

## **Check into Arbitration—Appellate Division Enforces Clickwrap Agreement**

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By **Lynne M. Kizis and Joseph Carlo** | December 12, 2023

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The reason, as the Appellate Division stated in *Santana v. SmileDirectClub*, 475 N.J. Super. 279, 292 A.3d 529 (App. Div. 2023), was that Santana had clicked the “I agree” checkbox during his registration process for SmileDirectClub. The checkbox was located next to a hyperlink, which, if clicked, would have led Santana to SmileDirectClub’s Terms and Conditions, including the arbitration provision. Judge Carmen Messano, writing for the court, stated that this design was sufficient to put Santana on inquiry notice of the arbitration provision since clicking the “I agree” checkbox was a valid manifestation of his assent to the terms. The clicking or checking of these boxes has now been universally defined as forming a “clickwrap” agreement.

In reversing the trial court’s decision, the court also distinguished its prior holding in *Wollen v. Gulf Stream Restoration and Cleaning*, 468 N.J. Super. 483, 259 A.3d 867 (App. Div. 2021) because the agreement in *Wollen* involved a browsewrap agreement, not the clickwrap type seen in *Santana*. A browsewrap agreement exists where the online host dictates that assent is given merely by using the website. The user is not required to review specific terms or check any boxes. Accordingly, there lacks the same manifestation of assent as seen in the clickwrap agreements, where the user is affirmatively clicking a checkbox attesting that they agree to the terms.

*Santana* received additional support with the recent decision in *Williams v. Ysabel*, 2023 (App. Div. 2023). In an unpublished opinion, the Appellate Division, relying almost exclusively on *Santana*, enforced Uber’s arbitration agreement, which required the user to click a checkbox stating, “By checking the box, I have reviewed and agree to the Terms of Use and acknowledge the Privacy Notice.” As in *Santana*, the user was not required to actually read the terms but merely had to click the checkbox to continue to use the Uber app. The Court held that the failure to read the provisions was not a valid defense and that the hyperlinked document was

sufficient to put the user on inquiry notice of the arbitration provision. By clicking the checkbox, the user was thus bound to the agreement.

## Practical Implications

With the Appellate Division's blessing, the prevalence of clickwrap agreements bears crucial practical implications. As wet-ink contracts are all but a relic of the past, companies can now leverage properly structured clickwrap agreements to bind users to favorable terms for the company. But from a consumer's perspective, there are understandable concerns. While *Santana* involved an arbitration clause, a derivative question is raised as to what other terms companies might enforce through a clickwrap agreement. As the courts readily acknowledge, the ordinary consumer does not click into each hyperlinked document and attentively review its terms before ultimately clicking "I agree."

These concerns are highlighted in a study published in 2016 on clickwrap agreements: "The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services," by Jonathan A. Obar and Anne Oeldorf-Hirsch. The study empirically investigated privacy policy and terms of service reading behaviors of users joining a fictitious social networking service. The study found that while the average reader should have taken about 50 minutes to read the privacy policy and terms of service, the average total reading time was slightly over 2 minutes. Furthermore, the study found that 98% of the study's participants assented to the mock social network's terms and conditions, which included a clause that entitled the network to the user's firstborn child as a form of payment.

## Adhesion Contracts

An overlooked issue on this topic is the interplay between clickwrap agreements and contracts of adhesion. A contract of adhesion is defined as a standardized contract which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to or reject the contract. By their very nature, internet contracts almost always fall into the category of adhesion contracts. In determining whether to enforce the terms of a contract of adhesion, courts look to not only the take-it-or-leave-it nature of the document, but also: (1) to the subject matter of the contract; (2) the parties relative bargaining positions; (3) the degree of economic compulsion motivating the "adhering" party; and (4) public interests affected by the contract. *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 912 A.2d 88, 189 N.J. 1 (Sup. Ct. NJ 2006).

Assuming that Santana's aligners were either medically necessary or recommended by a doctor, he had no choice but to click the checkbox agreeing to the arbitration clause in order to create a SmileDirectClub account and order his aligners. He was not offered any opportunity to negotiate the terms, was in an inferior bargaining position, and a significant public interest (his right to a jury trial) was entirely precluded. While the court did not conduct an adhesion analysis, it nonetheless found in favor of SmileDirectClub. Presumably, it reasoned that even if Santana's right to a jury trial was affected, he still had recourse through arbitration. See *Wells v. Volkswagen of America*, 2014 (NJ Law Div. 2014) (the Agreement to Arbitrate, even if a contract of adhesion, should not be considered unenforceable under these circumstances ... the court is satisfied all plaintiff's rights under the claims asserted shall be enforced in the arbitration, as they would be in court).

While New Jersey courts have made it clear that arbitration clauses in clickwrap agreements, even if deemed contracts of adhesion, will be enforceable, this argument might serve as a backstop for users if companies eventually seek to expand their clickwrap agreements to incorporate otherwise unconscionable terms. For example, the Superior Court in *Holder v. Carteret Holdings Urban Renewal*, 2015 (NJ Law Div. 2015), held

that undisclosed medical fees would not be enforced against an unsuspecting patient in what was determined to be a contract of adhesion.

## **Conclusion**

As online retail and services continue their ascent, the application of clickwrap agreements will only become more prevalent. The logical expectation is that many product liability claims or potential class actions will be precluded and subjected to mandatory arbitration. At the very least, consumers should be aware that by clicking these “I agree” checkboxes, they are bound by the provisions contained within the hyperlinked documents even if they were not read (subject to a potential unconscionability defense). On the flip side, it would be prudent for online retailers to convert any browsewrap agreements into clickwrap agreements in order to bolster their enforceability.

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