

New York State Court Declines to Compel Arbitration, Cites Purported Ambiguities in Mobile Contracting Process

New Media & Technology Law Blog on June 18, 2018

Courts are increasingly taking a magnifying glass to electronic contracting processes, particularly how the presentation of the terms of service and call to action are displayed. As such, companies might take a second look at their own user registration and e-commerce purchase processes to ensure they offer reasonably conspicuous notice of the existence of contract terms and obtain manifestation of assent by the user to those terms. Courts will generally enforce clickwrap style agreements as long as the layout and language of the site or mobile app give the user reasonable notice that a click will manifest assent to an agreement. Last year, the Second Circuit, in the notable *Meyer* opinion, [blessed Uber's mobile contracting process](#), but in considering a similar Uber platform, a New York state court late last month declined to compel the arbitration of user claims due to what the court considered an "ambiguous registration process." ([Ramos v. Uber Technologies, Inc.](#), 2018 NY Slip Op 28162 (N.Y. Sup. Ct. Kings Cty. May 31, 2018)). Such conflicting rulings highlight the importance of web design in determining if a service's terms are deemed enforceable.

In this case, a user of UberWAV (which is Uber's platform to connect disabled passengers with existing accessible vehicles) claimed that Uber violated certain state and local laws in allegedly failing to provide timely on-demand service. In response, Uber moved to compel arbitration according to the terms and conditions which included an arbitration clause. In determining whether the parties necessarily agreed to submit their disputes to arbitration, the court looked closely at the mobile contracting process in question.

As outlined by the court, the contracting process was a multistep process. After plaintiff downloaded a version of the iOS Rider App, she encountered the initial “CREATE AN ACCOUNT” screen where she could choose to connect via Facebook credentials or by manually typing in an email, mobile number and desired password. The second screen, named “CREATE A PROFILE” instructed the user to enter a first and last name. The final screen was titled “ADD PAYMENT,” where the user entered payment details. Below the input fields for the credit card information was the following: “By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy” (the words “Terms & Conditions and Privacy Policy” were contained in a clickable rectangular box, which would bring users to a screen where the terms could be viewed). To finish the process the applicant had to click on a blue button labeled “DONE.”

In seeking to compel arbitration, Uber argued that: (1) plaintiff had “more than sufficient” notice of the Terms and “unambiguously indicated her assent to them,” pointing to last year’s Second Circuit *Meyer* opinion blessing Uber’s similar “uncluttered” contracting interface; and (2) the hyperlink to the terms in the instant case was presented in a clickable box whose prominent location signified its importance. In opposition, plaintiff countered, among other things, that she was not given conspicuous notice of the terms during the contracting process, that the hyperlink to the terms was “less visible” than other words on the screen, and that the placement of the rectangular box containing the hyperlink to the terms was not in close enough proximity to the DONE button.

While Uber's contractual presentation in this instance arguably would be deemed enforceable by a fair number of courts, the New York state court found enough ambiguity to decline to enforce the arbitration clause. Specifically, the court stated that the language in the final screenshot, which states that "By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy" was "on its face ambiguous" because a user registrant might reasonably believe that the phrase "Terms and Conditions" pertains to letting Uber use the registrant's Facebook account to register, as opposed to referencing Uber's own terms and conditions (query whether the additional of a single word, "*Uber's* Terms and Conditions" would have passed muster in the court's view). Additionally, the court pointed to the final screen where it found no language instructing users that the rectangular box with the phrase "Terms & Conditions and Privacy Policy" would take them to another screen containing the terms, and also disagreed with Uber's argument that the framing of the phrase "Terms & Conditions and Privacy Policy" within a rectangular box gave reasonable notice of its importance. Ultimately the court stated that the registration process "[did] not compel the registrant to see the subject terms and conditions and does not compel the registrant to indicate in some fashion its acceptance of the subject terms and conditions, such as, by clicking an acceptance button."

The court's examination of Uber's contracting process could be fairly characterized as more rigid than the Second Circuit's *Meyer* opinion, which was sprinkled with statements that suggested reasonable smartphone users understand that registering with a new service requires agreement with a set of terms and conditions and that such terms are typically accessible via hyperlink in the final screen before completing a transaction. Perhaps the court's scrutiny was heightened because it was determining the enforceability of an arbitration clause, as opposed to another aspect of the terms and conditions. Still, the *Ramos* decision accentuates the need for attorneys to be involved in the decisions underlining the design of online contracting processes and presentation of terms so entities can attain adequate user notice and assent that would satisfy even the most exacting scrutiny.

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