GETTING A BAD "WRAP": AN ANALYSIS OF ONLINE CONTRACT CASES IN CALIFORNIA AFTER *STEP-SAVER* AND *PROCD*

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ABSTRACT

Consumers routinely enter contracts when engaging in online commerce. Such "contracts of adhesion" are created by sellers and provide no opportunity to negotiate. By surveying California state and federal court cases, this Note explores how California courts evaluate notice. Courts recognize four types of online contracts: clickwrap, browsewrap, scrollwrap, and sign-in-wrap. This Note also draws on the seminal cases Step-Saver Data Systems v. Wyse *and* ProCD, Inc. v. Zeidenberg *to discuss and compare the standards of notice used by courts. Overall, a uniform standard of notice has not yet emerged in California, and* Step-Saver *and* ProCD *remain relevant as courts primarily rely on fact-specific notice analysis. The utility of the four types of "wrap" categories may be diminishing as the online landscape evolves and changes.*

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INTRODUCTION

Imagine that you are purchasing something online, as you have likely done in the past. You enter the seller's website and pick out the product you want to buy—say, a pair of socks—then start the payment process by entering your personal information. As you are about to click "Complete Purchase," you see a notice pop up on the screen: "By completing your purchase, you agree to our Terms and Conditions." You pause for a moment, wondering whether you should review the terms, but that would involve opening another webpage and parsing through pages of dense legal language. You have purchased socks online before—what is the worst that can happen? Instead, you agree and complete your purchase. When you think back to the transaction, perhaps you will remember seeing the pop-up notice, or perhaps you will not. The result will likely be the same. You have assented to the seller's terms and entered a contract.

It is a common law principle that buyers and sellers should be held accountable for the contracts that they create, but one-sided form contracts

are sometimes regarded differently. Courts have grappled with the issue of assent to sales contracts since before the Internet became the commercial engine that it is today. "Box-top" or "shrinkwrap" contracts list the terms of the agreement on the outside of a product's packaging. By opening the packaging, a buyer manifests their intent to be bound by the terms. In 1991, the Third Circuit Court of Appeals decided a case involving a box-top license on a software product.[1] The court ruled for the software buyer, deeming the box-top license a proposal for new terms of agreement rather than a binding contract.[2] In contrast, when a similar case made its way to the Seventh Circuit Court of Appeals in 1996, the court ruled in favor of a software seller.[3] The seller's shrinkwrap agreement was binding because opening a package was a valid way for a buyer to accept the seller's offer.[4] *Step-Saver Data Systems v. Wyse* ("*Step-Saver*") and *ProCD, Inc. v. Zeidenberg* ("*ProCD*"), respectively, came to represent two distinct views on box-top and shrinkwrap contracts. Simply put, *Step-Saver* placed a greater burden on sellers by giving buyers the benefit of the doubt as to their awareness of new terms. *ProCD*, however, placed a greater burden on buyers to apprise themselves of a seller's terms. Though nearly three decades old, *Step-Saver* and *ProCD* still form the foundation of how courts approach disputes over online contracts.

Today, the average consumer would struggle to avoid such "contracts of adhesion" (also called form or "boilerplate" contracts), which offer no opportunity for negotiation on the part of the buyer. These contracts are efficient for sellers; modern commerce would not be nearly as fast or profitable if it were not for these contracts. But the ubiquity of online contracting and the rapid evolution of sellers' websites raises questions about contract law and consumer protection. How should courts balance enabling transaction efficiency while ensuring buyers are aware of sellers' terms?

California generally categorizes online contracts by modes of assent and into four types: "clickwraps," "browsewraps," "scrollwraps," and "sign-in-wraps."[5] Clickwrap agreements require an affirmative act of assent to become binding (e.g., clicking a button that reads "I have read and accepted the Terms and Conditions").[6] In contrast, browsewrap agreements do not require an affirmative act as to specific terms of the contract; "an internet

1. Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 105–06 (3d Cir. 1991).
2. *Id.*
3. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996).
4. *See id.* at 1452–53.
5. Sellers v. JustAnswer LLC, 289 Cal. Rptr. 3d 1, 15 (Ct. App. 2021).
6. *See id.*

user accepts a website's terms of use merely by browsing the site"[7] (e.g., a text banner that reads, "Use of this website constitutes agreement to the Terms and Conditions"). Scrollwrap agreements require a user to physically scroll to the bottom of a page containing the terms before proceeding to use a website.[8] Finally, sign-in-wrap agreements require a user to sign up for an Internet service or product, the process of which indicates assent to the seller's terms.[9] These four types of "wrap" create contracts of adhesion and, as their names suggest, are regarded by courts as the digital successors of shrinkwrap. Thus, when faced with a clickwrap, browsewrap, scrollwrap, or sign-in-wrap agreement, buyers are offered no opportunity to negotiate and can only "take it or leave it."[10]

This Note presents a case law survey of California state and federal district court cases between the years 2014 and 2024. It discusses the validity of the four commonly recognized types of online agreements and analyzes how courts' approaches differ depending on the type of "wrap." Part I provides background on contract common law, *Step-Saver* and *ProCD*, and significant U.S. Court of Appeals decisions. Part II details the case law survey: Section II.A describes state court cases and Section II.B describes federal district court cases. Section II.C summarizes the results of the survey and considers its implications for the way courts categorize online agreements and for the legacy of *Step-Saver* and *ProCD*.

This Note concludes that state and federal components of the case law survey largely reached the same outcomes with similar reasoning. Courts used multiple standards to determine whether a buyer received adequate or sufficient notice of a seller's terms, including both a "reasonable notice" and a "reasonably prudent" user standard that can be traced back to *ProCD* and *Step-Saver*. This survey shows that a predominant standard for notice has not yet emerged in California (although recent approaches set out by the Ninth Circuit may promote greater consistency going forward). Overall, courts generally remained deferential to sellers and their offers. Fact-specific inquiries into whether a buyer was given reasonable notice were common among the cases surveyed. Thus, meaningful categories of "wrap" types may be gradually losing utility. Finally, this Note briefly considers whether *Step-Saver* and *ProCD* are still relevant to current and prevalent forms of online contracts and explains that these cases establish and solidify California's most prevalent notice standards.

7. *Id.*
8. *Id.* at 15–16.
9. *Id.* at 16.
10. *Id.*

I. BACKGROUND

It is a basic principle of common law that the formation of a contract requires an "offer" and "acceptance."[11] *Step-Saver Data Systems v. Wyse* and *ProCD, Inc. v. Zeidenberg* are seminal cases for their applications of common law principles within the context of box-top and shrinkwrap sales agreements. The same fundamental issues and principles remain relevant among newer types of agreements for selling goods and services on the Internet, such as clickwrap and browsewrap agreements. Today, courts often defer to sellers' proposed modes of assent while using a fact-based "adequate notice" standard to evaluate the validity of a "wrap" agreement.[12]

A. CONTRACT COMMON LAW: OFFER AND ACCEPTANCE

Because the "elemental principles of contract formation apply with equal force to contracts formed online,"[13] the same principles of contract common law are relevant when considering the validity of an online agreement.[14] For a contract to be enforceable, common law requires that the parties' bargaining process must meet two basic requirements: (1) both parties must assent to be bound, and (2) the agreement must be "definite" enough to be enforceable.[15] The first requirement incorporates the presumption that one must consent to be bound, while the second requirement emphasizes the importance of receiving what one contracted for.[16] The process of assenting can be broken down into two steps: "offer" and "acceptance."[17] An offer is a "promise" conditional on an action by the offeree.[18] When an offeror makes an offer to the offeree, the offeree can accept, conveying their assent to be bound by the offeror's terms. Offers can take many forms, and the offeror has the ability and authority to set the terms of their offer and to specify a mode of acceptance.[19] Disputes can arise over whether the offeree had reason to believe that an offer was intended by the offeror to constitute an offer.[20] As discussed further below, in the realm of online contracts, consumers are often unaware that completing a purchase or

11. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 200 (3d ed. 2004)
12. *See infra* Section II.C.
13. Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 855–56 (9th Cir. 2022).
14. Christina L. Kunz, John E. Ottaviani, Elaine D. Ziff, Juliet M. Moringiello, Kathleen M. Porter & Jennifer C. Debrow, *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279, 289 (2003).
15. FARNSWORTH, *supra* note 11; *see also* RANDY E. BARNETT & NATHAN B. OMAN, CONTRACTS: CASES AND DOCTRINE 263 (7th ed. 2021).
16. FARNSWORTH, *supra* note 11, at 200–01.
17. *Id.* at 203–04 (emphasis omitted).
18. *Id.* at 204.
19. *See id.* at 251, 264, 269.
20. *See id.* at 254–55.

signing into an account indicates assent to the terms of a seller's agreement or even that a contract is being formed at all.

Parties can manifest assent in writing, through spoken word, or through conduct.[21] Doctrine on assent is split between a subjective theory of assent, which focuses on the actual intent of the parties to be bound through a "meeting of the minds," and an objective theory of assent, which focuses on the "external . . . appearance of the parties' intentions as manifested by their actions."[22] To avoid issues related to the negotiation process, many sellers use form contracts that set out standard, nonnegotiable terms for transactions.[23] An offeree has only two options: to proceed with the transaction and accept the terms, or to decline.[24] These contracts are highly efficient for offerors but can come with drawbacks for offerees. For example, under common law, it does not matter if an offeree assents carelessly or fails to consider the legal consequences of a contract. Failure to read a contract is not a defense to breach of contract.[25]

B. FROM SHRINKWRAP TO CLICKWRAP

The court in *Step-Saver* invalidated a shrinkwrap contract and deemed it a modification of an existing contract to which the buyer did not affirmatively assent. In contrast, the court in *ProCD* held that a shrinkwrap license was valid because the buyer was provided notice of the terms. Courts generally examine whether a seller provided adequate notice of its terms because online modes of assent to form contracts and website checkout flows greatly vary. In California, online contracts are sorted into four categories: clickwrap, browsewrap, scrollwrap, and sign-in-wrap. Each category has its own unique implications.

1. *Step-Saver* and *ProCD*

The box-top license printed on each package in *Step-Saver Data Systems v. Wyse* was a form contract that stated, "Opening this package indicates your acceptance of these terms and conditions. If you do not agree with them, you should promptly return the package unopened to the person from whom you purchased it . . . ."[26] Step-Saver, the buyer, argued that the box-top license materially altered a contract that was previously negotiated over the phone with The Software Link, Inc. ("TSL"), the seller, and that it

21. Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 855 (9th Cir. 2022).
22. FARNSWORTH, *supra* note 11, at 209.
23. *Id.* at 557.
24. *Id.* at 557–58.
25. *Id.* at 213.
26. Step-Saver Data Sys., Inc. v. Wyse Tech, 939 F.2d 91, 97 (3d. Cir. 1991).

was not binding under Uniform Commercial Code ("UCC") Section 2-207.[27] On the other hand, TSL argued that a contract came into existence when Step-Saver received the terms of the license on the package and still proceeded to open the box; thus, phone conversations were merely counteroffers and negotiations.[28] The court ruled for Step-Saver, deciding that the box-top license should be seen as "one more form in a battle of forms"[29] and that the terms were not binding because they materially altered the parties' agreement.[30] Judge John Minor Wisdom emphasized the fact that based on the parties' previous negotiations, Step-Saver would not have expected to be bound by the box-top license.[31] In response to TSL's argument that its offer to issue a refund protected Step-Saver enough to validate the box-top license, Judge Wisdom wrote, "[w]e see no basis in the terms of the box-top license for inferring that a *reasonable offeror* would understand from the refund offer that certain terms of the box-top license, such as the warranty disclaimers, were essential to TSL."[32] In his holding, he wrote that "Step-Saver [could] *reasonably believe* that, while TSL desires certain terms, it has agreed to do business on other terms."[33] Thus, this decision implies that a contract should not be binding unless a buyer affirmatively assents to a form contract and the parties reasonably believe that it is binding.

Judge Wisdom also rejected the seller's arguments that ruling in favor of Step-Saver would adversely affect the industry. He wrote:

> We are not persuaded that requiring software companies to stand behind representations concerning their products will inevitably destroy the software industry. We emphasize, however, that we are following the well-established distinction between conspicuous disclaimers made available before the contract is formed and disclaimers made available only after the contract is formed.[34]

27. UCC § 2-207(2) ("[A]dditional terms are to be construed as proposals for addition to the contract. . . . [S]uch terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.").

28. *Step-Saver*, 939 F.2d at 97–98.

29. *Id.* at 99. "Battle of the forms" refers to the process of back-and-forth negotiations where a buyer and seller each have competing versions of their agreement that they assert should be the final, binding, set of terms. *See* FARNSWORTH, *supra* note 11, at 317–18.

30. *Step-Saver*, 939 F.2d at 99–100, 105–06.

31. *Id.* at 104 ("Given TSL's failure to obtain Step-Saver's express assent to these terms before it will ship the program, Step-Saver can reasonably believe that, while TSL desires certain terms, it has agreed to do business on other terms—those terms expressly agreed upon by the parties.").

32. *Id.* at 103 (emphasis added).

33. *Id.* at 104 (emphasis added).

34. *Id.* at 104–05.

The court also speculated that sellers who justify the use of a box-top license with an optional refund provision might be "relying on the purchaser's investment in time and energy in reaching this point in the transaction to prevent the purchaser from returning the item," suggesting that a refund provision is generally not an adequate safeguard for consumers who assent to a license by opening a package.[35] *Step-Saver* represents a rare victory for consumers subjected to form contracts because it held the parties accountable to only the terms that were explicitly negotiated and agreed on.

In *ProCD, Inc. v. Zeidenberg*, a buyer violated a software license that restricted use of the software to "noncommercial" activity only.[36] The buyer, Matthew Zeidenberg, claimed that the shrinkwrap license should not be valid because it did not appear on the outside of the packaging and the terms could only be viewed by opening and using the software.[37] However, Judge Frank Easterbrook treated the license like an ordinary contract for the sale of goods, concluding that Zeidenberg could validly assent by doing as ProCD had requested: opening and using the software.[38] Judge Easterbrook stated that consumers can generally assent through any means held out as a form of acceptance by the seller, with exceptions for a seller's bad faith.[39] Judge Easterbrook used UCC § 2-204 to support the common law principle that a seller is the "master of the offer" who can invite and limit means of acceptance;[40] "[a] buyer may accept by performing the acts the vendor proposes to treat as acceptance."[41] Contracts can be formed in many ways and "ProCD proposed such a different way, and without protest Zeidenberg agreed."[42] Further, ProCD was reasonable in its proposed form of acceptance because even after the package was opened "the software splashed the license on the screen and would not let [the buyer] proceed without indicating acceptance."[43] An important part of Judge Easterbrook's decision was that the software incorporated a pop-up box containing the agreement terms, creating reasonable notice of the terms for the buyer.[44] Additionally, contrary to Judge Wisdom's reasoning in *Step-Saver*, Judge Easterbrook

35. *Id.* at 102.

36. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1450 (7th Cir. 1996).

37. *Id.* at 1450–52.

38. Brian Covotta & Pamela Sergeeff, *ProCD, Inc. v. Zeidenberg*, 13 BERKELEY TECH. L.J. 35, 38–39 (1998).

39. *See ProCD*, 86 F.3d at 1452.

40. *Id.* (quoting UCC § 2-204(1) ("A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.")).

41. *Id.*

42. *Id.*

43. *Id.*

44. *See* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 488 (2002).

determined that an option to return the product for a full refund added to the validity of the buyer's assent (though interestingly, in a 2004 interview of Matthew Zeidenberg and attorney David Austin, Austin claimed that the deposition of ProCD President James Bryant had revealed that ProCD did not have an actual return policy).[45] Sellers and businesses embraced Judge Easterbrook's decision and shrinkwrap licenses became "generally accepted" "[w]ithin six years" of the *ProCD* case.[46] Eric Posner wrote that Judge Easterbrook "reformulate[d] [the] offer-acceptance doctrine so as to permit enforcement of 'terms later' contracts, an important new business tool."[47]

In the wake of *Step-Saver*, *ProCD* came to represent a validation of the use of form contracts to conduct business. Judge Easterbrook stated that "[t]ransactions in which the exchange of money precedes the communication of detailed terms are common" and used the purchase of insurance as an example.[48] In a subsequent case, *Hill v. Gateway 2000, Inc.*, Judge Easterbrook clarified that *ProCD* was not just limited to software and was about "the law of contract" in general.[49] Furthermore, "[p]ractical considerations support[ed] allowing vendors to enclose the full legal terms with their products."[50] For example, cashiers could not "be expected to read legal documents to customers before ringing up sales."[51] Judge Easterbrook's words feel especially relevant today given the fast-paced nature of commerce. Notably, and perhaps regrettably, *ProCD* did not set real standards for what sellers should actually include on packaging in order to create notice of agreement terms. The court may have declined to create bright-line requirements for notice out of fear that restrictions would interfere with a seller's packaging.[52] Nevertheless, since the 1990s, when *Step-Saver* and *ProCD* created a circuit split, both decisions have been highly influential in the development of online contract law.

45. ProCD v. Zeidenberg *in Context*, 2004 WIS. L. REV. 821, 831 (2004) (transcript of a videotaped interview of Matthew Zeidenberg and David Austin by University of Wisconsin Law Professor Bill Whitford).

46. Stephen Y. Chow, *A Snapshot of Online Contracting Two Decades After* ProCD v. Zeidenberg, 73 BUS. LAW. 267, 267 (2017–2018).

47. Eric A. Posner, ProCD v. Zeidenberg *and Cognitive Overload in Contractual Bargaining*, 77 U. CHI. L. REV. 1181, 1193 (2010).

48. *ProCD*, 86 F.3d at 1451.

49. Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149 (7th Cir. 1997).

50. *Id.*

51. *Id.*

52. Kunz et al., *supra* note 14, at 301–02.

2. Online Contracts Today

Like shrinkwrap contracts, online form contracts for the sale of goods or services require a manifestation of assent for an offeree to be bound by a seller's nonnegotiable set of terms.[53] Clickwrap, browsewrap, scrollwrap, and sign-in-wrap agreements govern millions of transactions, drawing on the same common law principles as the shrinkwrap contracts in *Step-Saver* and *ProCD*. "While Internet commerce has exposed courts to many new situations, it has not fundamentally changed the requirement that '[m]utual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract.' "[54] Shrinkwrap agreements find a modern analogue in browsewrap agreements: neither shrinkwrap nor browsewrap requires an affirmative act of assent to specific terms to be binding. Like the buyer in *Step-Saver* who needed only to continue opening the package to accept the seller's terms, a buyer subject to a browsewrap agreement need only to continue interacting with a website to accept a set of terms. There is no clear instruction to, for example, click a checkbox before making a purchase. Judge Wisdom might be skeptical of the validity of browsewrap because it might not be reasonable for a buyer to expect to be bound in such a way. Indeed, California courts are generally more inclined to rule for the validity of a clickwrap or a scrollwrap contract than a browsewrap contract because clickwrap and scrollwrap require an affirmative act, evincing that the buyer was more likely to be put on notice instead of passively clicking.[55]

Because wrap agreements are contracts of adhesion that offer no opportunity for a buyer to negotiate, a buyer's only choices are to assent and complete the transaction or to walk away. Karl Llewellyn theorized in *The Common Law Tradition* that "there is no assent at all" to the specific terms within a boilerplate agreement; instead, there is "a blanket assent" to all terms of the agreement.[56] In other words, buyers either assent to all the terms, or they do not. Thus, buyers accepting clickwrap contracts should not be construed as assenting to one provision or another, but rather as assenting to the seller's entire agreement.

The "take-it-or-leave-it" nature of these contracts has potential to leave buyers stuck with terms they do not like. The court in *Step-Saver* considered the imbalanced nature of contracts of adhesion, reasoning that the seller may have been relying on the fact that the buyer had already invested time and

53. *See* FARNSWORTH, *supra* note 11, at 203–04.

54. Long v. Provide Com., Inc., 200 Cal. Rptr. 3d 117, 122 (Ct. App. 2016) (quoting Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1175 (9th Cir. 2014)).

55. *See, e.g.*, Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 856–58 (9th Cir. 2022); *Nguyen*, 763 F.3d at 1175–79.

56. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960).

energy into the transaction.[57] Some legal scholars, including Cheryl B. Preston, are skeptical about the ability of online contracts to be anything but one sided.[58] Buyers often fail to understand the terms to which they are assenting. Though it is a common law principle that whether a buyer has actually read a form contract is not dispositive of whether they will be bound, buyers who attempt to read the terms may find them inaccessible and full of legalese. A 2019 study by two law professors analyzed the sign-in-wrap contracts of 500 popular U.S. websites and found that 99% of them could be categorized as "unreadable."[59]

On the other hand, Judge Easterbrook might argue that form contracts do not leave buyers without options because the nature of a competitive market forces sellers to create favorable terms for buyers.[60] He wrote in his opinion for *ProCD* that "[c]ompetition among vendors, not judicial revision of a package's contents, is how consumers are protected in a market economy."[61] Additionally, efficiency and convenience are important to online consumers, who are generally unwilling to complicate a transaction. Eric Posner uses the term "cognitive overload" to describe how buyers may be dissuaded if too much information is received up front.[62] "If the seller conveys too much information, she will drive away buyers. If the seller conveys too little information, she will mislead buyers and possibly drive them away as well."[63] Even minor setbacks in a checkout process can mean the difference between completing a purchase or not. Forbes reported that around twenty-five percent of online shoppers choose not to go through with a purchase if the website forces them to create a new account.[64] For certain customers, the risk of potential legal complications down the road is a fair substitute for simple and efficient online processes.[65]

The validity of online form contracts often turns on whether the mode of acceptance created by seller-offerors adequately notifies buyers of the formation of an agreement on the seller's terms. The theory behind notice is

57. Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 102 (3d Cir. 1991).

58. *See* Cheryl B. Preston, *"Please Note: You Have Waived Everything": Can Notice Redeem Online Contracts?*, 64 AM. U. L. REV. 535, 538–39 (2015).

59. Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2278–80 (2019).

60. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1453 (7th Cir. 1996).

61. *Id.*

62. Posner, *supra* note 47, at 1181–82.

63. *Id.* at 1189.

64. Kristy Snyder, *35 E-Commerce Statistics of 2024*, FORBES (Mar. 28, 2024, 10:00 AM), https://www.forbes.com/advisor/business/ecommerce-statistics [https://perma.cc/LN35-8L5V].

65. Caroline Cakebread, *You're Not Alone, No One Reads Terms of Service Agreements*, BUS. INSIDER (Nov. 15, 2017, 4:30 AM), https://www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11 [https://perma.cc/X873-WVCV].

that it can level the playing field within the realm of online contracting. E. Allan Farnsworth notes that the "lack of equality between a person who is meticulous or who chances to have knowledge and a person who is blissfully unknowing is a patent point for dissatisfaction."[66] Because there is always an inherent potential for unfairness when there is no real negotiation of terms, there should be an attempt to create awareness for the non-drafting party. This is a defining characteristic of clickwrap and browsewrap contracts, especially because the ubiquity of ecommerce means that they are accessible to the expert as well as the layperson. In *Step-Saver*, Judge Wisdom considered whether a "reasonable" buyer could expect to be notified of the seller's priorities.[67] In *ProCD*, the conspicuousness of the seller's pop-up notice box was an important factor in creating objective notice for the buyer.[68]

It is challenging to synthesize a common standard for notice because clickwrap, browsewrap, scrollwrap, and sign-in-wrap can be nebulous categories. For example, courts frequently characterize contracts containing elements of both browsewrap and clickwrap as "hybridwrap."[69] One example of hybridwrap is acknowledged by courts when "the button required to perform the action manifesting assent (e.g., signing up for an account or executing a purchase) is located directly next to a hyperlink to the terms and a notice informing the user that, by clicking the button, the user is agreeing to those terms."[70] Hybridwrap may exist when users are reasonably notified of "the existence of the website's terms of use" and are often guided to click a button to signify agreement.[71] The case law survey in Part II shows that courts often struggle to categorize wrap agreements, and in lacking categorical rules to guide them, courts must look for adequate notice of the seller's terms.

Additionally, as will be discussed at length in Section II.C.1, adequate notice has advantages and disadvantages as a legal standard. One advantage is that it allows room for evolution in response to the rapidly evolving digital world. Ecommerce is still growing, especially given the recent COVID-19 pandemic, during which many businesses and consumers relied on online orders. The global ecommerce market is expected to total $6.3 billion in 2024 and $7.9 trillion by 2027.[72] Additionally, buyers today make online

66. FARNSWORTH, *supra* note 11, at 569.
67. Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 103–04 (3d Cir. 1991).
68. *See* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996).
69. *E.g.*, Nicosia v. Amazon.com, Inc., 384 F. Supp. 3d 254, 265–67 (E.D.N.Y. 2019).
70. *Id.* at 266.
71. Moyer v. Chegg, Inc., No. 22-cv-09123, 2023 U.S. Dist. LEXIS 128352, at *10–11 (N.D. Cal. July 25, 2023) (citing Meyer v. Uber Techs., Inc., 868 F.3d 66, 75–76 (2d Cir. 2017)).
72. Snyder, *supra* note 64.

purchases faster and more casually than they have in the past. Consumers who make habitual and trivial purchases online may not be privy to a seller's terms when, from the consumer's perspective, the transaction is as inconsequential as a "pair of socks."[73] Thus, not only are the means of business evolving, but the role and mindset of the consumer are changing as well. Courts have applied similar notice standards for the past three decades, but these standards can sometimes be a moving target.

C. SECOND AND NINTH CIRCUIT DECISIONS: *NGUYEN*, *BERMAN*, AND *SPECHT*

Major circuit court decisions from the past two decades show that courts often defer to sellers' proposed modes of assent to their agreements while using a fact-based adequate notice standard to evaluate the validity of a wrap agreement.

In *Nguyen v. Barnes & Noble Inc.*, a buyer unwittingly assented to Barnes & Noble's terms of use through a browsewrap agreement while shopping online.[74] The disputed arbitration term could not be viewed unless the buyer clicked on a hyperlink that was placed at the bottom of the webpage.[75] Additionally, Barnes & Noble did not require any affirmative act of assent as part of the transaction.[76] The court held for the buyer and denied Barnes and Noble's motion to compel arbitration.[77] The *Nguyen* court characterized online contracts as primarily coming in "two flavors": "clickwrap" and "browsewrap."[78] Browsewrap was defined as an agreement where "a website's terms and conditions of use are generally posted on the website via a hyperlink at the bottom of the screen."[79] Because browsewrap, unlike clickwrap, lacks an act of affirmative assent, the standard in *Nguyen* turned on "whether the user ha[d] actual or constructive knowledge."[80] Thus, the buyer was not bound by the terms of use because he was not adequately put on notice by the design of the website and the inconspicuous and "buried" hyperlink to the terms and conditions.[81] A rare bright-line rule for browsewrap emerged from this case:

> [W]here a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice

73. Sellers v. JustAnswer, LLC, 289 Cal. Rptr. 3d 1, 16 (Ct. App. 2021).
74. *See* Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1174 (9th Cir. 2014).
75. *See id.*
76. *See id.*
77. *Id.* at 1180.
78. *Id.* at 1175–76.
79. *Id.*
80. *Id*. at 1176.
81. *Id.* at 1176–79.

> to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice.[82]

Few other notice-related bright-line rules have been articulated, but *Nguyen* represented a turning point in the world of online contracts, discouraging sellers from implementing browsewrap agreements without a buyer's affirmative act of assent.

By 2021, scrollwrap and sign-in-wrap found their way into the lexicon of the courts, and California came to recognize four categories instead of the "two flavors" set forth in *Nguyen*.[83] The Ninth Circuit affirmed *Nguyen* in *Berman v. Freedom Financial Network*, in which a company's terms and conditions were not conspicuous or noticeable on the website.[84] The terms were hyperlinked, but displayed in the same font and color as an adjacent sentence, not in the typical blue color a reasonable buyer would expect of a hyperlink.[85] The court held that the company did not call sufficient attention to the fact that clicking "continue" would indicate assent to the company's terms, using a "reasonably conspicuous notice" standard to decide that the contract should be unenforceable.[86] Its fact-specific inquiry also assessed whether a "reasonably prudent Internet user" would be given notice given the webpage's fonts, font sizes, colors, overall design, and readability of the webpage.[87] The court found that such a user would not be put on notice given that the hyperlink was not conspicuous in color or design.[88] This standard is consistent with *Step-Saver*, which looked to the reasonable beliefs of the parties in assessing notice.[89] Lastly, the *Berman* court provided a two-part framework for courts' inquiries into notice:

> Unless the website operator can show that a consumer has actual knowledge of the agreement, an enforceable contract will be found based on an inquiry notice theory only if: (1) the website provides reasonably conspicuous notice of the terms to which the consumer will be bound; and (2) the consumer takes some action, such as clicking a button or checking a box, that unambiguously manifests his or her assent to those terms.[90]

82. *Id.* at 1178–79; *see* Keebaugh v. Warner Bros. Ent. Inc., 100 F.4th 1005, 1015 (9th Cir. 2024).
83. *See Nguyen*, 763 F.3d at 1175; Sellers v. JustAnswer, LLC, 289 Cal. Rptr. 3d 1, 15–17 (Ct. App. 2021).
84. *See* Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 853–54 (9th Cir. 2022).
85. *Id.* at 854.
86. *Id.* at 856–57.
87. *Id.*
88. *See id*. at 853–54.
89. Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 103 (3d Cir. 1991).
90. *Berman*, 30 F.4th at 856.

Berman is a recent case, and lower courts have generally been slow to adopt this exact two-part framework. As will be discussed in Part II, courts take—and have taken—a variety of approaches to conduct similar notice inquiries. [91]

In *Oberstein v. Live Nation Entertainment, Inc.*, the Ninth Circuit considered another factor when assessing notice: the expectation of a continued relationship with a seller.[92] A ticketing company's website presented users with buttons that read "you agree to our Terms of Use" at three independent stages: creating an account, signing into an account, and completing a purchase.[93] The court considered both "the context of the transaction" and the "placement of the notice."[94] Because the context of the transaction required full registration and implied somewhat of a "continuing relationship," users should have been notified of the terms of that relationship.[95] Thus, the court ruled for the ticketing company and added a new dimension to the adequate notice standard.[96]

Keebaugh v. Warner Bros. Entertainment Inc., a 2024 Ninth Circuit case, further clarified the standard set forth in *Berman*.[97] On a mobile entertainment app, users were presented with a large button that read "Play," and small text below the button that read "By tapping 'Play,' I agree to the Terms of Service."[98] Using both the *Berman* two-part inquiry and the "context" standard from *Oberstein*, the court categorized the agreement as sign-in-wrap and ruled for the entertainment company.[99] The court defined the "conspicuous" notice part of the *Berman* standard as "displayed in a font size and format such that the court can fairly assume that a reasonably prudent Internet user would have seen it."[100] Additionally, "[s]imply underscoring words or phrases . . . will often be insufficient to alert a reasonably prudent user that a clickable link exists."[101] In terms of a continuing relationship between company and user, the court emphasized that the context of downloading a mobile app carries an implication of long-

91. *See infra* pp. 452–54.
92. Oberstein v. Live Nation Ent., Inc., 60 F.4th 505, 516–17 (9th Cir. 2023).
93. *Id.* at 515–16.
94. *Id.* at 516 (referencing Sellers v. JustAnswer, LLC, 289 Cal. Rptr. 3d 1, 24–26 (Ct. App. 2021)).
95. *Id.*
96. *Id.* at 516–17; *see* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996) (discussing adequate notice).
97. Keebaugh v. Warner Bros. Ent. Inc., 100 F.4th 1005, 1014 (9th Cir. 2024).
98. *Id.*
99. *Id.* at 1014, 1023.
100. *Id.* at 1014 (quoting Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 856 (9th Cir. 2022)).
101. *Id.* (quoting *Berman*, 30 F.4th at 857).

term use.[102] Again, as demonstrated in Part II, courts in California have yet to latch onto the *Berman* standard. Courts have been using—and continue to use—similar, but not identical, standards.

New York law and California law often "dictate the same outcome" and draw from the same precedent.[103] The jurisdictions frequently exchange standards and reference the same lines of reasoning for cases considering the validity of an online contract. Further, other U.S. Courts of Appeal frequently apply California contract law as well.[104] In the 2002 Second Circuit case *Specht v. Netscape Communications Corp.*, then-Judge Sotomayor applied California law in denying a software company's motion to compel arbitration after a buyer was unaware of the terms of the contract.[105] In circumstances where consumers are "urged to download free software," "clicking on a download button does not communicate assent to contractual terms" without adequate notice.[106] Judge Sotomayor used a "reasonably prudent offeree of downloadable software" standard in determining whether it would be reasonable to conclude that the buyer should have been aware of the terms.[107] Like Judge Wisdom in *Step-Saver* and the Ninth Circuit in *Berman*, Judge Sotomayor examined the belief of the parties in determining that a "reasonably prudent offeree in plaintiffs' position would necessarily have known or learned of the existence of the SmartDownload license agreement."[108] She held that "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."[109] Finally, Judge Sotomayor also distinguished the facts of *Specht* from the facts of *ProCD*, in which the buyer "was confronted with conspicuous, mandatory license terms every time he ran the software on his computer."[110] However, she also noted that cases such as *ProCD* "do not help defendants" and emphasized the necessity of reasonably conspicuous notice "if electronic bargaining is to have integrity and credibility" going forward.[111]

102. *Id.* at 1019–20.

103. Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1175 (9th Cir. 2014); *see also* Meyer v. Uber Techs. Inc., 868 F.3d 66, 74 (2d Cir. 2017) ("New York and California apply 'substantially similar rules for determining whether the parties have mutually assented to a contract term.' " (quoting Schnabel v. Trilegiant Corp., 697 F.3d 110, 119 (2d Cir. 2012))).

104. *See, e.g.*, Soliman v. Subway Franchisee Advert. Fund Tr., Ltd., 999 F.3d 828, 834 (2d Cir. 2021) ("Here, the parties agree that California law applies to the question of contract formation.").

105. Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 32 (2d Cir. 2002).

106. *Id.*at 29–30, 32.

107. *Id.* at 30.

108. *Id*; *see* Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 103 (3d Cir. 1991); Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 856–57 (9th Cir. 2022).

109. *Id.* at 32.

110. *Id.* at 32–33.

111. *Id.* at 33, 35.

In 2017, the Second Circuit decided *Meyer v. Uber Technologies, Inc.*, an influential case among a slew of recent rideshare-related contract cases. The court held that a consumer unambiguously manifested assent to Uber's terms of service because a reasonable user would have seen and known that clicking a registration button would constitute assent to terms accessible via hyperlink.[112] Even though the sign-in-wrap agreement served two functions—"creation of a user account and assent to the Terms of Service"—the consumer's assent was still valid given the "physical proximity of the notice to the register button and the placement of the language in the registration flow."[113] Interestingly, the court seemed to prioritize the creation of notice over the type of wrap in dispute. The court stated that "[c]lassification of web-based contracts alone . . . does not resolve the notice inquiry."[114] In this case, the user was bound because they were "expressly warned . . . that by creating an Uber account, the user was agreeing to be bound by the linked terms."[115]

In general, *Nguyen*, *Berman*, *Oberstein*, *Keebaugh*, *Specht*, and *Meyer* show that courts must consider notice standards within the reality of the Internet and recognize the necessity of electronic form contracts to conduct ecommerce. Finding a balance between a consistent standard for sufficient notice and offeror efficiency, however, has proven to be challenging. Courts have issued very few bright-line requirements for offerors and generally take an "*ex ante* approach by emphasizing what the drafter *should have done* to make the terms prominent and noticeable."[116] This approach might be criticized as reactive and too deferential to sellers, who are in a better position to create awareness of their terms because they can exercise more control over a buyer's experience by designing the website.

Indeed, the common law principle that the offeror remains the "master" of the offer holds true in the realm of online form contracts. However, cases like *Berman* and *Specht* also highlight more buyer-centric common law principles, accounting for the reasonable expectations of the average "prudent" buyer. A dominant standard has not yet been established by the Ninth Circuit, and California law encompasses both the "reasonable notice" and the "reasonably prudent" user standard. Thus, this Note's case law survey attempts to analyze and identify how California courts utilize these flexible standards of notice to analyze buyers' acceptance of sellers' offers.

112. Meyer v. Uber Techs., Inc., 868 F.3d 66, 77–78, 80 (2d Cir. 2017).
113. *Id.* at 80.
114. *Id.* at 76; *see* Juliet M. Moringiello & William L. Reynolds, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting*, 72 MD. L. REV. 452, 466 (2013).
115. *Meyer*, 868 F.3d at 80.
116. Nancy S. Kim, *Online Contracts*, 78 BUS. LAW. 275, 285 (2022).

II. CASE LAW SURVEY

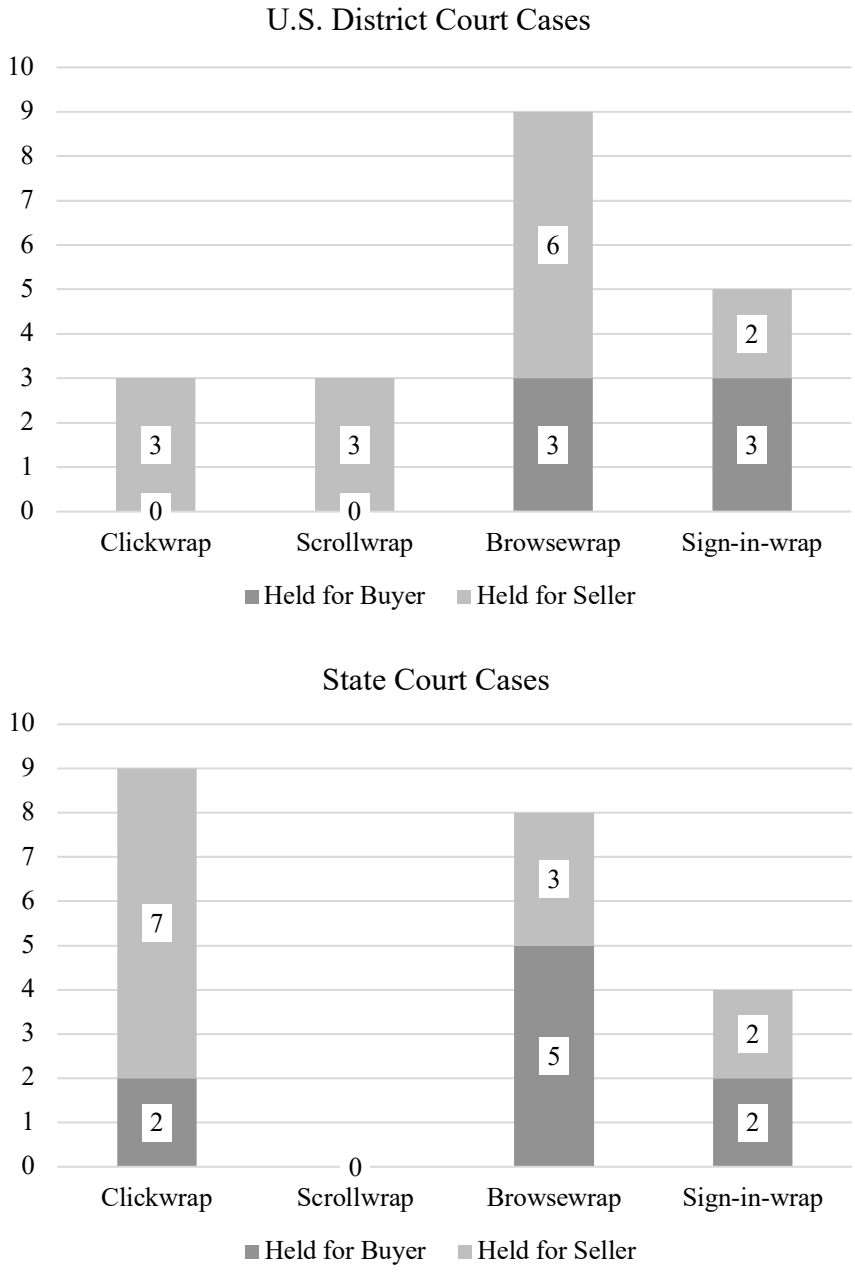
This survey examines state and federal district court cases to paint a picture of California courts' treatment of wrap agreements. Section II.A focuses on California state courts and discusses notable cases within the context of *Step-Saver*, *ProCD*, *Nguyen*, and *Specht*. It concludes that clickwrap agreements remain presumably enforceable, browsewrap agreements require a more fact-specific inquiry, and sign-in-wrap agreements are not yet fully distinguishable from browsewrap agreements. Section II.B focuses on the ways in which cases in federal district courts in California are consistent or inconsistent with cases in state courts. Section II.B concludes that district court decisions are largely in line with state court decisions, factoring in scrollwrap cases as presumptively enforceable. Finally, Section II.C further analyzes and summarizes differences between the forums and comments on the lasting influence of *Step-Saver* and *ProCD*. Overall, this case law survey shows that standards of notice from both *Step-Saver* and *ProCD* have been incorporated into California law, but a predominant standard for assessing adequate notice for wrap contracts has yet to take hold.

Twenty California state court cases and twenty U.S. District Court cases involving online form contracts for the sale of goods or services were chosen for this survey as a representative sample. This Note provides a brief quantitative analysis, then a substantive qualitative analysis of cases in each group. There were two main reasons for conducting a more comprehensive qualitative analysis: (1) the reasoning in the following cases was often fact specific, especially when the agreements in question defied easy categorization; and (2) although the chosen cases are representative of recent decisions, many similar cases exist beyond what is depicted here. It should be noted that some cases surveyed involved multiple types of wrap, or contained agreements that could have plausibly been categorized in more than one way. Importantly, the cases in this survey were sorted by the courts' own labels and characterizations for the wrap agreements in dispute.

Additionally, as discussed in Section I.B.2, the clauses most frequently in dispute—arbitration clauses, choice-of-forum clauses, and class-action waiver clauses—are small parts of long agreements.[117] As per Llewellyn's theory of "blanket assent" to terms in a boilerplate contract,[118] courts consider the validity of entire contracts rather than specific provisions. Thus, the cases in this survey generally either enforced the validity of an agreement or found the agreement to be invalid as a whole.

117. Chow, *supra* note 46, at 268.
118. LLEWELLYN, *supra* note 56.

FIGURE 1. OUTCOMES OF CASES INCLUDED IN CASE LAW SURVEY



A. CALIFORNIA STATE COURTS

Cases were chosen based on the following criteria: (1) cases arose out of California state courts; (2) cases were decided between the years 2014 and 2024 (inclusive); (3) the relationship between the parties to the case was that of a buyer and seller (or lessee/lessor), or the agreement in dispute arose out of a transaction for goods or services; and (4) the court addressed the validity of a clickwrap, browsewrap, scrollwrap, or sign-in-wrap contract. Interestingly, there have not yet been any cases concerning the validity of a pure scrollwrap agreement in this jurisdiction. This Note will not include substantial speculation as to how state courts might treat scrollwrap agreements, but the latter half of this case law survey involving federal cases will discuss how California state law is applied to scrollwrap. Generally, scrollwrap agreements appear to be more or less unanimously enforceable.[119]

Most of the selected cases involved disputes regarding forum-selection clauses and arbitration clauses, however, the nature of the disputed terms was of secondary importance because courts only consider whether the entire agreement is valid. It should be noted that the Federal Arbitration Act ("FAA") generally treats the enforcement of arbitration agreements favorably.[120] However, the FAA also limits the role of the courts to two related inquiries: (1) "whether a valid arbitration agreement exists," and (2) "whether the agreement encompasses the disputes at issue."[121] Online contract cases often turn on the first issue, as the second issue is typically less disputed by the parties. Thus, the court's inquiry was often whether a valid contract—and therefore, a valid arbitration agreement—existed.[122]

Of the twenty cases examined, nine cases involved clickwrap agreements, eight cases involved browsewrap, and four cases involved sign-in-wrap (one case involved both a browsewrap agreement and a sign-in-wrap agreement).[123] Seven of nine clickwrap cases held for the seller, three of eight browsewrap cases held for the seller, and two of four sign-in-wrap cases held for the seller.[124] The numeric breakdown of the case outcomes was secondary to the reasoning of the courts. In general, the courts found clickwrap contracts largely enforceable, barring unique circumstances with

119. *See, e.g.*, Regan v. Pinger, Inc., No. 20-CV-02221, 2021 U.S. Dist. LEXIS 33839, at *17–18 (N.D. Cal. Feb. 23, 2021).

120. Federal Arbitration Act, 9 U.S.C §§ 1–16.

121. Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1175 (9th Cir. 2014).

122. *See* LLEWELLYN, *supra* note 56, at 370–71; *see, e.g.*, *Nguyen*, 763 F.3d at 1175 ("The only issue is whether a valid arbitration agreement exists."); Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 855 (9th Cir. 2021) ("[T]he only issue we must resolve is whether an agreement to arbitrate was validly formed.").

123. *See infra* Appendix A.

124. *Id.*

extraneous issues. Browsewrap agreements were examined more closely, and the courts were more inclined to prioritize fact-based notice inquiries in such cases, echoing *Berman* and *Specht*. Cases involving sign-in-wrap were less unified by a single standard, and *Sellers v. JustAnswer LLC* highlighted some of the inconsistencies and issues with the various standards set forth by state and federal courts. Overall, although the reasoning of the courts closely followed Ninth and Second Circuit precedent, the standards for notice were inconsistently applied, even within wrap categories.

1. Clickwrap Agreements

As the Ninth and Second Circuits have noted, courts often presume clickwrap agreements to be enforceable because buyers must affirmatively manifest assent to the terms in question by physically clicking to proceed with an online transaction.[125] This is consistent with the *Berman* standard, but of the cases decided after *Berman*, none used the two-part framework. Overall, the courts generally presumed the validity of clickwrap and occasionally looked for adequate notice.

The cases surveyed revealed that a notice inquiry was secondary to the presumption of enforceability of pure clickwrap agreements. For example, it typically did not matter what was written on the digital button or box that users were directed to click; the action of clicking was enough of an affirmative act to bind the user. In *B.D. v. Blizzard Entertainment, Inc.*, a buyer clicked a button marked "Continue" and was bound by a seller's License Agreement.[126] The button was accompanied by a pop-up notice that notified buyers that continuing with the transaction would manifest assent.[127] In *Pierre v. Dexcom Inc.* and *Jackson v. Vines*, the court declared that clickwrap agreements are "generally considered enforceable."[128]

Courts were less likely to presume that clickwrap agreements were enforceable if they found elements of other wrap agreements present in a seller's website flow. Two clickwrap cases held for buyers. The first case is *Doe v. Massage Envy Franchising, LLC*, in which a buyer did not assent to a seller's terms of service on an in-store electronic tablet because the font color of the statement of notice was not conspicuous, and the terms were

125. *See, e.g.*, *Nguyen*, 763 F.3d at 1176–77; Meyer v. Uber Techs., Inc., 868 F.3d 66, 75, 80 (2d Cir. 2017).

126. B.D. v. Blizzard Ent., Inc., 292 Cal. Rptr. 3d 47, 53 (Ct. App. 2022).

127. *See id.*

128. Pierre v. Dexcom Inc., No. 37-2023-00014471, 2023 Cal. Super. LEXIS 56618, at *5 (July 28, 2023) (citing Sellers v. JustAnswer, LLC, 289 Cal. Rptr. 3d 1, 20–21 (Ct. App. 2021)); Jackson v. Vines, No. CVRI2201731, 2023 Cal. Super. LEXIS 69073, at *3 (Jan. 10, 2023) (citing *Sellers*, 289 Cal. Rptr. 3d at 20–21).

hyperlinked, not plainly visible.[129] The seller motioned to compel arbitration after the buyer alleged that she was sexually assaulted at the seller's franchise location.[130] The court emphasized that the buyer was under pressure to complete the forms quickly by seller's staff, which factored into the assessment of whether the buyer was actually aware of the terms.[131]

The second case in which a buyer prevailed is *Herzog v. Superior Court*. In *Herzog*, a healthcare company prompted users to assent to its terms of use before using a glucose monitoring app.[132] The agreement appeared to be "classic 'clickwrap,' " prompting a user to click a box stating: "I agree to Terms of Use."[133] However, merely "categorizing the purported agreement as a clickwrap [did] not resolve the formation question."[134] The court looked for "reasonably conspicuous notice" of the existence of terms to which users would be bound—specifically, the idea that "the content of [the app's] 'Legal' screen support[ed] the inference that the user's action on that screen—here, clicking the checkbox—constituted an unambiguous manifestation of assent to those terms."[135] The company's notice did not suggest assent; it read: "By ticking the boxes below you understand that your personal information, including your sensitive health information, will be collected, used and shared consistently with the Privacy Policy and Terms of Use."[136] The court concluded that a reasonably prudent user would fail to understand the relationship between the Terms of Use, the Privacy Policy, and the company's data collection.[137] Furthermore, users were confused by the fact that the company's app was not necessary to use its glucose monitoring technology.[138] *Herzog* can be distinguished from other cases in this survey because it involved clickwrap pertaining to multiple sets of terms and services. Nevertheless, *Massage Envy* and *Herzog* both provide interesting points of contrast to the general presumption that clickwrap creates a valid agreement.

Overall, with a couple exceptions, courts viewed clickwrap agreements as largely enforceable, sometimes presumptively so.

129. Doe v. Massage Envy Franchising, LLC, 303 Cal. Rptr. 3d 269, 271–73 (Ct. App. 2022).
130. *Id.* at 270.
131. *Id.* at 273.
132. Herzog v. Superior Ct., 321 Cal. Rptr. 3d 93, 99 (Ct. App. 2024).
133. *Id.* at 106.
134. *Id.* at 107.
135. *Id.*
136. *Id.* at 108.
137. *Id.*
138. *Id.* at 108–09.

2. Browsewrap Agreements

California State courts were generally protective of buyers confronted with browsewrap agreements but were inconsistent in their applications of standards of notice. In 2014, the Ninth Circuit wrote that it was "more willing to find the requisite notice for constructive assent where the browsewrap agreement resemble[d] a clickwrap agreement—that is, where the user is required to affirmatively acknowledge the agreement before proceeding with use of the website."[139] Following *Nguyen* and *Berman*, pure browsewrap agreements became rare; offerors began to require more from consumers using their websites in order to indicate assent to their terms.

When confronted with hybridwrap or browsewrap agreements, courts largely adhered to the precedent set by three main decisions applying California law to facts involving browsewrap agreements: *Nguyen*, *Specht*, and *Long v. Provide Commerce Inc.*[140] In *Long*, a flower seller's checkout flow did not create adequate notice that placing an order indicated a buyer's acceptance, nor did a link sent to the buyer's email create notice of the seller's terms.[141] Because browsewrap agreements require no affirmative action, "absent actual notice, 'the validity of [a] browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract.' "[142] The court examined whether the conspicuousness of the hyperlinks and design elements of the seller's website would put a reasonably prudent user on notice.[143] In dicta, the court agreed with the *Nguyen* court; simply displaying a hyperlink without further notice is likely not enough to "alert a reasonably prudent Internet consumer to click the hyperlink."[144]

But not all courts applied these notice standards in the same way, and some courts were more concerned with buyer protections than others. Drawing from *Long* and *Nguyen*, *Kellman v. Honest Co.* looked for "something more" in addition to a seller's browsewrap agreement that would put a reasonably prudent buyer on notice.[145] The court found that while a hyperlink and notice of the seller's terms were not buried on the webpage, "they were in small print of a lighter color" and were "surrounded by text that did not suggest that the hyperlink was important."[146] The court also

139. Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1176 (9th Cir. 2014).
140. Kellman v. Honest Co., No. RG16 813421, 2016 Cal. Super. LEXIS 20519, at *9–10 (Nov. 28, 2016).
141. Long v. Provide Com., Inc., 200 Cal. Rptr. 3d 117, 119–20 (Ct. App. 2016).
142. *Id.* at 123 (quoting *Nguyen*, 763 F.3d at 1177).
143. *Id.* at 119–20.
144. *Id.* at 126–27.
145. *Kellman*, 2016 Cal. Super. LEXIS 20519, at *9–10, *13–14.
146. *Id.* at *14.

emphasized the "realities of internet marketing and use," citing Judge Sotomayor's reasoning in *Specht*, and stressed that notice of a seller's terms is essential to the "integrity and credibility" of online contracting and the ecommerce industry.[147] Because sellers are aware that very few buyers read terms of use, some sellers "design their websites to take advantage of consumer inattention."[148] The court also cited Woodrow Hartzog who coined the phrase "malicious interface" to describe websites that deceive consumers.[149] It is a common law principle that parties should be bound to contracts that they enter into. But *Kellman* and *Specht* may suggest that unwitting assent is not assent at all.[150] These concerns are reminiscent of the *Step-Saver* court's suggestion that sellers might take advantage of buyers' reluctance to return a product if they dispute the terms of a shrinkwrap agreement.[151]

A few cases in the study attempted to provide definitions for various types of browsewrap and utilize appropriate standards of notice. *Rabbani v. Tesla Motors* described "pure-form browsewrap agreement[s]" as follows: "by visiting the Web site—something that the user has already done—the user agrees to the Terms of Use not listed on the site itself but available only by clicking a hyperlink."[152] *Esparza v. 23andMe Inc.* emphasized that an agreement is browsewrap if the offeror "assumes assent based upon the mere use of the website."[153] "Website users are entitled to assume that important provisions—such as those that disclose the existence of proposed contractual terms—will be prominently displayed, not buried in fine print."[154]

Generally, when browsewrap agreements contained elements of clickwrap, they were more likely to be enforceable. This was due to the creation of "reasonable notice" through the affirmative act of clicking. Even when terms were hyperlinked or not immediately noticeable, website flows that incorporated an affirmative act on the part of the buyer were enforceable. In *Collins v. Priceline*, a website's terms were only visible via a hyperlink

147. *Id.* at *16 (quoting Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 35 (2d Cir. 2002)).

148. *Id.* at *8 (citing Woodrow Hartzog, *Website Design as Contract*, 60 AM. U. L. REV. 1635, 1664 (2011)).

149. *Id.* (quoting Hartzog, *supra* note 148, at 1664).

150. *Id.*; *Specht*, 306 F.3d at 35. Contrast these cases with the clickwrap case Xiong v. Jeunesse Glob., LLC, No. 30-2019-01095448, 2020 Cal. Super. LEXIS 5220, at *4, *8 (Oct. 6, 2020), in which a user's inability to remember clicking a box that read "I agree" was an insufficient defense and the court deemed the clickwrap contract enforceable.

151. Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 102–04 (3d Cir. 1991).

152. Rabbani v. Tesla Motors Inc., No. 37-2021-00004478, 2021 Cal. Super. LEXIS 56460, at *4 (May 21, 2021) (quoting Long v. Provide Com., Inc., 200 Cal. Rptr. 3d 117, 123 (Ct. App. 2016)).

153. Esparza v. 23andMe Inc., No. 37-2022-00051047, 2023 Cal. Super. LEXIS 54347, at *3–4 (July 21, 2023).

154. *Id.* at *5 (quoting Berman v. Freedom Fin. Network, LLC, 30 F. 4th 849, 857 (9th Cir. 2022)).

but were enforced by the court because the buyer had adequate notice that "[b]y selecting Confirm Your Reservation [they] agree[d] to the Booking Conditions." [155] The affirmative act of clicking to move forward with the reservation resembled clickwrap enough for the court to hold the buyer to the terms.[156] *Esparza* and *Collins* were consistent with the *Berman* standard in that they emphasized the importance of an affirmative act, but *Esparza* did not apply the *Berman* framework, despite being decided in 2023.

Esparza also used a reasonably prudent user standard to determine whether a buyer had "adequate or constructive notice." The court examined factors that the *Nguyen* and *Long* courts examined, such as " 'placement,' color, and contrast of hyperlinks (i.e., 'color-contrasting text') and 'the website's general design.' "[157] The court in *Rabbani v. Tesla Motors, Inc.* also mentioned the reasonably prudent user standard but based its determination on the presence of "immediately visible notice," quoting *Specht*.[158] Thus, although these cases used many similar standards of notice, they were inconsistent in their approaches to finding reasonable notice.

Overall, the courts were most protective of buyers in cases involving browsewrap agreements, unless the agreements involved an affirmative act of assent. The greater amount of inconsistency was likely due to the variation in what browsewrap agreements look like. Thus, courts looked for elements that resembled clickwrap, leaning on its presumptive enforceability. Courts also used a reasonably prudent user standard to determine whether reasonable notice was present, but there was no predominant standard among browsewrap cases.

3. Sign-In-Wrap Agreements

Sign-in-wrap resembles browsewrap in that it can cause a buyer—who believes they are merely signing up for an account or email list—to unwittingly assent to terms. But sign-in-wrap can also resemble clickwrap in that it can incorporate an affirmative act of assent into the sign-up flow. Courts generally struggled with a consistent treatment for sign-in-wrap and used several standards from browsewrap cases such as the reasonable notice and the reasonably prudent user standard.

155. Collins v. Priceline.com LLC, No. 20STCV10231, 2020 Cal. Super. LEXIS 5739, at *4–5 (Dec. 22, 2020).

156. *Id.* at *5–*6.

157. *Esparza*, 2023 Cal. Super. LEXIS 54347, at *6 (quoting Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1177–78 and citing Long v. Provide Com., Inc., 200 Cal. Rptr. 3d 117, 125–26 (Ct. App. 2016)).

158. Rabbani v. Tesla Motors Inc., No. 37-2021-00004478, 2021 Cal. Super. LEXIS 56460, at *5 (May 21, 2021) (quoting Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 31 (2d Cir. 2002)).

A California appellate court was confronted with the issue of a sign-in-wrap agreement for the first time in 2021 in the case *Sellers v. JustAnswer LLC*.[159] A question-answering website prompted users with a button that read: "Start my trial" and small text below that read: "By clicking 'Start my trial' you indicate that you agree to the terms of service and are 13+ years old."[160] Although the court noted that sign-in-wrap should be enforceable "based on the existence of essentially any textual notice that purports to inform consumers they agree to the terms by signing up for an account," the court decided that the website's notice was not "clear and conspicuous," and the agreement was unenforceable.[161] The *Sellers* court used a reasonableness standard to determine that the website's notice was insufficient.[162] The factors identified in *Nguyen* and *Long* (including text size, text color, text location, proximity to clickable buttons, obviousness of hyperlinks, and "clutter" on the screen) provided a baseline for the factual inquiry.[163] Additionally, the fact that the user was signing up for a free trial of a service and was not expecting to enter into an ongoing contractual relationship contributed to the lack of conspicuousness.[164] The court quoted *Long*: "California law is clear—'an offeree, regardless of apparent manifestation of [their] consent, is not bound by inconspicuous contractual provisions of which [they were] unaware, contained in a document whose contractual nature is not obvious.' "[165] This set the stage for *Oberstein*, which solidified the "context" of a transaction standard that has yet to be embraced.[166]

Sellers is also notable for its focus on how an average user or consumer behaves, echoing parts of the opinion from *Step-Saver*. While the defendant-seller urged the court to set bright-line rules governing sign-in-wrap agreements, the court declined to do so.[167] This was also the case in *ProCD*, in which Judge Easterbrook did not create specific requirements for sellers' packaging out of fear of stifling business. The *Sellers* court commented on trends in online form contracting law, observing that courts have been inconsistent in their conceptualizations of a "typical online consumer."[168] The court declared that "not all internet users are alike";[169] some federal courts assume that " '[a]ny reasonably-active adult consumer will almost

159. Sellers v. JustAnswer, LLC, 289 Cal. Rptr. 3d 1, 5–6 (Ct. App. 2021).
160. *Id.* at 5.
161. *Id.* at 4–5, 22.
162. *Id.* at 19–22.
163. *Id.* at 22–23.
164. *Id.* at 26–27.
165. *Id.* at 13 (quoting Long v. Provide Com., Inc., 200 Cal. Rptr. 3d 117, 122 (Ct. App. 2016)).
166. Oberstein v. Live Nation Ent., Inc., 60 F.4th 505, 515–16 (9th Cir. 2023).
167. *See Sellers*, 289 Cal. Rptr. 3d at 22–24.
168. *Id.* at 24.
169. *Id.*

certainly appreciate that by signing up for a particular service, he or she is accepting the terms and conditions of the provider.' "[170] Other Internet users might have "only recently, and perhaps begrudgingly, began to use cell phones, or other internet-enabled devices, for the purpose of online commerce."[171] Thus, federal courts have been inconsistent in their treatment, relying on "subjective criteria" as opposed to the aforementioned factors.[172] An example is a court treating "conspicuousness" as the relevant question of law when it is "actually conducting . . . a fact-intensive inquiry."[173] The *Sellers* court zoomed into the reasonably prudent user standard employed by many courts, setting the stage for *Keebaugh*.[174]

Following the lead of *Sellers*, other sign-in-wrap cases in the case law survey did not establish or utilize a single standard. Instead, the cases likened sign-in-wrap agreements to browsewrap agreements and applied a broader "actual or constructive notice" standard. In *Thompson v. Live Nation Entertainment*, for example, the court emphasized the fact that a buyer received more than one opportunity to acknowledge a seller's Terms of Use, and the use of a different font color for the terms created adequate notice.[175] On one hand, these are commonly examined factors within a notice inquiry. On the other hand, the courts' decisions about which factors to examine were seemingly arbitrary.

The other case besides *Sellers* that held for a buyer was *O'Connor v. Road Runner Sports, Inc.*, which turned on the fact that the buyer did not manifest assent because he did not use one of the modes of acceptance established by the seller.[176] The terms and conditions of the loyalty program provided "three ways a customer could manifest his or her assent to be bound: purchasing a membership, using a membership, or renewing a membership."[177] Instead, the buyer called the seller's toll-free phone line, so he did not agree to the seller's terms.[178] As per common law, the offeror is the master of the offer, and in this case, the offeree did not undertake any of the modes of acceptance held out by the offeror.

170. *Id.* (quoting Selden v. Airbnb, Inc., No. 16-CV-00933, 2016 U.S. Dist. LEXIS 150863, at *15 (D.D.C. 2016)). In *Selden*, the court found that "the prevalence of online contracting in contemporary society lends general support to the [c]ourt's conclusion that [plaintiff] was on notice that he was entering a contract with the provider." *Id.*

171. *Sellers*, 289 Cal. Rptr. 3d at 24–25.

172. *Id.*

173. *Id.* at 23.

174. *See id.* at 24.

175. Thompson v. Live Nation Ent., No. 30-2018-00976153, 2018 Cal. Super. LEXIS 42847, at *3–4 (May 4, 2018).

176. O'Connor v. Rd. Runner Sports, Inc., 299 Cal. Rptr. 3d 785, 794–95 (Ct. App. 2022).

177. *Id.* at 794.

178. *Id.*

Given the *Sellers* decision, California courts have not yet settled on a singular standard for determining whether a sign-in-wrap agreement is enforceable because they have taken varied approaches to assessing adequate notice. Further, *Sellers* casts doubt on courts' adherence to so-called objective standards of notice. As the case law survey shows, courts have instead been using somewhat free-flowing, fact-based criteria.

In conclusion, California state courts were relatively consistent in presuming clickwrap agreements to be enforceable but were inconsistent in employing uniform standards of notice in browsewrap and sign-in-wrap cases. Part of the issue was the inability to define certain browsewrap agreements that did not fit cleanly into a single wrap category. Another issue, however, was the courts' inconsistent application of standards, through which they examined a variety of factors to assess reasonable notice and sometimes relied on a reasonably prudent user or context of the transaction standard. These standards were somewhat selectively employed by the courts in the surveyed cases, which still showed deference to the presumptive enforceability of some agreement types over others.

B. U.S. DISTRICT COURTS IN CALIFORNIA

This Note examined twenty cases to provide a point of comparison to the state court case survey and to show that recent federal cases in California reach conclusions largely consistent with those of the state courts. Mirroring the state court case law survey, federal cases were chosen based on four criteria: (1) cases arose out of U.S. District Courts from districts in California; (2) cases were decided between the years 2014 and 2024 (inclusive); (3) the relationship between the parties to the case was that of a buyer and seller (or lessee/lessor), or the agreement in dispute arose out of a transaction for goods or services; and (4) the court addressed the validity of a clickwrap, browsewrap, scrollwrap, or sign-in-wrap contract. While the state court case law survey yielded no instances of scrollwrap contracts, this part of the survey will analyze four cases involving scrollwrap, finding that the courts' conclusions were unsurprising and consistent with the former half of the case law survey. Again, the types of provisions in dispute in these cases were not relevant because the agreement was considered as a whole. Indeed, most of the selected cases involved disputes regarding forum-selection clauses and arbitration clauses.

Three cases contained discussions of the validity of clickwrap agreements, three contained scrollwrap, nine contained browsewrap, and seven contained sign-in-wrap (two browsewrap cases also contained aspects

of sign-in-wrap).[179] In each of the cases involving clickwrap or scrollwrap, the court held for the seller. In the browsewrap cases, the court held for the seller in six out of nine instances. In the sign-in-wrap cases, the court held for the seller two out of five times. The ratio of pro-buyer and pro-seller decisions for each type of wrap were not drastically different from those in state courts (see Figure 1, *supra*). More important than these numbers, however, was the consistency found in the reasoning within the decisions.

The cases largely adhered to the general standards established by pre-*Berman* Ninth Circuit precedent. Some courts modeled their analysis on the facts of past cases. For example, in *Friedman v. Guthy-Renker*, the Central District Court of California closely followed the blueprint established in *Nguyen* in order to determine the validity of a browsewrap agreement.[180] In *Peter v. Doordash, Inc.*, the court compared the actual webpage in question to the webpage in *Meyer v. Uber Technologies*.[181] As was the case in state courts, it still remains to be seen whether the two-part test from *Berman* or the context of a transaction test will gain traction over time. Cases concerning scrollwrap agreements came out as expected; courts ruled for sellers because scrolling generally constituted an affirmative act of assent. When considering the enforceability of browsewrap or hybridwrap agreements, federal courts favored sellers slightly more than state courts. But overall, these decisions were unsurprising and largely consistent with California state courts.

1. Clickwrap Agreements

The courts followed a deferential presumption of validity when it came to pure clickwrap agreements, and referenced recent decisions in state or other federal courts. In *Vanden Berge v. Masanto*, the court noted that "[c]lickwrap agreements 'have been routinely upheld by circuit and district courts.' "[182] In *Tingyu Cheng v. Paypal, Inc.*, the court declared that "[c]lickwrap agreements are routinely recognized by courts and are enforceable . . . ."[183] Determining that an agreement was identifiably

179. *See infra* Appendix B. Several cases involved discussions of multiple agreements. "Pure clickwrap" or "pure scrollwrap" refers to the characterization of a single agreement, not to the nature of the case itself.

180. Friedman v. Guthy-Renker LLC, No. 14-cv-06009, 2015 U.S. Dist. LEXIS 24307, at *10 (C.D. Cal. Feb. 27, 2015) ("Since *Nguyen* instructs that website design dictates the validity of online contracts, the Court will do its best to explain the layout of Guthy-Renker's website . . . .").

181. Peter v. Doordash, Inc., 445 F. Supp. 3d 580, 586 (N.D. Cal. 2020).

182. Vanden Berge v. Masanto, No. 20-cv-00509, 2020 U.S. Dist. LEXIS 261762, at *11 (S.D. Cal. Sept. 22, 2020) (quoting United States v. Drew, 259 F.R.D. 449, 462 n.22 (C.D. Cal. 2009)).

183. Tingyu Cheng v. Paypal, Inc., No. 21-cv-03608, 2022 U.S. Dist. LEXIS 7245, at *8 (N.D. Cal. Jan. 13, 2022) (citing Newell Rubbermaid, Inc. v. Storm, No. 9398, 2014 Del. Ch. LEXIS 45, at *17 (Mar. 27, 2014)).

clickwrap often ended a court's inquiry into the agreement's enforceability. As in state courts, notice was secondary to the presumption of validity.

Overall, there were no federal district court decisions concerning clickwrap that deviated from precedent. As was true in California state court cases, pure clickwrap agreements are still regarded as constituting an affirmative act of assent that binds a buyer.

2. Scrollwrap Agreements

The same consistency was true of cases involving scrollwrap agreements. Like pure clickwrap agreements, scrollwrap requires an affirmative act of assent through the action of physically scrolling down a webpage. However, scrollwrap arguably creates greater notice for a buyer because the entirety of the seller's terms is built directly into the website flow. When the buyer is forced to acknowledge the entirety of the agreement, it is harder to argue that the buyer did not receive adequate notice. Generally, the discussions of the validity of pure scrollwrap agreements were not accompanied by fact-specific inquiries into the reasonableness of the notice.[184] Courts were simply willing to accept the reasoning found within other binding or persuasive precedent once the type of wrap was established. In 2023, the court in *Flores v. Coinbase* declared that " 'scrollwrap' agreements are consistently found to be enforceable in California," referencing *Sellers*.[185] In *Perez v. Bath & Body Works*, the court cited the Ninth Circuit in *Berman*, stating that there is "little doubt" as to the blanket enforceability of scrollwrap agreements because "they affirmatively show the terms to the user before obtaining assent rather than linking to a separate page containing the terms that does not need to be viewed prior to agreement."[186]

Though California state courts have not yet decided any scrollwrap cases, it is likely that those courts would reach similar conclusions. Of all the types of wrap, scrollwrap probably creates the greatest presumption of validity because it requires an affirmative act, and the terms are conspicuous and accessible, by definition.

184. *See, e.g.*, *Tingyu Cheng*, 2022 U.S. Dist. LEXIS 7245, at *7–9; Stewart v. Acer Inc., No. 22-cv-04684, 2023 U.S. Dist. LEXIS 10241, at *2 (N.D. Cal. Jan. 20, 2023).

185. Flores v. Coinbase, Inc., No. CV 22-8274, 2023 U.S. Dist. LEXIS 90926, at *9 (C.D. Cal. Apr. 6, 2023) (citing Sellers v. JustAnswer LLC, 289 Cal. Rptr. 3d 1, 20 (Ct. App. 2021)).

186. Perez v. Bath & Body Works, LLC, No. 21-cv-05606, 2022 U.S. Dist. LEXIS 116039, at *10 (N.D. Cal. June 30, 2022) (citing Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 856 (9th Cir. 2022)).

3. Browsewrap Agreements

In contrast, courts were generally more skeptical of browsewrap agreements because of the passive nature of browsewrap. Some courts even expressed a presumption of invalidity for pure browsewrap agreements.[187] In *Brooks v. IT Works Marketing*, the court stated that "[i]nternet contracts fall on two ends of a spectrum; courts routinely find clickwrap agreements enforceable but are generally more reluctant to enforce browsewrap agreements."[188] *Moyer v. Chegg* quoted *Berman*: "Courts are more reluctant to enforce browsewrap agreements because consumers are frequently left unaware that contractual terms were even offered, much less that continued use of the website will be deemed to manifest acceptance of those terms."[189] As the court reasoned in *Nguyen*, a buyer is not expected to seek out the terms of an agreement and sellers should be responsible for providing notice.[190] Of the cases surveyed, when cases involved a pure browsewrap agreement that contained no elements of clickwrap or sign-in-wrap, the court ruled in favor of the buyer.[191] This is consistent with the former part of the case law survey.

Courts' inquiries became more complicated when browsewrap was combined with elements of clickwrap or sign-in-wrap. Notice of the terms of the agreement was almost always the standard, and courts again examined various factors.[192] In some of the cases examined, the courts did not even deem it necessary to categorize a website as offering one of the four recognized types. Eight out of nine browsewrap cases examined involved a form of hybridwrap, and given the variation in those agreements, the courts utilized a fact-specific inquiry across the board.

Reasonable notice or reasonably prudent user standards were most common. In *Friedman v. Guthy-Renker*, the court looked for "browsewrap that resemble[d] a clickwrap" because such an agreement would require an affirmative act of assent, evincing notice.[193] Applying the reasonably prudent user standard adapted from *Nguyen*, the court held for one of the

187. *See, e.g.*, Brooks v. IT Works Mktg., Inc., No. 21-cv-01341, 2022 U.S. Dist. LEXIS 103732, at *13 (E.D. Cal. June 9, 2022).

188. *Id.*

189. Moyer v. Chegg, Inc., No. 22-CV-09123, 2023 U.S. Dist. LEXIS 128352, at *10 (N.D. Cal. July 25, 2023) (quoting Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 856 (9th Cir. 2022)).

190. Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1177 (9th Cir. 2014).

191. *See, e.g.*, Friedman v. Guthy-Renker LLC, No. 14-cv-06009, 2015 U.S. Dist. LEXIS 24307, at *11–14 (C.D. Cal. Feb. 27, 2015); *Brooks*, 2022 U.S. Dist. LEXIS 103732, at *19–22.

192. *See, e.g.*, Regan v. Pinger, Inc., No. 20-CV-02221, 2021 U.S. Dist. LEXIS 33839, at *17 (N.D. Cal. Feb. 23, 2021) ("Regardless of the precise label, based on the design and function of the Sideline App, the Court finds that Plaintiff assented to the Sideline TOS by creating an account.").

193. *Friedman*, 2015 U.S. Dist. LEXIS 24307, at *11.

plaintiff-buyers and found that "a reasonably prudent person would not believe that the common noun 'terms' associated with the checkbox [were] the same terms found in the proper noun 'Terms & Conditions' at the bottom of the page."[194] Similarly, in *Chien v. Bumble*, a "blocker card contain[ed] aspects of both clickwrap and browsewrap agreements" and was "comparable to a pop-up screen in that users must click 'I accept' before they may proceed" but needed to click a hyperlink to view the full terms.[195] However, the notice was "reasonably conspicuous," and the agreement was therefore valid.[196]

In *Shultz v. TTAC Publishing*, a hybrid browsewrap agreement was invalidated because the checkbox next to the statement, "I agree to the terms and conditions," was already checked by default when a customer navigated to the checkout page; therefore, there was no affirmative act of assent.[197] Nevertheless, the court engaged in a factual inquiry as to whether there was sufficient notice to justify the browsewrap agreement, finding that "the webpage design [made] it exceedingly difficult to discern the significance of the hyperlink."[198] As was true in state courts, federal courts in California routinely applied similar, yet not identical, standards for notice. In a way, it did not matter that each of these cases involved browsewrap because the courts did not assign much inherent meaning to the category. The importance of browsewrap as a distinct category eroded in the face of many distinct types of hybridwrap.

In one sense, these cases validate the observation of the *Sellers* court: federal courts have relied on "subjective criteria" as opposed to one consistent version of a reasonable notice standard.[199] That being said, the courts consistently drew from the same pool of examinable factors in evaluating whether adequate notice was given, including fonts, sizes, colors, and proximity to clickable buttons. Generally, like the cases surveyed in Section II.A, federal courts in California preferred to draw on multiple factors and standards used by precedent in assessing notice. A singular, objective standard of reasonable notice thus remains elusive.

194. *Id.* at *13.
195. Chien v. Bumble Inc., 641 F. Supp. 3d 913, 933 (S.D. Cal. 2022).
196. *Id.* at 934.
197. Shultz v. TTAC Publ'g, LLC, No. 20-cv-04375, 2020 U.S. Dist. LEXIS 198834, at *9–11 (N.D. Cal. Oct. 26, 2020).
198. *Id.* at *10.
199. Sellers v. JustAnswer LLC, 289 Cal. Rptr. 3d 1, 24–25 (Ct. App. 2021).

4. Sign-In-Wrap Agreements

Like state court cases, federal cases involving sign-in-wrap agreements involved a fact-specific inquiry into the buyer's experience and did not place much inherent value on the sign-in-wrap category. A fact-based inquiry was typically warranted. *Serrano v. Open Road Delivery Holdings* cited *Sellers*, stating,

> [I]t is not apparent that the consumer is aware that they are agreeing to contractual terms simply by clicking some other button. Instead, the consumer's assent is largely passive, and the existence of a contract turns on whether a reasonably prudent offeree would be on inquiry notice of the terms at issue.[200]

The webpage should have provided "conspicuous notice to permit an inference that the user had manifested assent."[201] The court held for the consumer and found that notice was not conspicuous because of the small size of the text informing consumers that they were assenting to the terms of use by signing up.[202]

Courts employed a few other means of assessing notice. In addition to performing a broader factors-based inquiry, the court in *Peter v. Doordash* directly compared a seller's sign-up page to the page considered by the Second Circuit in *Meyer v. Uber Technologies*.[203] The court stated that "[t]he screens are similarly uncluttered and wholly visible, and the notice text appears even closer to the sign-up button on DoorDash's page than on Uber's."[204] In addition to using a more general standard, the court relied on a side-by-side comparison of two webpages.[205] Lastly, the court in *Regan v. Pinger* declined to settle on a precise label for the sign-in-based agreement and instead looked for broadly "sufficient notice to manifest mutual assent,"[206] as was true for some browsewrap cases as well.

Overall, sign-in-wrap cases in federal district courts also applied standards of reasonable notice in an inconsistent manner. Courts employed various techniques, including comparing the webpage in question to webpages from past cases and examining website elements, such as fonts, separately. These cases support the *Sellers* court's criticism of the

200. Serrano v. Open Rd. Delivery Holdings, Inc., 666 F. Supp. 3d 1089, 1095 (C.D. Cal. 2023) (quoting *Sellers*, 289 Cal. Rptr. 3d at 21).
201. *Id.* at 1096.
202. *Id.*
203. Peter v. Doordash, Inc., 445 F. Supp. 3d 580, 586 (N.D. Cal. 2020).
204. *Id.*
205. *Id.*
206. Regan v. Pinger, Inc., No. 20-CV-02221, 2021 U.S. Dist. LEXIS 33839, at *17–18 (N.D. Cal. Feb. 23, 2021).

inconsistent application of notice standards in federal courts.

In conclusion, this case law survey reveals consistency with California state courts. Beyond the presumptions of validity for clickwrap and scrollwrap contracts, standards of notice generally became nebulous as courts utilized any combination of website factors as well as other methods such as direct comparisons to websites from previous cases. Both state and federal courts struggled to pinpoint a consistent method of assessing whether reasonable notice was present, and even the reasonably prudent user standard yielded different results depending on how the court chose to define an average user. Thus, federal courts in California were largely consistent with state courts in their treatment of clickwrap, scrollwrap, browsewrap, and sign-in-wrap cases.

C. SUMMARY OF FINDINGS

To summarize, this case law survey shows consistency among state and federal courts in California. Courts were generally deferential to sellers and their offers if adequate notice was given to the buyer. This aligns with Judge Easterbrook's perspective in *ProCD*. However, California courts also employed a reasonably prudent user standard, which can be traced back to *Berman*, *Specht*, and *Step-Saver*. Finally, this Note concludes by arguing that *Step-Saver* and *ProCD* remain relevant as online contracts evolve because they establish and contextualize the most commonly used standards of notice in California. Courts will likely continue to lean on their reasoning in applying common law principles as new types of contracts emerge over time.

1. Standards of Notice

In some clickwrap and scrollwrap cases, courts were willing to declare an agreement valid solely because courts have presumed clickwrap and scrollwrap to be enforceable in the past.[207] On the other hand, some courts seemed reluctant to rely on categories at all.[208] However, most cases in the case law survey engaged in some level of fact-specific inquiry, and a few main standards were seen most frequently. It remains to be seen whether the two-part standard from *Berman* or the transactional "context" standard from *Oberstein* will gain traction in the coming years.

The reasonable notice standard was almost always applied throughout the case law survey. Consistent with the precedent set by *Nguyen*, *Specht*,

207. *See, e.g.*, Pierre v. Dexcom Inc., No. 37-2023-00014471, 2023 Cal. Super. LEXIS 56618, at *5 (July 28, 2023).

208. Herzog v. Superior Ct., 321 Cal. Rptr. 3d 93, 107 (Ct. App. 2024) ("As this court has explained, 'it is the degree of notice provided, not the label, that is determinative.' " (quoting B.D. v. Blizzard Ent., Inc., 292 Cal. Rptr. 3d 47, 64 (Ct. App. 2022))).

and *Berman*, courts examined various website design factors such as font size, font color, proximity to clickable buttons, underlining on hyperlinks, and the presence of an affirmative act of assent before completing a transaction.[209] Though *Nguyen* provided some specific rules pertaining to browsewrap,[210] there is still no requirement that courts examine certain factors or website elements. Perhaps this approach is practical considering the wide variation in sellers' website flows. However, the looseness of the standard was also a source of inconsistency throughout the survey, and courts created their own interpretations by picking and choosing certain factors to examine.[211]

The reasonably prudent user standard was often used with the reasonable notice standard and acted as a loose benchmark for courts analyzing the experience of a consumer engaging with a seller's interface. Some courts treated it as an independent standard,[212] while some courts treated is as a subset of reasonable notice.[213] The court in *Sellers* criticized some courts' exercise of the reasonably prudent user standard as being too subjective and inconsistent.[214] In considering the potential longevity of this standard, it is difficult to imagine whether the average Internet user of the future will be more or less prudent. Perhaps the average American will be more digitally literate in twenty or fifty years than they are today. Or perhaps technology will continue to evolve, leaving some generations and users behind. Nevertheless, it is certain that sellers and their offers will continue to evolve, causing standards to continue to adapt.

A few other methods of assessing notice were seen in the case law survey. The court in *Sellers* also wrote that some federal courts were using adjacent, but different, standards to determine whether sufficient notice was present, such as "conspicuousness."[215] Conspicuousness was sometimes employed as an independent test, as one of many factors of the reasonable notice standard, and as a separate prong of the *Berman* test.[216] Overall, courts have been inconsistent in their application and analysis of conspicuousness. Additionally, some courts decided to forgo tests and standards in favor of making comparisons to websites and agreements that have been seen in

209. *See*, Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1176–79 (9th Cir. 2014); Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 30–32 (2d Cir. 2002); Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 853–54 (9th Cir. 2022).

210. *Nguyen*, 763 F.3d 1171 at 1178–79.

211. *See, e.g.*, *Herzog*, 321 Cal. Rptr. 3d 93 at 107; *Pierre*, 2023 Cal. Super. LEXIS 56618, at *5.

212. *See, e.g.*, Long v. Provide Com., Inc., 200 Cal. Rptr. 3d 117, 119–20 (Ct. App. 2016).

213. *See, e.g.*, Serrano v. Open Rd. Delivery Holdings, Inc., 666 F. Supp. 3d 1089, 1096 (C.D. Cal. 2023).

214. Sellers v. JustAnswer LLC, 289 Cal. Rptr. 3d 1, 23 (Ct. App. 2021).

215. *Id.*

216. *Id.*; *see also* Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 853–54, 857.

courts already. Those decisions focused on the fact that the browsewrap or sign-in-wrap agreement in question resembled a similar agreement in a previous case. For example, the court in *Peter v. Doordash* compared the seller's sign-up page to the website in *Meyer*, stating that "DoorDash's sign-up page looks markedly similar to the page approved by *Meyer*. The screens are similarly uncluttered and wholly visible, and the notice text appears even closer to the sign-up button on DoorDash's page than on Uber's."[217] Comparing agreements to others that have already been "approved" by courts may be temporarily efficient. Looking forward, however, this method may not be sustainable if online agreements continue to evolve at a fast pace. Some legal scholars, including Cheryl B. Preston, are not optimistic about the potential of evolving notice standards to sufficiently protect consumers, especially given the needs of the "Internet-instant-gratification generation."[218] Perhaps Judge Easterbrook and the *Sellers* court were wise in declining to create bright-line rules; standards offer greater flexibility and adaptability to the online contracts of tomorrow.

This Note will not propose what alternative, more successful standards of notice might look like.[219] However, some other jurisdictions adopt combinations of these tests. Within the last few years, for example, Maine has embraced a "two-step inquiry" in which the first step focuses on a reasonably prudent user being put on reasonable notice of the contract terms, and the second step focuses on whether the user has manifested their assent.[220] Perhaps California courts embrace the *Berman* standard and the context of the transaction test, which seek to combine many of the standards that have been employed within the past decade. A more uniform standard for notice would create consistency and reduce the current reliance on courts to define the scope of a notice inquiry.

This case law survey shows that a singular notice standard remains to be established in California. While reasonable notice was almost universally considered important, courts created their own interpretations of this standard and applied it in many different ways.

217. Peter v. Doordash, Inc., 445 F. Supp. 3d 580, 586 (N.D. Cal. 2020).

218. Preston, *supra* note 58, at 574.

219. See *id.* at 572 (citing Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307, 1347 (2005); NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 184, 186–87, 192, 202 (2013)), for a discussion regarding a few alternative notice proposals, including the use of "significant actions indicating assent" that "more closely resemble the solemnity and psychological weightiness associated with applying an actual signature to paper contracts." This might include requiring a user to write their initials after specific contract terms or using website structures that require more than a single click to assent.

220. Sarachi v. Uber Techs., Inc., 268 A.3d 258, 268–69 (Me. 2022).

2. The Erosion of Distinct Wrap Categories

The results of this case law survey also show that courts did not always utilize California's four wrap categories in evaluating the validity of an agreement. While the clickwrap and scrollwrap categories carried presumptions of validity,[221] the browsewrap and sign-in-wrap categories lacked definite boundaries and uniform standards of notice. A concurring opinion in *Berman* made a bold proposition: "browsewrap agreements are unenforceable per se; sign-in wrap agreements are in a gray zone; and clickwrap and scrollwrap agreements are presumptively enforceable."[222] While this may be true for now, the *Berman* court's declaration may lose relevance as soon as wrap contracts further evolve—or devolve.

One issue is that courts were not always consistent in their categorization of wrap agreements. In state and federal courts, there was a struggle to define agreements when they incorporated elements of more than one type of wrap. Some of the decisions labelled by the courts as browsewrap or hybridwrap involved website flows that also directed users to sign-in or create accounts.[223] Thus, going forward, the wrap categories may only be useful insofar as the courts are consistent in their categorizations. Further, sellers are constantly adapting to standards set by new case law. For example, because *Nguyen* discouraged the use of a pure browsewrap agreement,[224] sellers have expanded the world of browsewrap to include many hybrid variations. Courts often fail to characterize these agreements in specific or useful ways. For example, the state court case *Kellman v. Honest Co.* adopted the language used in *Long v. Provide Commerce* to describe the type of agreement in dispute: browsewrap with "something more."[225] Not only was this definition of an agreement vague, but it also relied on a clear definition of browsewrap, which may no longer exist.

The fact that courts have recognized new types of wrap in the past may suggest that there is room for further types of agreements in California

221. *See, e.g.*, Vanden Berge v. Masanto, No. 20-cv-00509, 2020 U.S. Dist. LEXIS 261762, at *10 (S.D. Cal. Sept. 22, 2020); Tingyu Cheng v. Paypal, Inc., No. 21-cv-03608 2022 U.S. Dist. LEXIS 7245, at *8–9 (N.D. Cal. Jan 13, 2022).

222. Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 868 (9th Cir. 2022) (Baker, J., concurring).

223. *See, e.g.*, Hansen v. Ticketmaster Ent., Inc., No. 20-cv-02685, 2020 U.S. Dist. LEXIS 233538, at *8–9 (N.D. Cal. Dec. 11, 2020); Moyer v. Chegg, Inc., No. 22-cv-09123, 2023 U.S. Dist. LEXIS 128352, at *9–10 (N.D. Cal. July 25, 2023).

224. *See* Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1178–79 (9th Cir. 2014).

225. Kellman v. Honest Co., No. RG16 813421, 2016 Cal. Super. LEXIS 20519, at *14 (Nov. 28, 2016); Long v. Provide Com., Inc., 200 Cal. Rptr. 3d 117, 125 (Ct. App. 2016); *see also* White v. Ring LLC, No. CV 22-6909, 2023 U.S. Dist. LEXIS 16427, at *14–15 (C.D. Cal. Jan. 25, 2023) (first quoting *Nguyen*, 763 F.3d at 1176; and then quoting *In re* Ring LLC Priv. Litig., No. CV 19-10899, 2021 U.S. Dist. LEXIS 118461, at *19 (June 24, 2021)).

contract law. However, even if courts were to acknowledge new categories, such a process would likely occur gradually, moving at a speed much slower than the speed at which sellers create new website flows. As mentioned before, courts still take a reactionary, ex ante approach when assessing the validity of an online contract.[226]

Looking forward, advances in technology may further blur the lines. Companies today are converting customers by monetizing places that are not traditionally used as marketplaces. "Social commerce," for example, allows users of social media platforms like Instagram and Facebook to "purchase products without ever leaving the platform."[227] "Experience commerce" is another new example, promising to put the "customer first" and remove "the product from the center of the sales solution or offering" to create an "immersive . . . experience."[228] This Note does not speculate extensively about the future of ecommerce, but as Internet users find themselves becoming buyers in new contexts, they probably run a greater risk of assenting to terms unwittingly.

Overall, as sellers continue to adapt to current standards and hybridwrap becomes more pervasive, a fact-specific inquiry tailored to the agreement in question might always be necessary—even for cases involving clickwrap or scrollwrap. Thus, it is also worth considering whether these categorizations remain useful at all. First, there were the "two flavors" of contracts, clickwrap and browsewrap, and today, California courts recognize four. Moving forward, perhaps there will be many more—or none at all. This case law survey shows that the categories are already breaking down as sellers' websites resist simple categorization. If courts continue to prefer reasonable notice or reasonably prudent user standards, then perhaps hard-and-fast contract categories will cease to be necessary because these standards apply regardless of the wrap type. Browsewrap and sign-in-wrap have arguably already lost their efficacy as distinct categories because there is so much variation among website flows. Indeed, courts sometimes declined to categorize agreements at all and instead prioritized a notice analysis.[229]

226. Kim, *supra* note 116, at 285.

227. Kirk W. McLaren, *The Future of E-Commerce: Trends To Watch in 2023*, FORBES (Mar. 21, 2023, 9:45 AM), https://www.forbes.com/sites/forbesmarketplace/2023/03/21/the-future-of-e-commerce-trends-to-watch-in-2023 [https://perma.cc/39RS-NASP].

228. Sam Anderson, *Is 'E-Commerce' as We Know it Dead? Expert Predictions for 2023*, THE DRUM (Sept. 22, 2022), https://www.thedrum.com/news/2022/09/22/e-commerce-we-know-it-dead-expert-predictions-2023 [https://perma.cc/AL63-BM9B].

229. *See, e.g.*, Regan v. Pinger, Inc., No. 20-CV-02221, 2021 U.S. Dist. LEXIS 33839, at *17–18 (N.D. Cal. Feb. 23, 2021) ("Regardless of the precise label, based on the design and function of the Sideline App, the Court finds that Plaintiff assented to the Sideline TOS by creating an account.").

It is unclear whether the deterioration of wrap categories and emergence of fact-specific inquiries will create more protection for buyers. On the one hand, a fact-specific inquiry could benefit buyers because sellers exercise the most control over their websites. As masters of their own offers, they alone have the power to set the terms of the transaction. As Judge Wisdom suggested in *Step-Saver*, the fact that there is often no transaction history between parties to these contracts might cause buyers to assent to agreements that they do not anticipate or expect.[230] On the other hand, and as emphasized by Judge Easterbrook in *ProCD*, the ubiquity of ecommerce and the natural competition of the market may create enough protection,[231] even as website flows evolve to become more complex. Although most consumers do not read sellers' terms, reputation matters in a saturated market and might incentivize sellers to provide more favorable terms. Whether distinct wrap categories have longevity or not, courts likely need to define the appropriate notice standard that should be applied, which could eliminate some of the inconsistency highlighted by the *Sellers* court.

For now, this case law survey also shows that the four distinct contract categories still center in California courts' preliminary analysis of the validity of an online contract, though hybridwrap is becoming more pervasive. Courts almost always begin their analysis of an agreement's enforceability with an acknowledgement of the types of wrap, whether they use the categorization to presume validity or proceed to look for adequate notice by the seller. Because all wrap types can be potentially valid, courts are generally deferential to sellers and how they want to set the terms of their offers. There are still few bright-line requirements for sellers in this area of contract law, and parties are generally free to contract as they please.

3. The Relevance of *Step-Saver* and *ProCD*

The precedent set by *Step-Saver* and *ProCD* three decades ago is still applicable today. An important part of the *ProCD* decision was Judge Easterbrook's adherence to the common law principle that any mode of acceptance set by an offeror—hence, any type of wrap—is valid as long as the buyer has notice. The offeror is the master of the offer and can propose specific modes of assent. The reasonable notice standard used widely in California is consistent with Judge Easterbrook's determination that ProCD's pop-up box gave the buyer enough notice of the seller's agreement.[232] Many of the cases surveyed also prioritized the experience of buyers as part of an analysis of adequate notice. Relatedly, the reasonably

230. Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 103–04 (3d Cir. 1991).
231. ProCD, Inc., v. Zeidenberg, 86 F.3d 1447, 1453 (7th Cir. 1996).
232. *Id.* at 1452.

prudent user standard can be traced to *Step-Saver* and *Specht*. It forces sellers to acknowledge the other party in designing an offer and work around the experience of the buyer or user. Perhaps this amounts to more protection for buyers. In some cases, the court went so far as to insinuate that sellers take advantage of buyers in formulating their modes of acceptance.[233] Yet, this case law survey also shows that the *ProCD* and *Step-Saver* perspectives are not incompatible. Elements of both cases have made their way into California contract law, though Judge Easterbrook's approach seems to be slightly more pervasive today.

Step-Saver and *ProCD* are often seen as cases that are pro-buyer or pro-seller. *Step-Saver* was largely concerned with holding businesses accountable and is an important check on sellers. In contrast, Eric Posner termed *ProCD* a "masterpiece of realist judging" in the "canon of contract law cases" because it encouraged sellers to continue conducting business as they had been.[234] However, given the landscape of online contracting and the importance of notice, perhaps the cases should be recast as simply endorsing different standards of notice. *Step-Saver* is more aligned with the reasonably prudent user standard while *ProCD* is more aligned with reasonable notice. Online contract cases today implicitly recognize that form contracts enable the marketplace to function efficiently. Yet, because online sellers' website flows vary to such a great degree, it is difficult to make blanket statements as to the validity of certain agreements. Thus, notice will almost certainly remain a point of discussion for courts, and these cases will remain relevant as the sources of two significant standards of notice.

The world of online contracting is quickly outpacing the factual relevance of the two cases because new means of manifesting assent are rapidly being invented. For example, the box-top licenses in *Step-Saver* and *ProCD* can be likened to browsewrap agreements today, but many sellers have already stopped creating pure browsewrap agreements after *Nguyen*. While form contracts will likely remain important and necessary for online contracting, current shrinkwrap-like modes of acceptance may not. Nevertheless, these cases connect the concept of notice in form contracts to essential contract common law principles. As long as online modes of contracting are held to the same requirements of offer and acceptance, the reasoning of Judge Wisdom and Judge Easterbrook should remain in contract casebooks. These two cases contributed to the development of major standards of notice.

233. Kellman v. Honest Co., No. RG16 813421, 2016 Cal. Super. LEXIS 20519, at *8 (Nov. 28, 2016).

234. Posner, *supra* note 47, at 1194.

CONCLUSION

As was true three decades ago when *Step-Saver* and *ProCD* created a circuit split, courts are still determining how to evaluate notice when considering the validity of form contracts. When courts evaluate the validity of a clickwrap or scrollwrap agreement, precedent alone may dictate a certain outcome. For cases involving browsewrap or sign-in-wrap, a fact-specific inquiry is almost always necessary. While it remains to be seen whether California's four types of wrap will continue to be useful or important in evaluating sellers' offers and agreements, it is likely that courts will continue to look for adequate notice. This case law survey demonstrates that there are two main standards of notice that can be traced back to *ProCD* and *Step-Saver*: a factor-based reasonable notice standard and a reasonably prudent user standard. There is presently no uniform method of applying these standards in California, but most courts nevertheless acknowledge that elements of both are important. Overall, case law is trending towards the *ProCD* view that contracting should not be impeded by burdensome standards for sellers. However, sellers should still be held to reasonable standards to keep consumers informed, which is consistent with *Step-Saver*. In conclusion, these two cases remain important as courts continue to evaluate whether buyers were sufficiently notified of sellers' terms.

APPENDIX A. SURVEYED CASES IN CALIFORNIA STATE COURTS

	Case	*Held For*	*Type of Contract*	*Disputed Terms*	*Summary*
1	*B.D. v. Blizzard Ent., Inc.*, 292 Cal. Rptr. 3d 47 (Ct. App. 2022)	Seller	Clickwrap	Arbitration Provision	Seller's pop-up box gave sufficiently conspicuous notice that clicking a "Continue" button would manifest assent to the terms of a License Agreement.
2	*Bowers v. Ritchie Bros.*, No. RG21095426., 2021 Cal. Super. LEXIS 33293 (Aug. 18, 2021)	Seller	Clickwrap	Forum-Selection Provision	Buyer assented to an agreement by clicking "I agree to the IronPlanet Buyer Terms and Conditions," which was necessary to proceed with the transaction.
3	*Doe v. Massage Envy Franchising, LLC*, 303 Cal. Rptr. 3d 269 (Ct. App. 2022)	Buyer	Clickwrap	Arbitration Provision	Buyer brought an action for sexual assault, to which a seller moved to compel arbitration based on a clause in seller's agreement. Buyer did not assent to a

					seller's terms of service on an electronic tablet because the font color of the notice statement was not conspicuous, and terms were hyperlinked. Buyer was pressured to complete the forms quickly by seller's staff.
4	*Herzog v. Superior Ct.*, 321 Cal. Rptr. 3d 93 (Ct. App. 2024)	Buyer	Clickwrap	Arbitration Provision	Buyer assented to a healthcare company's terms by clicking a box, but the agreement was deemed unenforceable because clicking the box also constituted authorization for the company to collect and store the personal health information; thus, there was no unambiguous assent to the terms.
5	*Jackson v. Vines*, No. CVRI2201731, 2023 Cal. Super. LEXIS	Seller	Clickwrap	Arbitration Provision	Buyer assented to terms via a clickwrap agreement and could not use the fact that he did

	69073 (Jan 10, 2023)				not recall doing so as a defense.
6	*Njoku v. Airbnb, Inc.*, No. 21STCV34610, 2021 Cal. Super. LEXIS 84568 (Dec. 23, 2021)	Seller	Clickwrap	Arbitration Provision	Buyers were bound by an agreement because they clicked an electronic button that indicated their assent, even though the actual terms were hyperlinked and on another page.
7	*Pierre v. Dexcom Inc.*, No. 37-2023-00014471, 2023 Cal. Super. LEXIS 56618 (July 28, 2023)	Seller	Clickwrap	Arbitration Provision	Buyer was bound by a clickwrap agreement that read "I agree" or "I accept" and was provided with a link to the readily available agreement.
8	*Shaw v. U-Haul*, No. 21STCV20248, 2022 Cal. Super. LEXIS 23561 (Mar. 16, 2022)	Seller	Clickwrap	Arbitration Provision	Buyer manifested assent by clicking "Accept" with respect to seller's Arbitration Agreement.
9	*Xiong v. Jeunesse Glob., LLC*, No. 30-2019-01095448, 2020 Cal.	Seller	Clickwrap	Arbitration Provision	Buyer was bound by a clickwrap agreement that read "I agree," and her inability

	Super. LEXIS 5220 (Oct. 6, 2020)				to remember whether she clicked the box was an insufficient defense.
10	*Blood v. L.T.D. Commodities LLC*, No. 37-2020-00034050, 2021 Cal. Super. LEXIS 56220 (Sept. 24, 2021)	Buyer	Browsewrap	Arbitration Provision	A button on seller's website that read "START SAVING" did not notify buyer that clicking the button would constitute assent to seller's terms.
11	*Collins v. Priceline.com, LLC*, No. 20STCV1023 1, 2020 Cal. Super. LEXIS 5739 (Dec. 22, 2020)	Seller	Browsewrap	Arbitration Provision	Seller's website contained an enforceable part-browsewrap, part-clickwrap agreement because buyer had to click to assent and complete a reservation.
12	*Esparza v. 23andMe Inc.*, No. 37-2022-00051047, 2023 Cal. Super. LEXIS 54347 (July 21, 2023)	Buyer	Browsewrap	Arbitration Provision	A website's terms of use were not binding because they were only available by clicking a hyperlink after scrolling to the bottom of the page or in the site's chat feature.

13	*Kellman v. Honest Co.*, No. RG16 813421, 2016 Cal. Super. LEXIS 20519 (Nov. 28, 2016)	Buyer	Browsewrap/ Hybridwrap	Arbitration Provision	Seller's website design did not include design elements that would put a reasonably prudent buyer on notice of a browsewrap agreement.
14	*Long v. Provide Com., Inc.*, 200 Cal. Rptr. 3d 117 (Ct. App. 2016)	Buyer	Browsewrap	Arbitration Provision	Seller's checkout flow did not create adequate notice that placing an order indicated acceptance, nor did a link sent to buyer's email create notice.
15	*Pradmore v. J2 Glob., Inc.*, No. CGC-17-561916, 2018 Cal. Super. LEXIS 739 (Apr. 20, 2018)	Seller	Browsewrap/ Hybridwrap	Arbitration Provision	Seller's agreement was enforceable because it contained elements of browsewrap but also required buyer to click a box to assent to complete a transaction.
16	*Rabbani v. Tesla Motors Inc.*, No. 37-2021-00004478, 2021 Cal. Super. LEXIS 56460 (May 21, 2021)	Seller	Browsewrap	Arbitration Provision	Buyer was notified that placing an order would indicate assent to seller's terms and did not click on hyperlinks that would have

					revealed said terms.
17	*O'Connor v. Rd. Runner Sports, Inc.*, 299 Cal. Rptr. 3d 785 (Ct. App. 2022)	Buyer	Sign-In-Wrap	Arbitration Provision	In manifesting assent to cancel his membership to a seller's loyalty program, buyer did not use seller's preferred method to cancel the membership and seller's arbitration agreement was found to be unenforceable.
18	*Sellers v. JustAnswer LLC*, 289 Cal. Rptr. 3d 1 (Ct. App. 2021)	Buyer	Sign-In-Wrap	Arbitration Provision	A sign-in-wrap agreement was not binding when buyer signed up for a free trial of a service because notice was not clear and conspicuous, and this was not the type of transaction that would entail an ongoing contractual relationship.
19	*Skurskiy v. Neutron Holdings, Inc.*, No. 19STCV3684 6,Cal. Super. LEXIS	Seller	Sign-In-Wrap	Arbitration Provision	In signing up for a seller's service, buyer clicked an "I Agree" button where language on the page was

	104325 (Cal. Super. Ct. Apr. 15, 2021)				apparent that clicking would indicate assent to seller's user agreement.
20	*Thompson v. Live Nation Ent.*, No. 30-2018-00976153, 2018 Cal. Super. LEXIS 42847 (May 4, 2018)	Seller	Sign-In-Wrap/Browse wrap	Arbitration Provision	Buyer was required to acknowledge seller's terms twice in the process of creating an account and therefore assented. Key terms were set apart in a different color from other words.

APPENDIX B. SURVEYED CASES IN U.S. DISTRICT COURTS IN CALIFORNIA

	Case	*Held For*	*Type of Contract*	*Disputed Terms*	*Summary*
1	Brown v. Madison Reed, Inc., No. 21-cv-01233, 2021 U.S. Dist. LEXIS 164002 (N.D. Cal. Aug. 30, 2021)	Seller	Clickwrap	Arbitration Provision	Buyer was bound by seller's agreement because notice of the terms was set apart in bold and in a different color. Clicking to manifest assent was required to place an order.
2	*Tingyu Cheng v. Paypal, Inc.*, No. 21-cv-03608, 2022 U.S. Dist. LEXIS 7245 (N.D. Cal. Jan 13, 2022)	Seller	Clickwrap	Arbitration Provision	Seller's agreement was binding on buyer because he had to check a box indicating that he had read and agreed to a User Agreement and clicked a large blue button to indicate assent to creating an account.
3	*Vanden Berge v. Masanto*, No. 20-cv-00509, 2020 U.S. Dist. LEXIS 261762 (S.D. Cal. Sept. 22, 2020)	Seller	Clickwrap	Arbitration Provision	Buyer was bound by seller's terms because she affirmatively agreed to a clickwrap agreement while making a purchase.

4	*Flores v. Coinbase, Inc.*, No. CV 22-8274, 2023 U.S. Dist. LEXIS 90926 (C.D. Cal. Apr. 6, 2023)	Seller	Scrollwrap	Arbitration Provision	Seller's scrollwrap agreement was valid because the full text of the User Agreement was placed before buyer.
5	*Perez v. Bath & Body Works, LLC*, No. 21-cv-05606, 2022 U.S. Dist. LEXIS 116039 (N.D. Cal. June 30, 2022)	Seller	Scrollwrap	Arbitration Provision	Seller's agreement was valid because buyer was physically required to scroll through the terms in order to assent.
6	*Stewart v. Acer Inc.*, No. 22-cv-04684, 2023 U.S. Dist. LEXIS 10241 (N.D. Cal. Jan. 20, 2023)	Seller	Scrollwrap	Arbitration Provision	Seller's agreement was enforced because the terms appeared after turning on the product (a computer) and constituted adequate notice.
7	*Allen v. Shutterfly, Inc.*, No. 20-cv-02448, 2020 U.S. Dist. LEXIS 167910 (N.D. Cal. Sept. 14, 2020)	Seller	Browsewrap/ Hybridwrap	Arbitration Provision	Buyer was bound by a browsewrap agreement where constructive notice was present due to the conspicuousness of the terms, although they were hyperlinked.

8	*Brooks v. IT Works Mktg.*, No. 21-cv-01341, 2022 U.S. Dist. LEXIS 103732 (E.D. Cal. June 9, 2022)	Buyer	Browsewrap	Arbitration Provision	Buyer was not bound by seller's terms because she never saw the link to the Terms of Use as they were in a small font and an inconspicuous color.
9	*Chien v. Bumble Inc.*, 641 F. Supp. 3d 913 (S.D. Cal. 2022)	Seller	Browsewrap/ Hybridwrap	Arbitration Provision	Buyer was bound by seller's agreement because a pop-up blocker card containing the Terms and Conditions and a button stating "I accept" was reasonable notice.
10	*Crawford v. Beachbody, LLC*, No. 14cv1583, 2014 U.S. Dist. LEXIS 156658 (S.D. Cal. Nov. 5, 2014)	Seller	Browsewrap/ Hybridwrap	Forum-Selection Provision	An enforceable agreement was made because seller's Terms and Conditions were in a conspicuous font directly below the "PLACE ORDER" button to complete the transaction.
11	*DeVries v. Experian Info. Sols., Inc.*, No. 16-cv-02953, 2017 U.S. Dist. LEXIS 26471 (N.D. Cal. Feb. 24, 2017)	Seller	Browsewrap/ Hybridwrap	Arbitration Provision	Seller's browsewrap agreement was valid because there was adequate notice when the phrase "Terms and Conditions" was

					in a different color and in close proximity to a clickable button.
12	*Friedman v. Guthy-Renker LLC*, No. 14-cv-06009-, 2015 U.S. Dist. LEXIS 24307 (C.D. Cal. Feb. 27, 2015)	Buyer	Browsewrap/ Hybridwrap	Arbitration Provision	Buyer was not bound by seller's terms and conditions because the hyperlink to the terms was "buried" at the bottom of the screen and not enough notice was provided of their existence.
13	*Hansen v. Ticketmaster Ent., Inc.*, No. 20-cv-02685, 2020 U.S. Dist. LEXIS 233538 (N.D. Cal. Dec. 11, 2020)	Seller	Browsewrap/ Sign-In-Wrap	Arbitration Provision	Seller's browsewrap agreement was valid because assenting to terms was required before buyer had the option to purchase tickets from seller.
14	*Moyer v. Chegg, Inc.*, No. 22-cv-09123, 2023 U.S. Dist. LEXIS 128352 (N.D. Cal. July 25, 2023)	Seller	Browsewrap/ Sign-In-Wrap	Arbitration Provision	Buyer was bound because she received conspicuous notice of the terms, which were hyperlinked right below a button that buyer needed to click to create an account.
15	*Shultz v. TTAC Publ'g, LLC*, No. 20-cv-	Buyer	Browsewrap/ Hybridwrap	Arbitration Provision	Buyer was not bound by seller's

	04375, 2020 U.S. Dist. LEXIS 198834 (N.D. Cal. Oct. 26, 2020)				browsewrap/clickwrap agreement because the checkbox next to the statement "I agree to the terms and conditions" was checked by default, requiring no act of assent by the user.
16	*Colgate v. Juul Labs, Inc.*, 402 F. Supp. 3d 728 (N.D. Cal. 2019)	Buyer	Sign-In-Wrap	Arbitration Provision	Seller's notice was not conspicuous enough to notify buyer because the hyperlink to the Terms and Conditions was not underlined, italicized, or visually distinct from the surrounding text.
17	*Seneca v. Homeaglow, Inc.*, No. 23-cv-02308, 2024 U.S. Dist. LEXIS 33698 (C.D. Cal. Feb. 7, 2024*)*	Buyer	Sign-In-Wrap	Arbitration Provision	Seller's sign-in-wrap agreement was not binding on buyer because buyer had already purchased services from seller when the agreement was presented, and the notice was not conspicuous.
18	*Peter v. Doordash, Inc.*, 445 F. Supp. 3d 580	Seller	Sign-In-Wrap	Arbitration Provision	Seller's agreement was notably similar to the agreement in *Meyer* and the

	(N.D. Cal. 2020)				notice text was conspicuous. Thus, the agreement was binding on buyer.
19	*Regan v. Pinger, Inc.*, No. 20-CV-02221, 2021 U.S. Dist. LEXIS 33839 (N.D. Cal. Feb. 23, 2021)	Seller	Sign-In-Wrap	Arbitration Provision	Seller's repeated notice that the creation of an account would constitute assent to the Terms of Service was enough to bind a user.
20	*Serrano v. Open Rd. Delivery Holdings, Inc.*, 666 F. Supp. 3d 1089 (C.D. Cal. 2023)	Buyer	Sign-In-Wrap	Arbitration Provision	Seller's webpage did not provide reasonably conspicuous notice of the terms and conditions because the notice text was small and in a light-colored font.