This is the sixth survey of electronic contracting cases that we have prepared for *The Business Lawyer*. Our first survey covered a number of interesting topics. As time went on, however, there was less and less to write about—there were fewer cases that dealt with electronic issues and the cases themselves presented fewer interesting issues. Two years ago, we noted that the law of electronic contracts has matured.

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* Professor, Widener University School of Law. Professor Moringiello thanks Matthew Banks, Widener University School of Law Class of 2011, for his research assistance on this article.

** Jacob A. France Professor of Judicial Process, University of Maryland School of Law.


The problem is even more acute this year: There are very few decisions to include in this Survey and none of them presents a novel problem for resolution.\(^3\) Fortunately, there were a few cases decided in the past year that presented some interesting variations on maturity.

I. **IS THERE ANYTHING NEW IN THE WORLD OF “WRAPS?”**

Standard form electronic contracts are often placed into two categories based on the type of assent required. Clickwrap terms call for an explicit manifestation of assent, usually by clicking on an “I agree” icon or in a small box next to the statement, “I agree to the Terms and Conditions.”\(^4\) Browsewrap terms do not call for an explicit manifestation of assent, and those terms are usually accessible through a hyperlink.\(^5\) Both terms are derived from “shrinkwrap,” a term used to describe paper terms included in the box containing a purchased product.\(^6\) This year

\(^3\) We discuss decisions decided in the past year, which discuss problems in electronic contracting. We do not include cases that involved electronic contracting methods that failed to raise questions about their use.


The dispute in Appliance Zone, LLC v. NexTag, Inc.\footnote{Appliance Zone, LLC No. 4:09-cv-0089-SEB-WGH, 2009 U.S. Dist. LEXIS 120049 (S.D. Ind. Dec. 22, 2009).} was between the operator of an online comparison shopping web site and one of its merchants. The NexTag web site required its merchants to agree to the NexTag Terms of Service by clicking a box next to the phrase “I accept the NexTag Terms of Service.”\footnote{Id. at *9-10.} While the opinion does not say so explicitly, it appears that this phrase was hyperlinked to the terms themselves. The terms contained a forum selection clause.

The plaintiff argued that it should not be bound to the forum selection clause because the terms were unconscionable. To support its contention that the terms were procedurally
unconscionable, the plaintiff argued that the terms were inconspicuous and that the parties possessed unequal bargaining power. In rejecting the plaintiff’s inconspicuousness argument, the court noted that the NexTag presentation of terms was “typical of the online retail industry.” Next, the court recognized that the terms were clearly labeled and that they were placed “in a highly visible portion of the web page.” We assume that the court meant that the link was clearly visible, because the plaintiff based its argument on the fact that the terms themselves did not appear next to the “I agree” box. Last, the court found that the requirement that the plaintiff affirmatively check a box added “further clarity and equity to the process.” The court found that all of these web site characteristics gave adequate notice of the terms and, therefore, the plaintiff was bound by the fundamental rule of contract law that “a person who signs a contract is presumed to know its terms and consents to be bound by them.”

12 Although courts will usually refuse to enforce terms only if they are both procedurally and substantively unconscionable, we focus in this article on procedural unconscionability because that is where issues specific to electronic contracts arise.

13 See id. at *11.

14 Id. at *12.

15 Id. at *12.

16 Id. at *12.

17 Id. at *13.
The court easily disposed of plaintiff’s argument that it was an unsophisticated party, noting simply that plaintiff’s customers were required to complete a similar process to use its web site.\(^\text{18}\)

At issue in *Scherillo v. Dun & Bradstreet*\(^\text{19}\) was a forum selection clause contained in web site terms and conditions that appeared in a scroll box during the web site registration process. In order to register for the defendant’s services, a web site user was required to check a box below the scroll box that was adjacent to the phrase “I have read and AGREE to the terms and conditions shown above” and click another box containing the phrase “Complete Registration.”\(^\text{20}\)

The court held that such a presentation reasonably communicated the choice of forum clause to the web site user despite the fact that a user would have to scroll through a text box in order to read the entire contract. In so holding, the court made a useful analogy to paper contracts, stating that “a person who checks the box agreeing to the terms and condition of purchase on an internet site without scrolling down to read all of the terms and conditions is in the same position as a person who turns to the last page of a paper contract and signs it without reading the terms – namely, the clause is still valid.”\(^\text{21}\)

\(^{18}\) *See id.* at *13-14.*

\(^{19}\) *Scherillo v. Dun & Bradstreet,* 684 F. Supp. 2d 313 (E.D.N.Y. 2010).

\(^{20}\) *Id.* at 320.

\(^{21}\) *Id.* at 322-323.
The browsewrap cases involved one business-to-business contract and one business-to-consumer contract. The plaintiff in *PDC Laboratories, Inc. v. Hach Co.*22 had purchased agar plates (used to test water for *E. coli*) from defendant through defendant’s web site. The online Terms and Conditions of Sale contained a clause limiting warranties and remedies. When plaintiff found that the agar plates were defective, it sued defendant and claimed it was not bound by the warranty disclaimer and remedy limitation because they were not sufficiently conspicuous and, therefore, procedurally unconscionable. While the web site did not require that the plaintiff click a box to accept the terms, the terms were hyperlinked on three pages of the order process in underlined, blue, contrasting text and the last page of the order process directed the buyer to “Review terms, add any comments, and submit order.”23 This sentence was followed by a hyperlink to the terms.24

In finding that the terms were adequately communicated to the plaintiff, the court relied both on the Uniform Commercial Code ("UCC") definition of “conspicuous” and the holding in *Hubbert v. Dell.*25 A term is conspicuous under the UCC if it is presented in a manner “that a reasonable person against which it is to operate ought to have noticed it.”26 Because the

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23 *Id.* at *8.

24 *See id.* at *8.


hyperlink to the terms appeared on several pages of the ordering process in blue contrasting text, the presentation of the terms satisfied the UCC definition of conspicuous. They also satisfied the test for conspicuousness under *Hubbert*, which held that terms were sufficiently conspicuous when a contrasting hyperlink to the terms appeared on every page of the ordering process.27

The plaintiff argued that because it was not required to click a box assenting to the terms, it should not bind them. The court rejected this argument, stating that the acceptance requirements in clickwrap cases are inapplicable to cases involving only hyperlinked terms.28 Without explicitly saying so, the court recognized that whether terms are presented as clickwrap terms or browsewrap terms has no bearing on enforceability; rather the relevant inquiry is whether the terms were reasonably communicated to the web site user.29

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28 See id. at *9.

29 Other courts have recognized this as well. See Moringiello & Reynolds, *2006 Survey* at 201-203 (discussing *Hotels.com, L.P. v. Canales*, 195 S.W. 3d 147 (Tex. Ct. App. 2006)).
The other browsewrap case, *Hines v. Overstock.com, Inc.*,\(^{30}\) can be described as a “pure browsewrap” case because the only notice to a web site user that she would be bound to the Terms and Conditions appeared in the first line of the Terms and Conditions themselves. The Overstock.com Terms and Conditions stated that “[e]ntering this site will constitute your acceptance of these Terms and Conditions.”\(^{31}\) Because the court found that the plaintiff did not have adequate notice of the terms, it held that she was not bound by the arbitration clause contained in the terms.

*Hines* provides a good lesson on how not to present web site terms and conditions. The plaintiff claimed that when she visited the Overstock.com web site to buy a vacuum, she was never made aware of the terms. Indeed, the link to the terms was on the bottom of the web page in small print between a link to the privacy policy and the Overstock.com trademark.\(^{32}\) At no time in the ordering process was it necessary for a buyer to scroll down to the end of the web page. Like the court in *PDC v. Hach*, the court in *Hines* focused on notice. The court stressed that in determining the validity of browsewrap terms, the main inquiry is whether the web site user “has actual or constructive notice of a site’s terms and conditions prior to using the site.”\(^{33}\)

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\(^{31}\) *Id.* at 367.

\(^{32}\) *See id.* at 365.

\(^{33}\) *Id.* at 366 (internal quotations omitted).
This rule reflects the general contract rule regarding both paper and electronic standard forms: the terms must be reasonably communicated.  

II. DON’T FORGET BASIC CONTRACT LAW

Reading a collection of contract cases does remind us of the need to remember basic contract principles at all times. That need is not lessened by the fact that the contract has been formed electronically. Consider Appliance Zone, LLC v. NexTag, Inc. The Court, however, correctly applied the doctrine of apparent authority to dismiss that contention. The temptation to use a teen-ager to run a website must be very strong at times, but an employer must remember that it is giving the youngster authority to bind the company. Hire someone responsible, instead—a law student, for example.


36 Id. at *8.

37 Id. at *9.
Consider also the use of emails to reach agreement. Two cases discussed email contracts. At issue in the first, Querard v. Countrywide Home Loans, Inc.\(^{38}\) were several emails between the parties concerning a re-financing of a mortgage during a “softening” of the market. \(^{39}\) The court found that the combined emails, when read together, contained sufficient terms either explicitly or that could “be implied from industry custom and the terms of the parties’ existing loan agreements.”\(^{40}\) The key to the result was reading the emails together. The court wrote: “While the final April 8 email considered by itself did not include all of the essential terms, taking the exchange of emails as a whole, the critical terms were stated explicitly.”\(^{41}\)

The second email case was Carimati di Carimate v. Ginsglobal Index Funds,\(^{42}\) a case similar to Querard in that it required a court to determine that emails could be read as a whole in connection with an earlier document in order to constitute a contract. The earlier document was a

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38 Querard v. Countrywide Home Loans, Inc., No. A124262, 2010 Cal. App. Unpub.LEXIS 3404 (2010). Although Querard is listed as “Not to be Published” in Official Reports,” it is a careful examination of several issues and well worth reading.

39 Id. at *4.

40 Id. at *24. The opinion also discussed briefly, whether the emails would have satisfied the statute of frauds as applied by the Uniform Electronic Transactions Act, but the court bypassed the question when it found that the agreement did not have to be in writing.

Memorandum of Understanding ("MOU") concerning a marketing joint venture. The MOU was then modified in a series of emails, whose alleged breach led to the litigation. The defendant contended that the modifications were not complete as to essential terms and, therefore, could not be a contract. Defendant buttressed that argument by observing that the parties contemplated entering into a new (and presumably integrated) agreement. The court rejected those arguments. It held that the “equal sharing agreement embodied in the MOU and the [later] emails contain the elements essential to create an enforceable contract.”

Taken together, Querard and Carimati remind us that care has to be taken when using emails. They can be read together to create a contract. That is standard contract law, of course, but we worry that parties are less careful in their choice of language when using electronic rather than paper communication, and they might be quite surprised at the outcome. Emailer, beware!

III. ANOTHER OLD FAVORITE

We have already discussed Hubbert v. Dell, a case whose quality we recognized in an earlier Survey.\(^4\) We close this Survey with a discussion of another old favorite, DeFontes v. Dell, Inc.\(^5\) This is a consumer class action brought against Dell in May of 2003. Dell moved to dismiss on the basis of an arbitration clause in its Terms and Conditions. Dell contended that its

\(^4\) Id. at *19. The court distinguished two cases from Texas and California where emails failed to contain information essential to the formation of a contract. Id. at *17-19. Where, as in Carimati itself, the email supply the requisite information, then questions of formation should disappear.

buyers had notice of those provisions in a hyperlink available in both browsewrap and shrinkwrap versions. In 2005, the trial court ruled that the buyers were not bound by the browsewrap notice because it was inconspicuous. We approved of that ruling in our first Survey: “it is not enough that the terms can be found somewhere; the terms also must be presented in such a way that they can be found by the reasonable user.”\footnote{Juliet M. Moringiello & William L. Reynolds, \textit{Internet Contracting Cases 2004-2005}, 61 \textit{Bus. Law.} 433, 436 (2005).} That left alive the shrinkwrap argument, but we would not learn the fate of that until late 2009 when the Supreme Court of Rhode Island issued its opinion. That court decided to follow the well-known decision by Judge Easterbrook in \textit{ProCD, Inc. v Zeidenberg}.\footnote{ProCD, Inc. v Zeidenberg, 86 F. 3d 1447 (7th Cir. 1996).} That led the court to hold that the contracts in question were formed only “when the consumer accepts the full terms after receiving a reasonable opportunity to refuse them.”\footnote{DeFontes, 984 A. 2d at 1071.} Unfortunately, for Dell, however, the court also held that the buyers had not been properly informed that they had the power to reject the goods by returning the goods.\footnote{See id. at 1073.} The terms stated that “[b]y accepting delivery of the computer systems, related products, and/or services and support, and/or other products described on that invoice[,] You (‘Customer’) agrees to be bound by and accepts those terms and conditions.”\footnote{Id. at 1071.}
“acceptance” is a term of art under Article 2 of the Uniform Commercial Code and, that under Article 2, acceptance does not occur until the buyer has the opportunity to inspect the goods.\textsuperscript{51} Because the court found that a buyer could reasonably believe that acceptance could occur upon opening the package, the court held that the buyers were not properly informed of their power to reject the goods and thus the terms. This result again seems correct. An important right such as the right to return should be readily known to the buyer. So once again, a \textit{DeFontes} court gets it right.

\textbf{IV. CONCLUSION}

We can discern no difference between contracts formed electronically and those formed by other means. The law should no longer treat electronic contracts with wonder, skepticism, or concern. Electronic contracts should no longer be a separate concern.

\textsuperscript{51} U.C.C. § 2-606 (2000).