SEYFARTH SHAW

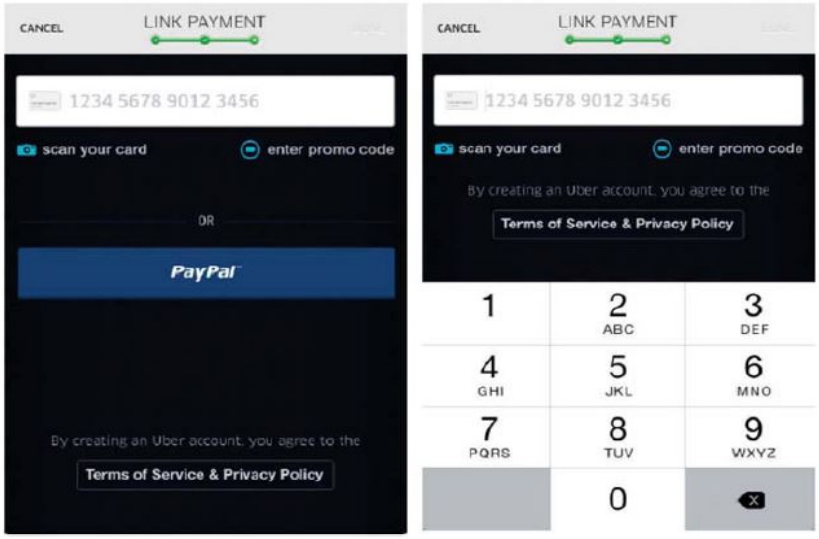
# One Minute Memo®

## First Circuit Invalidates Arbitration Clause in Uber's User Agreement

*By Caleb J. Schillinger*

***Executive Summary and Takeaway.*** User agreements for websites and apps have become increasingly prevalent in recent years, and courts have had to adapt traditional rules of contract interpretation to the new digital frontier. On Monday, June 25, 2018, the First Circuit in *Cullinane v. Uber Technologies, Inc.* reversed a district court decision enforcing an arbitration clause contained in the terms of service for Uber's smartphone app, finding that those terms were not sufficiently "conspicuous" for a user to know that he or she had agreed to be bound by them. The First Circuit's decision continues a trend of judicial hostility to arbitration clauses, and is notable for its scrutiny of the record below: the court studied in minute detail the design and content of the registration screen containing a hyperlink to the terms of service—including the size, shape, color, font, and location of the hyperlink—and concluded that the link to the terms of service failed "to grab the user's attention." Companies with similar user agreements governed by Massachusetts law or that could potentially apply to Massachusetts consumers should review their websites and/or apps to ensure that their platforms disclose any terms of use in a clear and conspicuous manner in relation to the rest of the content on the screen.

***Additional Background.*** To request a ride via the Uber app, a customer must first register with Uber by creating an account. As part of the registration process, users are shown a screen that requests their payment information and notifies them that by creating an account they are agreeing to Uber's Terms of Service and its Privacy Policy:



The words "Terms of Service & Privacy Policy" are in a clickable box that includes a hyperlink. Upon clicking on that hyperlink, the user is directed to a screen with two other links: one to Uber's Terms of Service, and the other to its Privacy Policy. The user can view either document by clicking on the appropriate link.

At the end of the registration process, the user clicks on the button in the top-right-hand corner of the screen that says "DONE." (As shown above, the button is grayed out and unclickable until the user enters her payment information.) Users cannot complete the process without completing each of the registration steps and clicking the "DONE" button on the final screen. They can, however, complete the process without clicking on the "Terms of Service & Privacy Policy" box and without having accessed or read the Terms of Service or the Privacy Policy.

Uber's Terms of Service state that it "constitute[s] a legal agreement between [user] and Uber. . . . In order to use the Service [] and the associated Application [], you must agree to the terms and conditions that are set out below." It also states that, by using any of Uber's services, the user "expressly acknowledge[s] and agree[s] to be bound by the terms and conditions of the Agreement." Those terms and conditions include an arbitration provision containing a class action waiver: "You acknowledge and agree that you and [Uber] are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding."

In 2014, plaintiffs filed a putative class action against Uber in Massachusetts state court on behalf of themselves and other users of Uber's ride-hailing service in the Boston area. Plaintiffs accused Uber of overcharging them for travel to and from Boston Logan Airport and East Boston by imposing fictitious fees hidden in charges for legitimate local tolls. Their Second Amended (and operative) Complaint asserted a claim for unfair and deceptive acts in violation of the Massachusetts consumer protection statute (Mass. Gen. Laws c. 93A), and a common law unjust enrichment claim. Uber removed the case to the U.S. District Court for the District of Massachusetts pursuant to the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d), and filed a motion to compel arbitration and to stay or dismiss the case, relying on the arbitration clause in the Terms of Service.

***The District Court Compels Arbitration.*** On July 8, 2016, the district court granted Uber's motion to compel arbitration and dismissed the action. As the district court summarized, "[i]n online adhesion contracts, the analysis under Massachusetts law . . . . as to enforceability boils down to basic contract theory of notice and informed assent with respect to the terms in question." The district court explained that the analysis does not differ depending on the type of online adhesion contract at issue -- whether it is a "*browsewrap*" agreement (where "the user does not see the contract at all but in which the license terms provide that using a [web]site constitutes agreement to a contract whether the user knows it or not"); "*clickwrap*" agreement ("in which website users are required to click on an 'I agree' box after being presented with a list of terms and conditions of use"); "*scrollwrap*" agreement (requiring "users to physically scroll through an internet agreement and click on a separate 'I agree' button in order to assent to the terms and conditions of the host website"); or "*sign-in-wrap*" agreement (that presents the user "with a button or link to view terms of use," and that "usually contain language to the effect that, by registering for an account, or signing into an account, the user agrees to the terms of service to which she could navigate from the sign-in screen").

The district court held the Terms of Service, including its arbitration provision, to be enforceable because "[t]he process through which the plaintiffs established their accounts put them on reasonable notice that their affirmative act of signing up also bound them to Uber's Agreement." In particular, the district court concluded that the notice on Uber's registration screen that creation of an account bound the user to Uber's Terms of Service was "prominent enough to put a reasonable user on notice of the terms of the Agreement." The district court also concluded that plaintiffs had manifested their agreement to the Terms of Service because "[t]he language surrounding the button leading to the Agreement is unambiguous in alerting the user that creating an account will bind her to the Agreement," and "the word 'Done,' although perhaps slightly less precise than 'I accept,' or 'I agree,' makes clear that by clicking the button the user has consummated account registration, the very process that the notification warns users will bind them to the Agreement."

***The First Circuit Reverses.*** On appeal, plaintiffs challenged the district court's conclusions that the Terms of Service was reasonably communicated to and accepted by plaintiffs. The court of appeals determined that users were not reasonably notified of the Terms of Service because of how the hyperlink to the terms was displayed on the registration screen. Emphasizing that the conspicuousness of the link "may not be read in a vacuum," but "must be contextualized," the court scrutinized the appearance and placement of the link in relation to the other buttons and visual elements on the screen:

- "Uber's 'Terms of Service & Privacy Policy' hyperlink did not have the common appearance of a hyperlink. While not all hyperlinks need to have the same characteristics, they are 'commonly blue and underlined.' . . . Here, the 'Terms of Service & Privacy Policy' hyperlink was presented in a gray rectangular box in white bold text. Though not dispositive, the characteristics of the hyperlink raise concerns as to whether a reasonable user would have been aware that the gray rectangular box was actually a hyperlink."

- "[T]he overall content of the [registration screen] show[s] that the 'Terms of Service & Privacy Policy' hyperlink was not a conspicuous term . . . . The screen[] contained other terms displayed with similar features. For example, the terms 'scan your card' and 'enter promo code' were also written in bold and with a similarly sized font as the hyperlink. . . . [The screen] also included the words 'CANCEL' and 'DONE," -- the latter being barely visible until the user had entered the required payment information -- in all capital letters and dark colored font. . . . The inclusion of the additional payment option and the placement of a large blue PayPal button in the middle of the screen were more attention-grabbing and displaced the hyperlink to the bottom of the screen."

In short, it was the "design and content" of the screen that led the court of appeals to conclude that the Terms of Service hyperlink "was not conspicuous." The court noted that "[e]ven though the hyperlink did possess some of the characteristics that make a term conspicuous, the presence of other terms on the same screen with a similar or larger size, typeface, and with more noticeable attributes diminished the hyperlink's capability to grab the user's attention. If everything on the screen is written with conspicuous features, then nothing is conspicuous."

Even less conspicuous to the court of appeals was the phrase "By creating an Uber account, you agree to the." The court noted that "[t]his notice was displayed in a dark gray small-sized non-bolded font against a black background," and as a result, "[t]he notice simply did not have any distinguishable feature that would set it apart from all the other terms surrounding it."

Because plaintiffs were not reasonably notified of the Terms of Service, it followed that they also did not provide their unambiguous assent to those terms. The court of appeals reversed the district court's order compelling arbitration and dismissing the action, and remanded the case for further proceedings consistent with its opinion.

If you have any questions, please contact Caleb Schillinger at *cschillinger@seyfarth.com.*

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