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Second Circuit reverses district court, ruling that website interface provided reasonable notice of arbitration agreement and that consumer assented to that agreement through transactional conduct

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Takeaway: Technology advances. Business processes evolve. Internet transactions become increasingly ubiquitous. Contract formation, however, remains an old-fashioned concept. An Internet consumer must, at a minimum, be on inquiry notice of terms to be bound by them. The best option for showing assent is "clickwrap," where a consumer must click "I agree" after being presented with terms to proceed. With "browsewrap," where the consumer need not—but has the option to—access terms by hyperlink, the question of assent often focuses on conspicuousness. *See Internet contracts – beyond clickwrap and browsewrap* (April 14, 2022); *see also Internet terms of use: Ninth Circuit enforces arbitration agreement accessible through browsewrap hyperlink* (August 31, 2020). In *Edmundson v. Klarna, Inc.*, 85 F.4th 695 (2d Cir. 2023), the Second Circuit recently analyzed a "browsewrap"-like contract formation process, ruling that the consumer had reasonable notice of the terms containing the arbitration agreement and that she manifested her assent to those terms through her online transactional conduct. The panel reversed the district court's order denying the defendant's motion to compel arbitration while at the same time acknowledging that the defendant could have done a better job in terms of presenting its Internet terms of service.

Defendant Klarna, Inc. ("Klarna"), is a large "buy now, pay later" service that enables consumers to make online purchases in four installments without being charged any fees or interest. *Edmundson*, 85 F.4th at 698-699. When buying online from one of Klarna's merchant-partners, customers are asked whether they want to make a traditional payment or if they would rather use Klarna's "Pay in 4" service. If a consumer selects the "Pay in 4" option, the consumer is then prompted to provide various forms of information, including debit card information.

Plaintiff Najah Edmundson is a former Klarna customer who lives in Connecticut. She made online purchases using the "Pay in 4" service. As per Klarna's service terms, Klarna later automatically deducted installment payments from Ms. Edmundson's checking account. Because she did not have sufficient funds in her account to satisfy the payments, however, she incurred overdraft fees from her bank, amounting to $70.

Ms. Edmundson filed a putative class action against Klarna, alleging that Klarna targets poor people but does not provide notice about the dangers of incurring overdraft fees. She asserted claims for common law fraud and violations of the Connecticut Unfair Trade Practice Act.

Klarna moved to compel arbitration, arguing that its service terms contain a mandatory arbitration provision and class action waiver, and further asserting that Ms. Edmundson agreed to those terms

based on her navigation of three separate user interfaces. But the district court declined to compel arbitration, ruling that Ms. Edmundson was never provided "reasonably conspicuous notice" of and never "unambiguously manifested" her assent to those terms. *Id*. at 698 (citing *Edmundson v. Klarna, Inc*., 642 F. Supp. 3d 256, 260 (D. Conn. 2022)).

Klarna appealed the district court's order under the Federal Arbitration Act (9 U.S.C. § 16), which authorizes a direct appeal of an interlocutory order denying a motion to compel arbitration. Focusing on just one of the user interfaces navigated by Ms. Edmundson (the "Klarna Widget"), the Second Circuit panel reversed and remanded with the instruction that Klarna's motion to compel arbitration be granted. Ms. Edmundson was presented with the Klarna Widget after she was prompted to disclose her debit card information. After she clicked on the "Continue" button, she arrived at the Klarna Widget interface to finalize her on-line purchase, which the Court of Appeals described as follows:

"From top to bottom, the Klarna Widget instructed the user to 'Review your plan' and listed details about the 'Payment plan,' including the amount of the four equal payments, the amount 'Due today,' and the total cost of the transaction. The Widget then set forth the statement 'I agree to the payment terms' and provided a button marked 'Confirm and continue.' The phrase 'payment terms' was underlined, bolded, and served as a hyperlink, which, when clicked, would display the … 'Pay Later in 4 Agreement' … Until the purchaser clicked on 'Confirm and continue,' she was 'free to exit the Klarna widget at any time ... without incurring any fee or penalty.' When Edmundson clicked on 'Confirm and continue,' she completed her purchase …"

Id. at 699-700 (citations omitted).

Klarna's "Pay Later in 4 Agreement" provided that users were subject to the "Mandatory Arbitration of Disputes" and included another hyperlink to the arbitration provision in Klarna's Services Terms. *Id*. at 700.

The panel observed that the issue of contract formation is one governed by state contract law. While the parties agreed that Connecticut law controlled, they also acknowledged that "traditional contract formation law does not vary meaningfully from state to state, …"*Id*. at 702.

Evaluating caselaw pertaining to the formation of web-based contracts, the panel stated that, in a case such as Ms. Edmundson's, where there is no evidence that the online consumer had actual knowledge of contractual terms, the user will still be bound to the terms if (1) a "reasonably prudent" person would be on "inquiry notice" of the terms, and (2) the consumer "unambiguously manifests assent" through conduct providing that assent. *Id*. at 703 (citations omitted). Both elements are analyzed by an objective, reasonable person standard and usually involve "fact-intensive" inquiries based on the consumer's online transactional experience. *Id*. (citations omitted).

The only issue on appeal was whether Ms. Edmundson was provided with reasonably conspicuous notice and whether she unambiguously manifested her assent to the terms when she clicked "Confirm and continue" to finalize her online purchase. There was no dispute as to whether the "Pay Later in 4 Agreement" referred to and incorporated the mandatory arbitration provision and class action waiver, and there was no dispute as to whether the arbitration agreement covered Ms. Edmundson's claims. Reviewing the undisputed transactional facts, the panel concluded that Klarna's notice was reasonably conspicuous and that Ms. Edmundson unambiguously manifested her assent. The panel did note that the Klarna Widget could have done a better job providing notice: "To be sure, the Klarna Widget has some deficiencies. For example, it could be argued that blue font is a better signal to consumers that

text contains a hyperlink." *Id*. at 707. But the panel concluded "none of these deficiencies are fatal to our finding that, under the totality of the circumstances, the Klarna Widget provided, as a matter of law, reasonably conspicuous notice of Klarna's terms, including the mandatory arbitration provision." *Id*. at 707.

The panel also noted that the Klarna Widget was not ideal in terms of the manifestation of assent issue, either: "We recognize that some of Edmundson's arguments are not unreasonable. To be sure, Klarna could have chosen to include clearer instructions, such as 'By selecting 'Confirm and continue,' I agree to the terms set forth under this hyperlink: payments terms.'" *Id*. at 708. But the law "only required that the interface 'make clear' to the reasonable internet user that a specific 'click' signifies assent" and "[t]he Klarna Widget satisfies this burden." *Id*. at 708-709.