.* at 237-38.

35. Ed Bayley, *The Clicks That Bind: Ways Users “Agree” to Online Terms of Service*, ELECTRONIC FRONTIER FOUNDATION (Nov. 16, 2009), <https://www.eff.org/files/eff-terms-of-service-whitepaper.pdf>.

bottom corner of a webpage. The difference in notice is significant.

In the last two years, courts around the country have also repeatedly enforced what I'll call "semi-clickwrap" agreements, in which the user must click something to "assent" to terms or to sign up after being presented with only a link to those terms. In *Fteja v. Facebook, Inc.*, for example, a Facebook user challenged the venue selection clause included in the site's Terms of Use.³⁶ Facebook's sign-up process involved, at the relevant time, completion of online forms containing profile information followed by a "Sign Up" button; next to this button was a link to Facebook's Terms.³⁷ The *Fteja* court collected cases from numerous jurisdictions in which an affirmative click of some kind, where the clicked button was near a hyperlink to Terms, was deemed to constitute assent and form a binding contract.³⁸ Interestingly, the court stated "at least for those to whom the [I]nternet is in an indispensable part of daily life, clicking the hyperlinked phrase is the twenty-first century equivalent of turning over the cruise ticket [as in *Carnival*] . . . [w]hether or not the consumer bothers to look is irrelevant."³⁹

In situations where terms are hidden on the website and are assented to not by some acknowledging action of the user but instead by mere "use of the website," the question of whether those terms are enforceable is a closer one.⁴⁰ For example, where software

36. *Fteja v. Facebook, Inc.*, No. 11 Civ. 918(RJH), 2012 WL 183896, at *4 (S.D.N.Y. Jan. 24, 2012). As used herein, "Terms" refers generally to a website's Terms of Use, Terms and Conditions, End-user License Agreement, or a similar user agreement.

37. *Id.* at *5-6.

38. *Id.* at *7-11 (citing in support of the enforceability of click-wrap agreements, *inter alia*, Lemley, *Terms of Use*, 91 MINN. L. REV. 459; *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 587 (1991); *Effron v. Sun Line Cruises, Inc.*, 67 F.3d 7 (2d Cir. 1995); *Centrifugal Force, Inc. v. Softnet Commc'n, Inc.*, No. 08 Civ. 5463 (CM)(GWG), 2011 WL 744732, at *7 (S.D.N.Y. Mar. 1, 2011); *Snap-on Bus. Solutions Inc. v. O'Neil & Assocs., Inc.*, 708 F. Supp. 2d 669 (N.D. Ohio 2010); *United States v. Drew*, 259 F.R.D. 449, 462 n.22 (C.D. Cal. 2009); *Guadagno v. E*Trade Bank*, 592 F. Supp. 2d 1263 (C.D. Cal. 2008); *Major v. McCallister*, 302 S.W.3d 227, 230 (Mo. Ct. App. 2009); *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 118 (Ill. App. Ct. 2005). *But see* *Grosvenor v. Qwest Comm'ns Int'l, Inc.*, No. 09-cv-2848-WDM-KMT, 2010 WL 3906253, at *2 (D. Colo. Sept. 30, 2010) (declining to enforce terms of a "semi-clickwrap" agreement).

39. *Fteja*, 2012 WL 183896, at *10 (citing *Centrifugal Force*, 2011 WL 744732, at *7 (enforcing clickwrap agreement) ("Failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract.")).

40. *See, e.g.*, *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 32 (2d Cir. 2002) ("[I]n circumstances such as these, where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms."); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 401 (2d Cir. 2004) ("Verio's argument might well be persuasive if its queries addressed to Register's computers had been sporadic and

downloaded from a website includes terms but the terms must be searched out or the user has no reason to look for them where they sit, those terms have been held unenforceable.⁴¹ Similarly, where terms for downloaded software were obscured during the installation process “in such a way that the average, non-expert consumer would not notice the hyperlink” to them, the Northern District of Illinois has refused to enforce them.⁴² The Western District of Washington, at least, has also refused to enforce browsewrap agreements where the actual terms were three landing pages past a hyperlink emailed to the customer in an order confirmation.⁴³ It is therefore possible to obscure a website’s terms so much that the requisite notice is not present.

infrequent. If Verio had submitted only one query, or even if it had submitted only a few sporadic queries, that would give considerable force to its contention that it obtained the WHOIS data without being conscious that Register intended to impose conditions, and without being deemed to have accepted Register’s conditions. But Verio was daily submitting numerous queries, each of which resulted in its receiving notice of the terms Register exacted. Furthermore, Verio admits that it knew perfectly well what terms Register demanded. Verio’s argument fails.”); *Harris v. comScore, Inc.*, No. 11 C 5807, 2011 WL 4738357, at *2 (N.D. Ill. Oct. 7, 2011) (“It is true . . . that the plaintiffs in this case should have seen the reference to the agreement and the requirement that they acknowledge that they read it before commencing their download. Nonetheless, it is not reasonable to expect a user casually downloading free software to search for such an agreement if it is not immediately available and obvious where to obtain it.”) (denying motion to transfer venue in accordance with the agreement); *Hines v. Overstock.com*, 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009); *Ticketmaster L.L.C. v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1107 (C.D. Cal. 2007) (plaintiff was “highly likely to succeed in showing that Defendant received notice of the Terms of Use and assented to them by actually using the website” where site displayed a warning that “use of this Website is subject to express Terms of Use” and “[t]he underlined phrase ‘Terms of Use’ is a hyperlink to the full Terms of Use”); *Ticketmaster Corp. v. Tickets.com, Inc.*, No. 99CV7654, 2000 WL 1887522, at *5 (C.D. Cal. Aug. 10, 2000) (rejecting Ticketmaster’s application for a preliminary injunction to enforce posted terms of use of data available on its website against a regular user and noting that the user of Ticketmaster’s website is not required to check an “I agree” box before proceeding, the court concluded that there was insufficient proof of agreement to support a preliminary injunction). *Cf. Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000) (“[A] browse wrap license is part of the web site and the user assents to the contract when the user visits the web site.”).

41. *Compare Register.com, Inc.*, 356 F.3d at 402 (citing *Specht*, 306 F.3d 17) (“Netscape’s posting of its terms [linked to, but not present on the same page] did not compel the conclusion that its downloaders took the software subject to those terms because there was no way to determine that any downloader had seen the terms of the offer. There was no basis for imputing to the downloaders of Netscape’s software knowledge of the terms on which the software was offered.”), with *Fteja*, 2012 WL 183896 (enforcing terms linked near an affirmative user click but not present on the page with the click and arguably eroding the holding in *Specht*).

42. *See Harris*, 2011 WL 4738357 (reasoning that hyperlink to terms was obscured during software installation, terms of the agreement were not reasonably available during the installation process, and the location of the agreement was not readily apparent to users).

43. *See Kwan v. Clearwire Corp.*, No. C09-1392JLR, 2012 WL 32380 (W.D. Wash. Jan. 3, 2012).

In our example, OKCupid's terms are visible before registration, but only by (1) clicking a small link at the bottom of the homepage reading "About OKCupid Free Online Dating,"⁴⁴ (2) scrolling below 23 employee profiles with pictures and clicking "Legal,"⁴⁵ and then encountering the terms in one of three tabs.⁴⁶ The terms state that "[b]y directing your browser to this Website or otherwise accessing the pages of this Website, you accept these terms of use. Humor Rainbow [OKCupid's parent company] may change the terms of use at any time at its sole discretion."⁴⁷ They do not identify any notification procedure for updates to these terms.⁴⁸

However, under certain circumstances courts deem even such passive acceptances binding.⁴⁹ The *Fteja* court collected and analyzed such decisions and noted that (1) cases where browsewrap agreements not apparent from website use were enforced have often "turned on the user's constructive knowledge of the hyperlinked terms" and (2) "the cases in which courts have enforced browsewrap agreements have involved users who are businesses rather than . . . consumers [as in *Specht*]."⁵⁰ Both findings suggest that courts may be more likely to

44. OKCUPID, <http://www.okcupid.com> (last visited Aug. 6, 2012).

45. *About Us*, OKCUPID, <http://www.okcupid.com/about/okcupid> (last visited Aug. 6, 2012).

46. *Legal Information*, OKCUPID, <http://www.okcupid.com/legal/terms> (last visited Apr. 14, 2012).

47. *Id.*

48. *See id.*

49. *See Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 401 (2d Cir. 2004).

Verio contends that it nonetheless never became contractually bound to the conditions imposed by Register's restrictive legend because, in the case of each query Verio made, the legend did not appear until after Verio had submitted the query and received the WHOIS data. Accordingly, Verio contends that in no instance did it receive legally enforceable notice of the conditions Register intended to impose. Verio therefore argues it should not be deemed to have taken WHOIS data from Register's systems subject to Register's conditions.

Verio's argument might well be persuasive if its queries addressed to Register's computers had been sporadic and infrequent. If Verio had submitted only one query, or even if it had submitted only a few sporadic queries, that would give considerable force to its contention that it obtained the WHOIS data without being conscious that Register intended to impose conditions, and without being deemed to have accepted Register's conditions. But Verio was daily submitting numerous queries, each of which resulted in its receiving notice of the terms Register exacted. Furthermore, Verio admits that it knew perfectly well what terms Register demanded. Verio's argument fails.

Id. The court noted, however, that the first use might not warrant enforcing the terms; it was the repeated use of the site and exposure to the notice that made a difference here. *Id.*

50. *Fteja v. Facebook, Inc.*, No. 11 Civ. 918(RJH), 2012 WL 183896, at *5-6 (S.D.N.Y. Jan. 24, 2012).

enforce even a “pure” browsewrap agreement where the user is, by her character or circumstances, likely to know terms are present—whether the website makes that presence apparent or not.

This analysis may differ, at least under California law, where assent to *revised* terms of service is at issue.⁵¹ Specifically, where the website host has provided some notice that terms have changed and stated that continued use of the service after such notice binds a user, courts have been willing to enforce the update.⁵² By contrast, where terms provide that they may be changed “from time to time” by the website host, merely by posting revised terms on the website—even where the terms expressly state that the user accepts any such revised terms—such revisions have been held unenforceable.⁵³ For example, in *Douglas v. US Dist. Ct.*, the Ninth Circuit, relying on the lack of notice of the revised terms, held that a user was not bound by terms revised, posted to a website, and containing provisions for (1) new service charges, (2) a class action waiver, (3) arbitration of disputes, and (4) a new choice of law, even though he continued to use the

51. See generally *Douglas v. U.S. Dist. Court for Cent. Dist. of Cal.*, 495 F.3d 1062 (9th Cir. 2007).

52. See, e.g., *TradeComet.com LLC v. Google, Inc.*, 693 F. Supp. 2d 370, 374 (S.D.N.Y. 2010) (enforcing revised agreement only because use of the service “after notice that Terms have changed indicate[d] acceptance of the Terms”); *MySpace, Inc. v. The Globe.com, Inc.*, No. CV 06-3391-RGK (JcX), 2007 WL 1686966, at *9-10 (C.D. Cal. Feb. 27, 2007) (holding a revised agreement was not unenforceable because of unconscionability where (1) defendant had choices of other similar websites to use instead and (2) defendant had notice); cf. *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273, 286-87 (Cal. Ct. App. 1998) (holding that a revised contract containing an arbitration clause is unenforceable against existing customers, even when they are given notice by mail).

53. See *Rolling v. E*Trade Sec., LLC*, 756 F. Supp. 2d 1179, 1190 (N.D. Cal. 2010) (holding that agreement stating that “E*TRADE Securities may modify the fee structure at any time by posting a modified structure on its Web site,” and “I understand that this Agreement may be amended from time to time by E*TRADE Securities, with revised terms posted on the E*TRADE Financial Web site. I agree to check for updates to this Agreement. I understand that by continuing to maintain my Securities Brokerage Account without objecting to revised terms of this Agreement, I am accepting the terms of the Revised Agreement and I will be legally bound by its terms and conditions” were “sufficient to state a claim for unjust enrichment based on unenforceability.”); *Sawyer v. Bill Me Later, Inc.*, No. CV 10-04461 SJO (JCGx), 2010 WL 5289537, at *2-3, *5-6 (C.D. Cal. Oct. 4, 2010) (holding revised forum selection clause enforceable against plaintiff who had received an e-mail notice of revised terms and future effective date thereof in the face of evidence that the user had clicked to view the revised agreement multiple times, but refusing to enforce the agreement because enforcement would deprive Plaintiff of a CLRA claim); cf. *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 575 F. Supp. 2d 696, 706 (D. Md. 2008) (applying Mississippi law to determine that revisions were enforceable where website host attempted to disclaim amendment during litigation and relying in part on the principle that ambiguous contract terms are construed against the drafter, distinguishing *Union Planters Bank Nat’l Ass’n v. Rogers*, 912 So. 2d 116, 118-19 (Miss. 2005) on that basis).

website for years.⁵⁴ Courts have also suggested that a party's failure to follow the notice procedures it set forth in its previous terms can render revised terms unenforceable.⁵⁵ This analysis is doctrinally consistent with the enforceability of pure browsewrap agreements, in general.

The current state of the law seems to be that most online agreements can be deemed enforceable under at least some circumstances, but that a website can place its terms obscurely enough to destroy enforceability as well. In the Apple iteration, where the full agreement appears in a pop up window with an "I accept" button, or the Facebook iteration, where the terms are hyperlinked near an affirmative click, courts are likely to find that an enforceable contract was made. While browsewrap agreements have greater enforceability issues, analysis of case-specific facts may warrant enforcing those as well. Neither manner of enforcement turns on whether the user has read the terms; in fact, in no case reviewed for this article did a user admit to having read any part of the terms before using the website or clicking to accept.

Realistically, few Internet users bother to read terms of service. Imagine browsing the Internet but stopping at each new site to read 5 to 50 pages of boring, somewhat scary legalese and you'll understand why. While no academic study appears to have been performed on this point, various news outlets have polled readers to discover what

54. *Douglas*, 495 F.3d at 1066 ("Douglas claims that he authorized AOL to charge his credit card automatically and Talk America continued this practice, so he had no occasion to visit Talk America's website to pay his bills. Even if Douglas had visited the website, he would have had no reason to look at the contract posted there. Parties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been changed by the other side. Indeed, a party can't unilaterally change the terms of a contract; it must obtain the other party's consent before doing so. . . . This is because a revised contract is merely an offer and does not bind the parties until it is accepted." (citing *Union Pac. R.R. v. Chi., Milwaukee, St. Paul & Pac. R.R.*, 549 F.2d 114, 118 (9th Cir. 1976) and *Matanuska Valley Farmers Cooperating Ass'n v. Monaghan*, 188 F.2d 906, 909 (9th Cir. 1951)); *Badie*, 79 Cal. Rptr. 2d at 286-87 (holding that a revised contract containing an arbitration clause is unenforceable against existing customers, even when they are given notice by mail).

55. See *DIRECTTV, Inc. v. Mattingly*, 829 A.2d 626, 634-35 (Md. 2003) (holding that simply sending the revised agreement did not satisfy the plain meaning of the prior agreement's requirement of notice describing the change because it did not "let [the subscriber] know . . . what that change entailed," where DIRECTTV had mailed another agreement to the subscriber that appeared to be nearly identical to the prior agreement, but importantly contained certain changes that were neither highlighted nor separately described, including the addition of a new provision purporting to subject all disputes under the agreement to binding arbitration); cf. 17A C.J.S. *Contracts* § 409 (2012) (stating that while parties may agree in advance to a method for modifying an agreement, such method is not exclusive, and the parties are free to choose another method of modification, thereby waiving the originally agreed provisions for modification).

percentage of users read any terms on the websites they visit; a poll by *The Guardian* found that seven percent of users read some terms of use;⁵⁶ a poll by *The Telegraph* found that seventy percent of users never read any terms of use.⁵⁷ One United Kingdom gaming website played an April Fool's joke where assent to its terms, automatic by use of the website, gave the company rights in the user's immortal soul.⁵⁸ The gaming company provided an opt-out, and had only a twelve percent opt-out rate—including during the period after the prank was publicized.⁵⁹ None of these surveys make clear whether the users who represented that they read terms of service regularly or in a particular instance read every word, skimmed through, or just scrolled down. However, it seems clear that Internet users don't usually bother to read terms. Unfortunately, that has little to do with whether the terms can be enforced against them.⁶⁰

Fifty years ago it would be reasonable to expect a court to refuse to enforce, as adhesive or unconscionable, a contract appearing in a dark corner of an express oil change station, in tiny print, which no customer claimed to have seen, disclaiming all liability of the oil change outfit for putting acid in the oil tank. Today, we can expect that many—if not most—of our online consumer relationships rely upon the enforcement of a similar contract.

V. THE SUPREME COURT'S DECISION IN *AT&T v. CONCEPCION*

On April 27, 2011, the Supreme Court's opinion in *AT&T v. Concepcion* held that the Federal Arbitration Act required the enforcement of arbitration provisions which California law had previously held to be unconscionable.⁶¹ Practically, this holding may act as a bar to any class action suit arising from consumer transactions conducted over the Internet if the website host has included an arbitration provision in its terms of service.

56. Rebecca Smithers, *Terms and Conditions: Not Reading the Small Print Can Mean Big Problems*, THE GUARDIAN (May 11, 2000, 2:00 EDT), <http://www.guardian.co.uk/money/2011/may/11/terms-conditions-small-print-big-problems>.

57. *Companies Use Apps to Harvest Users' Personal Information*, THE TELEGRAPH (Feb. 26, 2012, 5:52 PM GMT), <http://www.telegraph.co.uk/technology/9107042/Companies-use-apps-to-harvest-users-personal-information.html>.

58. *See 7,500 Online Shoppers Unknowingly Sold Their Souls*, FOXNEWS.COM (Apr. 15, 2010), <http://www.foxnews.com/scitech/2010/04/15/online-shoppers-unknowingly-sold-souls/>.

59. *Id.*

60. *See Fteja v. Facebook, Inc.*, No. 11 Civ. 918(RJH), 2012 WL 183896, at *8 (S.D.N.Y. Jan. 24, 2012).

61. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

Concepcion strictly examines whether the Federal Arbitration Act preempts California case law holding certain arbitration provisions unenforceable.⁶² The controlling holding results from Justice Scalia’s majority opinion, joined by Chief Justice Roberts and Justices Alito and Kennedy, and Justice Thomas’ concurrence.⁶³ *Concepcion* examines § 2 of the Federal Arbitration Act (“FAA”), which states that arbitration agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁶⁴ California law had defined such grounds to include unconscionability, as explained below.⁶⁵

The case arose when the *Concepcions* sued AT&T for false advertising and fraud after responding to an advertisement for “free” phones for which AT&T charged \$30.22 in sales tax.⁶⁶ In connection with their “free” purchase, the *Concepcions* executed a contract with AT&T that provided for the arbitration of all disputes between the parties and required that claims be brought in consumers’ “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.”⁶⁷ The agreement set forth several steps the parties would follow to resolve disputes, including a short notice of dispute over the AT&T website, a period in which AT&T could settle the claim informally before the consumer was permitted to file a Demand for Arbitration.⁶⁸ It also provided some consumer-friendly procedures for arbitration, including AT&T payment of plaintiffs’ costs for non-frivolous claims, the placement of arbitration in the consumer’s jurisdiction, the option to proceed by telephone at the consumer’s election, a prohibition on AT&T’s seeking attorney’s fees, and a guaranteed payment of \$7,500 if the consumer receives an arbitration award greater than AT&T’s last settlement offer.⁶⁹

Vincent and Liza *Concepcion* sued in the Southern District of California in March 2006,⁷⁰ and their complaint was consolidated with a putative class action.⁷¹ In March 2008, AT&T moved to

62. *See id.* at 1746.

63. *Id.* at 1743

64. 9 U.S.C. § 2 (2010).

65. *See infra* text accompanying note 75.

66. *See Laster v. AT&T Mobility LLC*, 584 F.3d 849, 852-53 (9th Cir. 2009).

67. *Concepcion*, 131 S. Ct. at 1744.

68. *Id.* at 1744.

69. *Id.*

70. Complaint at 1, *Concepcion v. Cingular Wireless LLC*, No. 3:06-cv-00675-DMS-NLS (S.D. Cal. Mar. 27, 2006).

71. *See Concepcion*, 131 S. Ct. at 1744.

compel arbitration.⁷² The plaintiffs opposed AT&T's motion on the basis that the arbitration provision of the agreement was "unconscionable and unlawfully exculpatory under California law because it disallowed class wide procedures."⁷³

The District Court denied AT&T's motion in reliance on *Discover Bank v. Superior Court*.⁷⁴ In *Discover Bank*, the California Supreme Court had held that where class action waivers in consumer contracts of adhesion appear "in a setting in which disputes between the [contracting] parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money," such a waiver exempting the drafting party from responsibility is unconscionable.⁷⁵ *Concepcion* recited the popular summary of this holding, termed the "*Discover Bank* rule," as stating that arbitration agreements in adhesive contracts were unconscionable.⁷⁶ Unconscionability in turn requires, under at least California law, both a procedural and substantive element.⁷⁷ The procedural element of unconscionability turns on the presence of "oppression" or "surprise" due to unequal bargaining power.⁷⁸ The substantive element of unconscionability turns on the presence of "overly harsh" or "one-sided" results.⁷⁹

Applying this framework to class-action waivers in arbitration agreements, the *Discover Bank* court explained:

[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or

72. *Id.*

73. *Id.* at 1745.

74. *Laster v. T-Mobile USA, Inc.*, No. 05cv11167 DMS (AJB), 2008 WL 5216255, at *7-12 (S.D. Cal. Aug. 11, 2008) (citing *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005)).

75. *Discover Bank*, 113 P.3d at 1110.

76. *Concepcion*, 131 S. Ct. at 1743.

77. *See Armendariz v. Found. Health Pyschcare Servs., Inc.*, 24 Cal. 4th 83, 114 (Cal. 2000); *accord Discover Bank*, 113 P.3d at 1108.

78. *See Armendariz*, 24 Cal. 4th at 114; *accord Discover Bank*, 113 P.3d at 1108.

79. *See id.*

property of another.” Under these circumstances, such waivers are unconscionable under California law and should not be enforced.⁸⁰

The court further explained that, in practice, such agreements “operate to insulate a party from liability that otherwise would be imposed under California law.”⁸¹ Future California opinions applied this “*Discover Bank* rule” to find that adhesive contracts containing arbitration agreements were unconscionable and unenforceable.⁸²

In *Concepcion*, the majority negated the *Discover Bank* rule with a focus on the fact that the rule deemed certain agreements unconscionable *because* they required arbitration.⁸³ Within that framework, the majority believed that the FAA pre-empted the rule because the rule stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in passing the FAA.⁸⁴ It held that the phrase in the FAA “save upon such grounds as exist at law or in equity for the revocation of any contract” permits agreements to arbitrate to be invalidated by “‘generally applicable contract defenses, such as fraud, duress, or unconscionability’ but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”⁸⁵

As a result, class action waivers and arbitration provisions tucked into adhesive online terms should now be enforceable. If enforced according to *Concepcion*, such waivers and arbitration provisions prevent litigants from proceeding on a class wide basis. Such simple provisions therefore function to prohibit any class action against an online provider, absent some other grounds to render the agreements unenforceable.

As discussed above, the majority of privacy-based claims recently litigated involve very small measures of damages incurred under the onus of a provider’s online terms. They proceed on a contingency basis because the potential for class wide damages motivates the plaintiff’s bar to risk resources in the hope of obtaining a large aggregate judgment. However, if online providers can remove

80. *Discover Bank*, 113 P.3d at 1110 (emphasis added) (quoting CAL. CIV. CODE § 1668 (West 2012)).

81. *Id.* at 1109.

82. *See, e.g.*, *Cohen v. DirectTV, Inc.* 48 Cal. Rptr. 3d 813, 819-20 (2006); *Klussman v. Cross Country Bank*, 36 Cal. Rptr. 3d 728, 739-40 (2005); *Aral v. EarthLink, Inc.*, 36 Cal. Rptr. 3d 229, 237-38 (2005).

83. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011).

84. *See id.* at 1748.

85. *See id.* at 1746.

the potential for a large aggregate judgment by requiring individual arbitration of claims in online terms, it seems unlikely that any lawyer will remain willing to bring a privacy-based claim for the thus-far miniscule damages claimed by any individual litigant.

VI. THE INTERPRETATION OF *AT&T v. CONCEPCION*

Since the Supreme Court's opinion in *Concepcion* was published, it has been interpreted broadly by lower courts. While most of the citing decisions have been in the employment context,⁸⁶ a few cases dealing with privacy considerations have applied *Concepcion* to compel arbitration based on a provision in a form contract.⁸⁷

In *Wilson v. Cash America International Inc.*, a Northern District of Texas Court compelled the arbitration of claims of common law invasion of privacy by intrusion and violations of Texas consumer statutes.⁸⁸ The contract governing the parties' relationship was not a clickwrap or browsewrap agreement, but a series of credit service organization form contracts.⁸⁹ The court primarily relied upon the Supreme Court's opinion in *CompuCredit Corp. v. Greenwood*.⁹⁰ *CompuCredit* held that, where a statute is silent on whether claims arising under that statute can proceed under arbitration, the FAA requires that an agreement to arbitrate in the instrument governing the parties' relationship be enforced.⁹¹ However, the court also noted that, "to whatever extent plaintiff is contending that the class action provisions of the arbitration agreements cannot be enforced, the court notes that the contention would be at odds with [*Concepcion*]." ⁹² This suggests that the application of *Concepcion* won't turn on any analysis of unconscionability specific to California law.

86. See *Sutherland v. Ernst & Young LLP*, No. 10 Civ. 3332(KMW)(MHD), 2012 WL 130420 (S.D.N.Y. Jan. 17, 2012) for a case highlighting the controversy surrounding this application.

87. See, e.g., *Wilson v. Cash Am. Int'l Inc.*, No. 4:11-CV-421-A, 2012 WL 310936 (N.D. Tex. Feb. 1, 2012); *Aneke v. Am. Express Travel Related Servs.*, Civil Action No. 11-1008(GK), 2012 WL 266878 (D. D.C. Jan. 31, 2012); *Khanna v. Am. Express Co.*, No. 11 Civ. 6245(JSR), 2011 WL 6382603 (S.D.N.Y. Dec. 14, 2011); *Bailey v. Household Fin. Corp.*, No. 10cv857 WQH (RBB), 2011 WL 5118723 (S.D. Cal. Oct. 28, 2011); *Brewer v. Missouri Title Loans*, No. SC90647, 2012 WL 716878 (Mo. Mar. 6, 2012).

88. *Wilson*, 2012 WL 310936.

89. See *id.* at *1.

90. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012).

91. See *Wilson*, 2012 WL 310936, at *3-4 (summarizing *CompuCredit v. Greenwood*). This analysis also prompts a question as to whether a statute which by its terms prohibited enforcement in an arbitrable forum would alter the result.

92. *Wilson*, 2012 WL 310936, at *4 n.3.

Next, in *Bailey v. Household Finance Corp.*, the Southern District of California compelled arbitration of claims including the violation of California's Invasion of Privacy Act.⁹³ The opinion permitted the defendant to compel arbitration in what would otherwise be an untimely fashion because, until *Concepcion*, its arbitration agreement would have been assumed unenforceable under California law.⁹⁴

In *Khanna v. American Express Co.*, the Southern District of New York compelled arbitration of claims including violations of the Electronic Communications Privacy Act, 18 U.S.C. § 2510 *et seq.*⁹⁵ American Express had mailed the plaintiff a replacement credit card and enclosed a copy of a Cardmember Agreement that provided for acceptance by "us[ing] the [a]ccount (or . . . sign[ing] or keep[ing] the card)."⁹⁶ It also provided simply that either party could elect to resolve the claim by arbitration and such an election would remove both parties' rights to a jury trial.⁹⁷ Finally, it required any arbitration be conducted on an individual basis.⁹⁸ The court found no Utah law (the contract's governing law) to suggest that a generally applicable contract defense should be applied and compelled individual arbitration.⁹⁹ While the user was mailed this agreement, note that the court did not require an affirmative act to indicate assent before enforcing the agreement against the user.¹⁰⁰

In *Aneke v. American Express*, the District of Columbia Court compelled arbitration of claims under the Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq.*, over the sharing of plaintiffs' phone numbers with call centers outside the United States without consent.¹⁰¹ The opinion does not discuss the assent process for the Cardmember Agreements that contained the arbitration provision, which included a waiver of the right to class proceedings and a requirement to arbitrate on an individual basis.¹⁰² The Cardmember

93. *Bailey v. Household Fin. Corp.*, No. 10cv857 WQH (RBB), 2011 WL 5118723 (S.D. Cal. Oct. 28, 2011).

94. *See id.* at *9.

95. *Khanna v. Am. Express Co.*, No. 11 Civ. 6245(JSR), 2011 WL 6382603 (S.D.N.Y. Dec. 14, 2011).

96. *Id.* at *2.

97. *See id.*

98. *See id.* at *2.

99. *See id.* at *2-5.

100. *See id.* at *3-5.

101. *Aneke v. Am. Express Travel Related Servs.*, Civil Action No. 11-1008(GK), 2012 WL 266878 (D. D.C. Jan. 31, 2012).

102. *See id.* at *2-3.

Agreements did not contain provisions for informal dispute resolution or what could be termed consumer-friendly resolution procedures like those in the *Concepcion* agreement.¹⁰³ Arbitration was compelled nonetheless.¹⁰⁴

Collectively, these cases suggest that *Concepcion* has not been applied to rely upon the presence of a consumer-favorable arbitration procedure. Similarly, none of these courts has focused on the presence of absence of a class-action waiver or a provision requiring arbitration on an individual basis. Instead, it has been applied broadly to require individual arbitration where even an adhesive consumer contract states merely that claims will be arbitrated—even absent a user’s affirmative act of assent.

VII. THE PRACTICAL CONSEQUENCES OF *AT&T v. CONCEPCION*

The law governing online terms of service, which almost exclusively deems such terms enforceable contracts, suggests that any online business can shield itself from class-action suits merely by including language along these lines in its online terms:

Any claims between the parties under these Terms shall be resolved by arbitration on an individual basis. [The consumer] will have no right to (1) litigate that claim in court or have a jury trial on that claim or (2) participate in a representative capacity or as a

103. *See id.*

104. *See id.* at *8. *But see* *Brewer v. Missouri Title Loans*, No. SC90647, 2012 WL 716878, at *8-9 (Mo. Mar. 6, 2012) (holding that absence of any mechanism for informal complaint resolution distinguished *Concepcion* in reliance on Thomas’ concurrence where defendant could elect to use the courts to obtain its own relief but plaintiff could not). Note, however, that *Brewer* was decided simultaneously with the submission of this article and it is unclear what result would arise from an appeal to the Supreme Court. Nonetheless, the draft arbitration provision I suggest below requires mutual arbitration, rather than arbitration in the Company’s discretion for this reason. Other recent cases have hinged on the disparity in bargaining power between the parties, but never where electronic form terms were used. *See, e.g., Lau v. Mercedes-Benz USA, LLC*, No. CV 11–1940 MEJ, 2012 WL 370557, *6-11 (N.D. Cal. Jan. 31, 2012) (refusing to enforce pre-printed agreement’s arbitration clause because the presence of the clause was not clear to the consumer and therefore the agreement was procedurally unconscionable as well as because the high arbitration fees were substantively unconscionable); *Trompeter v. Ally Financial, Inc.*, No. C 12–00392 CW, 2012 WL 1980894, *6 (N.D. Cal. June 1, 2012) (refusing to enforce arbitration provision on the reverse of the printed agreement and agreement was one-sided because drafting party could seek re-arbitration but consumer could not and consumer was responsible for excessive arbitration fees); *NAACP of Camden County East v. Foulke Mgmt. Corp.*, 24 A.3d 777, 781 (N.J. Super. Ct. App. Div. 2011); *cf. Vernon v. Qwest Comms. Int’l, Inc.*, Civil Action No. 09–cv–01840–RBJ–CBS, 2012 WL 768125, *14 (D. Colo. Mar. 8, 2012) (enforcing arbitration provision where arbitration term was easy for consumer to find in part because of continued display on the company website). *See infra* Part VII.

member of any class have any of claimants pertaining to any claim subject to arbitration. The arbitrator's decision will be final and binding [except as set forth by the Company herein].

In order for such a provision to function as a class-action shield, however, it must be a part of an enforceable contract with the user. Therefore, assent to the terms must have been effective, likely through a clickwrap or quasi-clickwrap mechanism. In addition, any update to the applicable terms likely must be performed both (1) in accordance with those terms' intrinsic procedures for revision and (2) in a manner providing sufficient notice to the user that there has been some update, or that arbitration specifically is now required under the revised terms.

At least one California case, decided pre-*Concepcion*, has held the *ex poste* addition of an arbitration provision was unenforceable as unconscionable where the user could only reject the revised terms by canceling the service.¹⁰⁵ In light of *Concepcion*'s specific rejection of California's unconscionability determination based upon the very use of arbitration for such claims, we might expect that unconscionability based on the chosen assent process might still invalidate such provisions. However, this distinction does not appear to have been tested in court.

By using a valid update procedure, however, it seems that any online business can now plug language into its terms of service that shields it from class litigation and forces its users to arbitrate. The plaintiff's bar is unlikely to spend tens or hundreds of thousands of its own dollars to litigate a claim worth less than \$100 in contingency award. Given the shift in law instigated by *Concepcion*, it seems reasonable to expect that few plaintiffs' lawyers will be bringing contingency actions against online businesses with arbitration clauses in their terms of service.

VIII. THE DIFFERENCE SOME FRAUD MAKES

Expressly exempt from Section 2 of the FAA, and therefore from

105. See *Kaltwasser v. Cingular Wireless LLC*, 543 F. Supp. 2d 1124, 1130 n.5 (N.D. Cal. 2008) ("Although the Wireless Service Agreement provides that Kaltwasser has the right to accept any amendments or reject the amendments and hold Cingular to the terms of the original contract, the Amendment specifies no means of rejecting the modified terms, other than cancelling service. California courts have held that such an offer is procedurally unconscionable.") (citing *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 2002)). *Kaltwasser* does not rely on the *Discover Bank* holding overturned by *Concepcion* in this respect; rather it is the unconscionability of the update procedure, as opposed to the arbitration itself, in *Discover Bank*. See *id.*

the purview of *Concepcion*, are circumstances of fraud.¹⁰⁶ However, as a practical matter, I argue that only fraud in the execution can preserve the ability to bring a privacy class action based on online consumer transactions where the allegedly controlling terms contain and arbitration clause.

One can imagine that a challenger to terms such as the April Fools provision mentioned above,¹⁰⁷ transferring ownership of one's immortal soul in exchange for access to an informational website about gaming, would argue that the challenger's assent resulted from fraud. In particular, one might argue that the entire website was a trick crafted to collect a user's valuable immortal soul. This sort of argument is in the vein of fraud. One might also argue that OKCupid's failure to disclose advertising practices in its privacy policy was fraudulent in that it misled users into thinking they could speak freely to potential mates absent third party scrutiny. However, the involvement of any kind of fraud will not be sufficient to trump the class-action killing power of *Concepcion*.

Fraud in the inducement occurs where a signatory to an agreement knows what she is signing but her consent is induced by fraud.¹⁰⁸ The classic example is a purposeful misrepresentation by the counterparty about a quality or characteristic of the product or service purchased by the induced party. If proven, fraud in the inducement renders a contract voidable.¹⁰⁹ However, because such contracts are voidable rather than void *abinitio*, one would be required to prove their voidability in court.¹¹⁰ To do so, one would have to abide by the forum selection, arbitration, or other litigation constraining provision in the contract. Therefore, even if assent to online terms were induced by fraud, so long as the user "knew" she was assenting to or clicking through terms of use for that site, an arbitration provision in those terms would function to prevent class actions.

106. See 9 U.S.C. § 2 (2010).

107. See *supra*, note 58.

108. See 1 WITKIN, SUMMARY OF CAL. LAW, CONTRACTS § 297 (10th ed. 2005).

109. See *id.*

110. See *Davis v. Avvo, Inc.*, No. 8:10-cv-2352-T-27TBM, 2011 WL 4063282, at *5 n.14 (M.D. Fla. Sept. 13, 2011) (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974)). Note that decisions applying *Concepcion* have left open the possibility of defeating arbitration with "fraud" generally, but have not explained how such a defense would leap this procedural hurdle and have had different results from the cases discussed in Part VI *supra*. See, e.g., *Brewer v. Missouri Title Loans*, No. SC90647, 2012 WL 716878 (Mo. Mar. 6, 2012) (relying on absence of defendant payments or informal resolution mechanism of arbitration provision in thirteen loan agreements plaintiff claimed she did not read or fully understand when she signed in order to find agreement unconscionable).

The same is not true of fraud in the execution, also sometimes called fraud in the inception. Essentially, fraud in the execution goes to the inception or execution of the agreement, such that the promisor “is deceived as to the nature of his act, and actually does not know what he is signing, or does not intend to enter into a contract at all, mutual assent is lacking, and [the contract] is *void*.”¹¹¹ Because the assent obtained by fraud in the execution is ineffective, no contract is formed and the contract is void *ab initio*.¹¹² An arbitration provision contained in terms of use obtained by fraud in the execution will therefore be unenforceable, allowing class-wide litigation to proceed without the onus of the website host’s self-serving mandates regarding the litigation process.

A California appeals court recently held as void online terms of use assented to in light of fraud in the execution.¹¹³ *Duick v. Toyota* concerned a Toyota online marketing scheme of a curious nature.¹¹⁴ Any user of the Toyota Matrix website provided Toyota with her friend’s name, email, and physical address, designating that person (the “Player”) as a participant in the “Your Other You ‘interactive experience.’”¹¹⁵ The Player would then receive an email appearing to originate with the recommending individual inviting the Player to click a hyperlink (identified in an unclear manner with Toyota) that led to a landing page entitled “Personality Evaluation.”¹¹⁶ On this page, Player could click to “begin,” at which point Player was directed to a page entitled “Personality Evaluation Terms and Conditions,” where Player had to, according to defendants, scroll through the length of terms and conditions before being allowed to proceed by clicking a box labeled “I have read and agree to the terms and conditions.”¹¹⁷

The initial paragraph of these terms was somewhat consistent with a “Personality Evaluation,” in that it said Player had been invited by someone who knows them to participate in an “interactive experience.”¹¹⁸ Further down, these terms included that Player would engage in a 5 day digital experience where Player would receive

111. *Rosenthal v. Great W. Fin. Sec. Corp.*, 926 P.2d 1061, 1073 (Cal. 1996).

112. *See Duick v. Toyota Motor Sales, U.S.A., Inc.*, 131 Cal. Rptr. 3d 514, 517 (Cal. Ct. App. 2011).

113. *Id.* at 514.

114. *Id.* at 515.

115. *Id.* at 515-16.

116. *Id.* at 515.

117. *Id.*

118. *Id.* at 516.

“email messages, phone calls, and/or text messages” from Toyota, as well as an individual-basis arbitration provision.¹¹⁹ Plaintiff Player purportedly clicked that she had “read and agree[d] to the terms and conditions,” though her testimony was that she did not recall doing so, and in fact had technical difficulties viewing all of the terms page.¹²⁰ Nonetheless, Plaintiff Player soon began receiving emails from a man calling himself “Sebastian Bowler,” linked to a MySpace page for an alcoholic soccer hooligan, explaining over the five day period that he was coming to stay at her house, bringing his spontaneously vomiting dog, running from the cops, and sticking her with the bill for a hotel room he’d destroyed.¹²¹ She sued Toyota for intentional infliction of emotional distress, negligence, and false advertising, among other claims.¹²²

The *Duick* court thought this was one circumstance where, without negligence on her part, Plaintiff Player had attached her signature to a paper “assuming it to be a paper of a different character.”¹²³ It noted that the terms were called “Personality Evaluation Terms and Conditions,” which could have led Plaintiff Player to believe she was going to participate in a personality evaluation and nothing more—not that she would be subject to a prank.¹²⁴ The court noted that (1) the terms regarding an “interactive experience” were vague and (2) even if Plaintiff Player had seen the term regarding receiving emails, she could not have known what sort of emails she would receive.¹²⁵ Because Toyota “misrepresented and concealed” the true nature of what was coming to Player Plaintiff, Toyota “deprived [Plaintiff Player] of a reasonable opportunity to learn the character’ of the putative agreement, regardless of her access to the agreement’s terms.”¹²⁶ The appeals court therefore affirmed the district court’s denial of Toyota’s motion to compel arbitration.¹²⁷

Fraud in the execution appears to be, at this early stage in the history of *Concepcion*, the only argument a litigant can make to attempt proceed with claims on a class wide basis, without observing an arbitration clause, where the relationship is purportedly governed

119. *Id.*

120. *Id.*

121. *Id.* at 516-17.

122. *See id.* at 517.

123. *Id.* at 517.

124. *Id.* at 518.

125. *Id.*

126. *Id.* at 517-518.

127. *Id.*

by a single version of online terms.

IX. CONCLUSION

The holding in *Concepcion* suggests that it will be nearly impossible—absent fraud in the execution—to bring a class action suit for any claim, including a privacy claim, arising from one’s use of a website with an arbitration provision in its terms of use. Such terms are most often deemed enforceable, particularly where a user is expected to know of their existence.

For websites that haven’t included such a provision, it appears the same result can be obtained with a simple amendment to those terms, provided the website is willing to ask users to check a box to confirm their assent to the revised terms.

In the case of OKCupid,¹²⁸ a harm in the form of insurance premiums increased by several hundred dollars per use, for example (resulting from advertisers’ disclosure of users’ profile information) could become virtually unredressable *vis a vis* OKCupid. This would depend upon OKCupid or its analogue having imposed a notice and assent procedure for its revised terms of the “clickwrap” or “quasi-clickwrap” variety. It may also depend on what information about the update OKCupid presents: an accurate summary, a misleading summary, or the full revised terms. Perhaps there would be an argument for fraud in the execution where an update was merely to add an arbitration provision to prevent class action suits but hid or misrepresented that purpose. However, outside of that presumably rare circumstance, OKCupid and its analogues can likely use *Concepcion* to shield themselves from any and all class action suits over their behavior. All they need do is ask users to click absentmindedly through an amendment.

It seems unlikely that this was the Supreme Court’s purpose in ruling as it did in *Concepcion*. Nonetheless, the holding appears to have made online privacy suits even harder to win than they already were.

128. See *infra* Part II.