ATLANTA BAR ASSOCIATION
LAWYERS WHO SERVE
Litigation Section

The Litigator

SUMMER 2025
Official Publication of the
Atlanta Bar Association Litigation Section

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Arbitration – All in the Wrapping

In 2000, Congress embraced "electronic" contracting by enacting the federal Electronic Signatures in Global and National Commerce ("ESIGN") Act, 15 U.S.C. § 700. It noted that "a signature, contract, or other record relating to such [electronic] transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form."1 ESIGN includes not just contracts with electronic signatures, but also contracts formed when a consumer manifests assent via "click-wrap" or "browse-wrap"2 (collectively, "Wrap Agreements"). Definitions in this arena are still not entirely clear, but generally, "clip-wrap" agreements include consumers "agreeing" to a vendor's terms and conditions ("TAC") by clicking on an electronic "accept" dialog box or popup window. "Browse-wrap" agreements typically refer to a more passive approach with language advising that by continuing to use a service or by proceeding from a home page to a subsequent page, the customer is assenting to a seller's TAC.

Frequently, TAC provides for arbitration, including a waiver of the right to participate in class or collective action litigation. Twenty-five years after ESIGN was enacted, what is the state of the law governing the enforceability of these arbitration provisions? And what issues are of current concern?

Historically two issues have dominated legal discussion of Wrap Agreements. First, when is it fair to conclude that a consumer has assented to arbitrate? This question also includes whether and when the use of a "Wrap Agreement" is procedurally unconscionable. Second, and relatedly, to what extent is the question of enforceability impacted by notions of substantive unconscionability? While the law is relatively settled in both areas, there are new developments impacting both.

1. Assent - Procedural Unconscionability

- ***History***

The nature and context of Wrap Agreements – usually an electronic button and links to lengthy, turgid legalese – means consumers only rarely bother to read the TAC. Nevertheless, have consumers assented?

After a substantial amount of judicial precedent and academic input, we can now draw conclusions regarding when a court is likely to enforce such an agreement. Generally, a party seeking to enforce an arbitration provision in a click wrap or browse wrap contract must show that an offeree – whether the offeree wades through the TAC or not – will nevertheless be bound if he or she is on inquiry notice. E.g., Lipsett v. Popular Bank, No. 22-3193-cv, 2024 WL 111247 (2d Cir. Jan. 10, 2024). And when is there inquiry notice? The consensus is that this question turns on:

1) Whether a deliberate, affirmative act on the part of the offeree is required.
2) Whether the offeree must acknowledge having had the opportunity to review the TAC. 3) Whether all factors considered – website design, font, color, etc. – the arbitration provision is sufficiently conspicuous. See, e.g., Chabolla

v. Class Pass, Inc., 129 F.4th 1147 (9th Cir. 2025) (emphasizing importance of presentation and denying motion to compel); Goden v. JustAnswer, LLC, No. 24-2095 (9th Cir. Apr. 15, 2025) (same); Dhruva v. CuriosityStream, Inc., 131 F.4th 146 (4th Cir. 2025) (same but granting motion to compel).

- ***New Issues***

Although there will continue to be cases analyzing the way web pages deal with the issue of consent, the basic rules are likely in place. There are a few additional areas that will no doubt be litigated.

First, there is the question of when third parties, namely people other than the “clicker” or “browser,” are bound. Some cases have required arbitration even in attenuated circumstances. See McGinty v. Zheng, 2024 WL 4248446 (N.J. Sept. 20, 2024) (Uber Eats app approved by daughter bound her parents to arbitrate personal injury claim after automobile accident); Piccolo v. Great Irish Pubs, 2024 WL 3874700 (Fla. Cir. Ct. Orange Co. May 31, 2024) (booking trip through Disney + required arbitration of wrongful death case alleging food poisoning at Disney property restaurant); Jackson v. World Wrestling Entm't, Inc., 95 F. 4th 390, 392 (5th Cir. 2024) (sports ticket purchased by uncle required bound nephew to arbitrate). Additional cases will hopefully delineate a clear set of principles governing this issue.

Second, there is regulatory focus on so-called “negative option” agreements, i.e., arrangements which take effect or continue in effect absent affirmative action by an offeree. These include “free” trial periods and subscription renewals. A new FTC regulation addressing these arrangements took effect on May 14, 2025. See 16 CFR, Part 425. Among other things, it requires that cancellation be no more difficult than signing up.

Lastly, because recent cases have put increasing emphasis on the prominence of buttons which must be clicked after review of TAC, i.e., “click-wrap” buttons, it follows that browse wrap is increasingly outdated.

2. Substantive Unconscionability

- ***Historically***

The law relating to substantive unconscionability in the context of Wrap Agreements has been influenced by three factors:

- Developments in employment law;
- Dicta in AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); and
- Minimum fairness protocols by the American Arbitration Association (“AAA”), JAMS, and other arbitral organizations.

- ***Developments in Employment Law***

In Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), the Supreme Court enforced an arbitration provision in a case brought under the Age Discrimination in Employment Act (“ADEA”). While the Court opined that the Federal Arbitration Act (“FAA”) required Mr. Gilmer to enforce his statutory ADEA rights in accordance with his agreement to arbitrate, it made clear that he retained his contract defenses, including unconscionability. Post-Gilmer, the courts developed a five-part test. An agreement to arbitrate an employment dispute had to “(1) provide[ ] for neutral arbitrators, (2) provide[ ] for more than minimal discovery, (3) require[ ] a written award, (4) provide[ ] for all types of relief that would otherwise be available in court, and (5)[ ] not require employees to pay either unreasonable costs or any arbitrators' fees or expenses…” Cole v. Burns S., Int’l Sec. Servs., 105 F. 3d 1465, 1482 (D.C. Cir. 1997).

- ***Concepcion***

Starting in the mid-1990s, vendors began to include class action waivers in consumer arbitration agreements. Results were mixed with some courts striking down these provisions. See, e.g., Tillman v. Commercial Credit Loans, Inc., 362 N.C. 93 (2008) (waiver unconscionable); Discover Bank v. Super. Ct., 36 Cal. 4th 148 (2005) (same); Leonard v. Terminex Intern. Co. L.P., 854 So. 2d 529 (Ala. 2002) (same). But see, e.g., Blaz v. Belfer, 368 F. 3d 502, 504-505 (5th Cir. 2004) (not unconscionable.); Johnson v. West Suburban Bank, 225 F. 3d 366, 269 (3d Cir. 2000) (same).

From around 1995 until 2011, there was substantial commentary regarding whether consumer arbitration – and the use of class action waivers – ought to be subject to the same constraints as employment arbitration. Pro-consumer advocates favored explicit guardrails. “Pro-arbitration” commentators argued that the doctrine of substantive unconscionability would adequately prevent abuse.

The Supreme Court stepped into the breach in 2011 with AT&T Mobility LLC v. Concepcion. The Court held (five to four) that the FAA preempted California law which had found class arbitration waivers in consumer contracts unconscionable. Importantly, in addition to its endorsement of class action waivers, the Court discussed several pro-consumer provisions in the underlying agreement – provisions that echoed those developed in employment jurisprudence. These included minimal filing fees with AT&T covering other costs, locating hearings in locations convenient to the consumer, and a provision allowing the arbitrator to award any form of relief available in court. Id. at 337. Though dicta, the majority appeared to approve of these consumer-friendly provisions, suggesting that with them the AT&T agreement was not unconscionable. Id. at 352. Unsurprisingly, companies such as Sony, Netflix, and Microsoft conformed their Wrap Agreements to the Court's dicta.

- ***Minimum Fairness Standards***

Beginning in 1998, major providers of arbitration services took steps to forestall aggressive provisions that stepped outside the "safe harbor" model and risked a finding of unconscionability by adopting minimum standards for consumer arbitration. In general, they impose costs on the respondent apart from minimal filing fees, preserve the right to obtain all remedies available in court, and obtain discovery. Of course, some vendors and service providers continue to push the envelope. But since Concepcion, clauses not complying with their protocols are increasingly rare. Hence, provisions apt to be invalidated because of unconscionability are now rarely encountered.

- ***Current Issues***

That said, recent experience recalls the law of unintended consequences. The prohibition of class and collective arbitration, combined with the requirement that respondents pay the bulk of the costs, have resulted in the filing of so-called "mass arbitrations" with a single law firm or group of firms filing hundreds or thousands of claims, each requiring the payment of administrative costs, which in the aggregate can be in the millions of dollars. For example, Samsung is facing some 35,000 claims and an aggregate administrative fee of over $4 million. See Wallach v. Samsung Electronics Am., Inc., 196 F. 4th 609 (7th Cir. 2024). This issue has resulted in concern in the business community. In addition, major providers are revising their minimum standards and/or issuing specific protocols on mass arbitration filings. These issues will likely be litigated in various forums.