Proskauer

Thoughtful Presentations of Terms of Use Crucial for Enforceability

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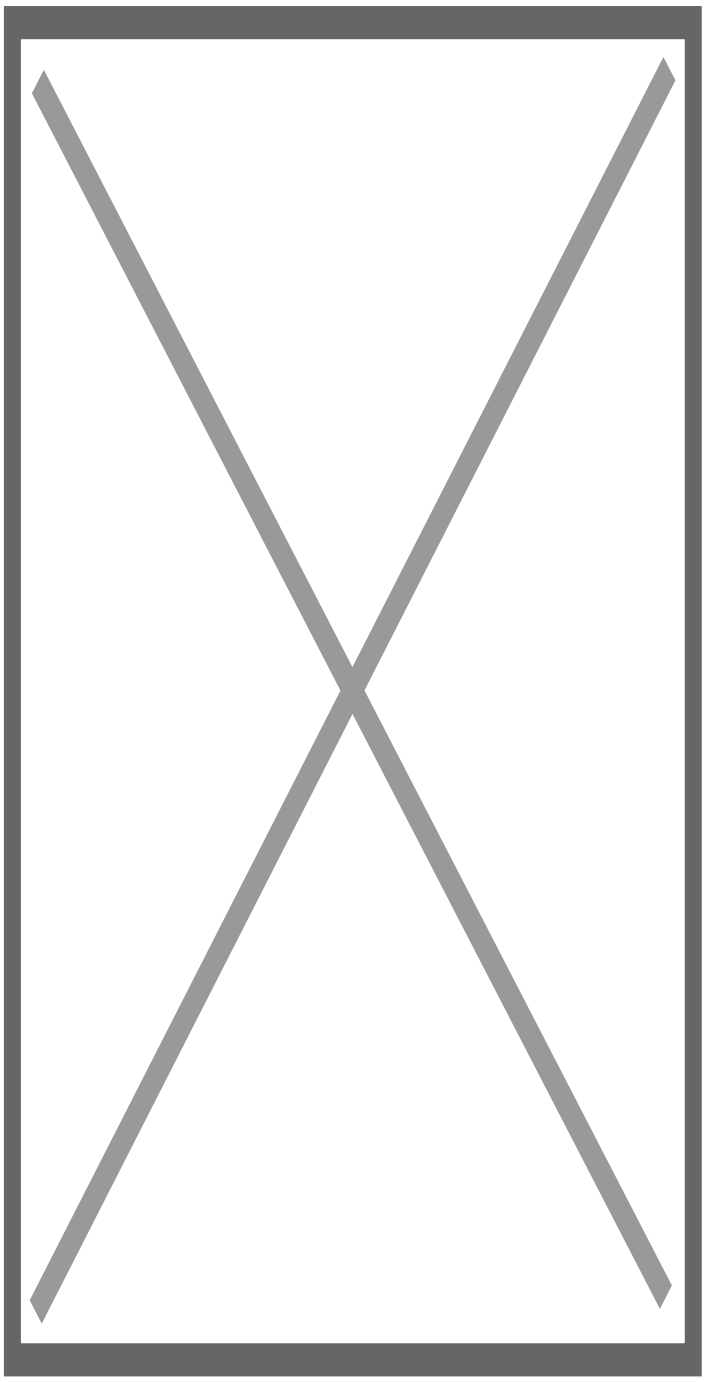
Many online services feature comprehensive terms of use intended to protect their business from various types of risks. While it is often the case that a great deal of thought goes into the creation of those terms, frequently less attention is paid to how those terms are actually presented to users of the service. As case law continues to demonstrate, certain mobile and website presentations will be held to be enforceable, others will not. Courts continue to indicate that enforceability of terms accessible by hyperlink depends on the totality of the circumstances, namely the clarity and conspicuousness of the relevant interface (both web and mobile) presenting the terms to the user. In a prior post about electronic contracting this year, we outlined, among other things, the danger of having a cluttered registration screen. In this post, we will spotlight five recent rulings from the past few months where courts blessed the mobile contracting processes of e-commerce companies, as well as one case which demonstrates the danger of using a pre-checked box to indicate assent to online terms.

The moral of these stories is clear – the presentation of online terms is essential to enhancing the likelihood that they will be enforced, if need be. Thus, the design of the registration or sign-up page is not just an issue for the marketing, design and technical teams – the legal team must focus on how a court would likely view a registration interface, including pointing out the little things that can make a big difference in enforceability. A failure to present the terms properly could result in the most carefully drafted terms of service ultimately having no impact on the business at all.

Dohrmann v. Intuit, Inc.

In *Dohrmann v. Intuit Inc.*, No. 20-15466 (9th Cir. Aug. 11, 2020) (unpublished), plaintiffs brought a putative class action alleging various state law claims against Intuit, Inc. ("Intuit"), the publisher of "TurboTax" online tax preparation software. The lower court denied Intuit's motion to compel arbitration, finding that the presentation of Intuit's terms fell "below the gold standard" for conspicuousness, noting, for example, that the hyperlinks were in blue, but not underlined to make them stand out to the user. On appeal, the Ninth Circuit reversed. [Note: On September 8, 2020, the plaintiffs filed a petition for a panel rehearing or rehearing en banc.]

During the relevant timeframe, a user accessing a TurboTax account on the web encountered this sign-in screen:



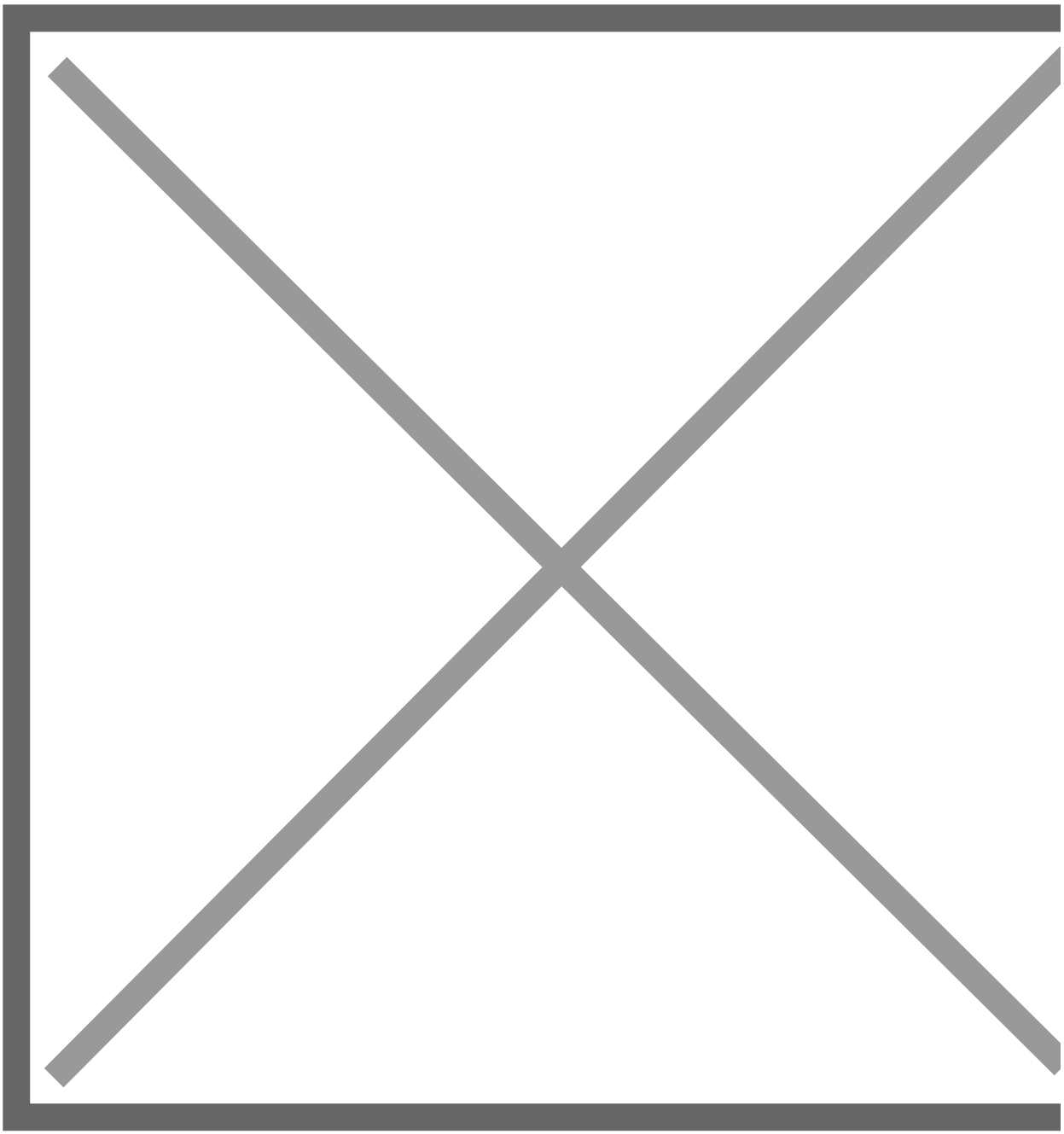
Directly beneath the call-to-action language, the terms “Turbo Terms of Use,” “TurboTax Terms of Use” and “Privacy Statements” appeared, each as light blue hyperlinks which, if clicked, directed the user to a new webpage (with the “TurboTax Terms of Use” link leading to a document containing the relevant arbitration clause). In finding the terms enforceable against the plaintiffs, the Ninth Circuit found that the “relevant warning language and hyperlink to the Terms of Use were conspicuous – they were the only text on the webpage in italics, were located directly below the sign-in button, and the sign-in page was relatively uncluttered.” The court concluded by stating that TurboTax’s website “provided sufficient notice to a reasonably prudent internet user of its Terms of Use, which include an arbitration clause.”

Interestingly, one judge on the panel dissented, noting, among other things, the potentially confusing nature of Intuit having listed two separate sets of hyperlinked terms, the Turbo Terms of Use and the TurboTax Terms of Use ("More than one terms-of-use link on a sign-in screen by itself is enough to confound a reasonably prudent user"). In fact, the lower court had also pointed out the "confounding" nature of having links to two different agreements, particularly when only the latter contained the arbitration agreement at issue. The dissent also took issue with the light color of the hyperlinks and presence of blue in the sign-in box that further obscured the presentation.

Even though Intuit prevailed on its motion to enforce its terms and compel arbitration, there are clear lessons to learn from this case. Companies should take another look at their consumer registration or sign-in screens to remove any potentially extraneous hyperlinks and ensure the color scheme reinforces the conspicuous presentation of the call-to-action language and terms.

Hidalgo v. Amateur Athletic Union

In another case, the Amateur Athletic Union of the United States, Inc. ("AAU"), a non-profit sports event organization, moved to compel arbitration on the various claims brought by the plaintiff related to a data breach suffered by AAU. Examining the electronic contracting process, presented through a smart phone interface, the court granted the motion, finding the plaintiff assented to the terms and conditions when he checked the box indicating that he was aware of the existence of the various online agreements that bound AAU members. (*Hidalgo v. Amateur Athletic Union of the United States, Inc.*, No. 19-10545 (S.D.N.Y. June 16, 2020)).



As configured above, before an applicant submits an application by clicking the green “Continue” button, he or she must check a box that appears to the immediate left of the words “*I understand and agree to all terms and conditions listed.” The check box and the accompanying text appear at the bottom of a yellow box in the application immediately below the bolded heading “Terms and Conditions — Digital Signature.” The section also informs the users that: “Membership in any category may be granted only after an application is submitted and approved. By submitting an application, the applicant agrees to comply with the provisions of the AAU Code, including its constitution, bylaws, policies, procedures, regulations, and rules.” The final phrase is hyperlinked in blue text and takes a user to a separate AAU Code Book screen. Further down the page, the user is given additional notice that submitting an application is an acknowledgement of the terms.

When the plaintiff applied for membership he necessarily checked the box in the “terms and conditions” section as an AAU application cannot be processed without the user clicking the box.

The parties disputed whether the plaintiff had “reasonable notice” of the arbitration provision contained in the AAU Code Book sufficient for the plaintiff to manifest assent to the terms of the arbitration provision by virtue of completing the AAU membership application. In this instance, the court found that the plaintiff had “reasonable notice” that by completing his application for AAU membership, he would be bound by the contractual language contained in AAU Code Book, including the binding arbitration provision. The court stated that the application page was still “relatively uncluttered,” the relevant portion of the application page was aptly labeled “Terms and Conditions—Digital Signature” in a large bold font and shaded in a “distinctive yellow color,” which contrasted with the AAU Code links marked in blue text. Commenting on the entire layout, the court also pointed out:

> “The “terms and conditions” box is also prominently placed squarely in the middle of the very end of the application, which is a conspicuous part of the application because it is the last place an applicant looks before finishing the application process.”

> "[T]he check box in which a user manifested assent to the terms and conditions contained in the AAU Code Book appeared in close proximity to the two hyperlinks to the AAU Code Book and all were contained within the box plainly labeled "Terms and Conditions — Digital Signature." Notice of the terms and conditions of membership, including being bound by the contents of the AAU Code Book was also temporally coupled to the plaintiff's application because notice appeared on the application page itself…."

Arguably, the screen in the *Hidalgo* case is a little busy. Still, the court ruled that the plaintiff was given reasonable notice of the terms, emphasizing the checkbox that compelled the user to manifest assent to the hyperlinked terms before completing the application. While a checkbox is not mandatory for contract formation purposes, it was certainly helpful for the site in this instance.

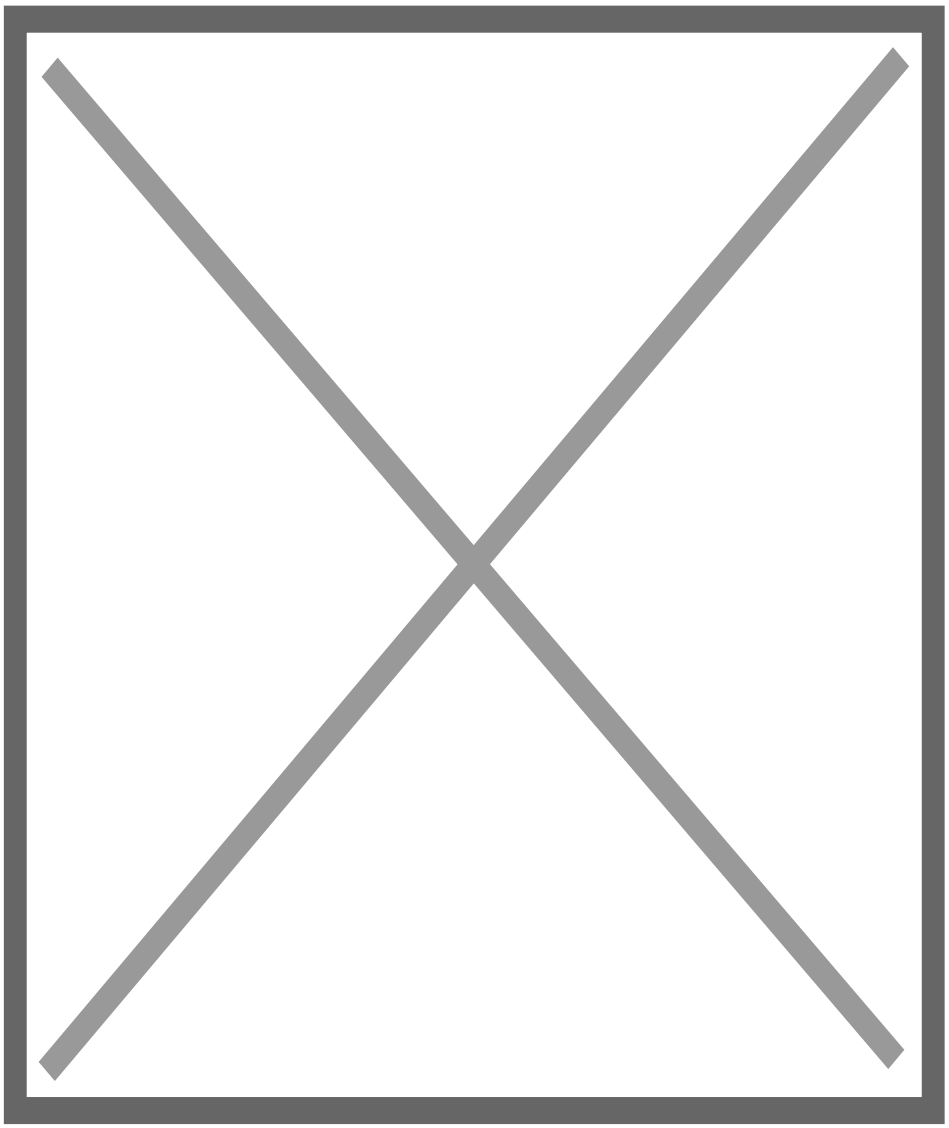
The court also rejected the plaintiff's argument that the website was not optimized for mobile devices and that, viewing the page on an iPhone, he had to move and pinch the screen to view the full application. The court found that the plaintiff still viewed the checkbox signaling agreement to the terms and was on reasonable notice that becoming a member required agreement to such terms, even if it required him to zoom in and out of certain text on the smartphone screen to complete the application.

> "The plaintiff points to no authority for the proposition that a reasonably prudent smartphone user does not have inquiry notice of terms and conditions when the user physically checks a box indicating that the user understands and agrees to the terms and conditions."

Miracle-Pond v. Shutterfly

In a third case examining the conspicuousness of online terms, the plaintiff brought biometric privacy claims under the Illinois Biometric Information Privacy Act ("BIPA") against the photo storage service, Shutterfly, Inc. ("Shutterfly"), which allegedly used facial recognition software to extract biometric identifiers for photo tagging and related functions in violation of the BIPA. In response, Shutterfly moved to compel arbitration, which the court granted. (*Miracle-Pond v. Shutterfly, Inc.*, No. 19-04722 (N.D. Ill. May 15, 2020)).

In 2014, when plaintiff registered for a Shutterfly account via the Android app, she encountered this final screen:



As shown, the page directed users to the Terms of Use and required users to click “Accept” to complete the registration. In May 2015, Shutterfly amended the terms to add an arbitration provision. The original terms included a provision that stated Shutterfly could amend the terms “from time to time by posting a revised version.” Every version of Shutterfly’s terms since May 2015 has included an arbitration provision and such revised terms were in effect when the plaintiff made multiple purchases in the ensuing years before the lawsuit filed in June 2019.

Plaintiff claimed that she never assented Shutterfly’s terms when she first formed her Shutterfly account. Shutterfly countered that plaintiff had assented to the terms when she opened her account and was bound by the later 2015 amendment to the terms adding an arbitration clause.

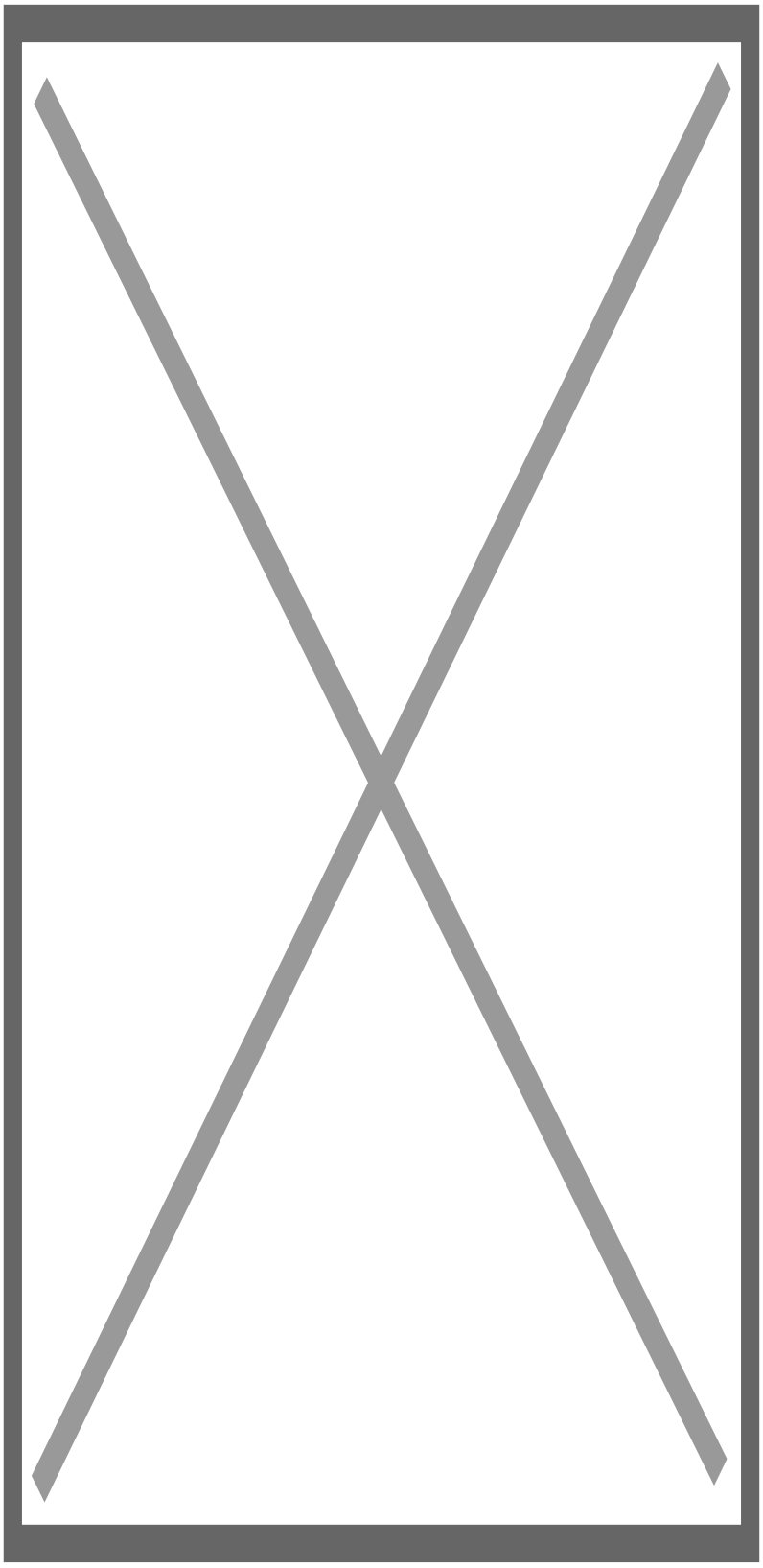
In enforcing the terms, the court rejected the plaintiff's semantic argument that she merely agreed that her "use" of Shutterfly's website and services would comply with the terms, not that she would be bound by them and that the call to action language never expressly stated that by clicking "Accept," she was also agreeing to the terms. The court deemed the distinction "largely irrelevant":

> "[B]ecause Shutterfly's 'app contained a clear and conspicuous statement that … a user agreed to the Terms of Service and Privacy Policy' by clicking a link or pressing a button, a reasonable user who completes that process would understand that she was manifesting assent to the Terms."

Additionally, the court rejected plaintiff's argument that the arbitration clause was unenforceable because the terms were unilaterally amended to include such a provision. In following precedent, the district court found that Illinois courts have "repeatedly recognized" the enforceability of arbitration provisions added via a unilateral change-in-terms clause, as long as "the parties agree that one party may unilaterally modify the terms of the contract." The court further found that the plaintiff had agreed, per the terms, that her continued use of Shutterfly's services would communicate her assent to the most recent version of the terms posted online at the time of her use (and that plaintiff had made multiple purchases following Shutterly's amendment of the terms to include an arbitration clause).

Peter v. DoorDash

In another case, *Peter v. DoorDash, Inc.*, No. 19-06098 (N.D. Cal. Apr. 23, 2020), the plaintiffs brought mobile privacy claims against food delivery service DoorDash, Inc. ("DoorDash"). In response, DoorDash moved to compel arbitration per its online terms. During the account registration process, the plaintiffs entered their names, email addresses, phone numbers, and passwords on a sign-up screen. To complete the process and place an order, they clicked a "Sign Up" button. Below that button was a statement reading: "By tapping Sign Up, Continue with Facebook, or Continue with Google, you agree to our Terms and Conditions and Privacy Statement." The words "Terms and Conditions" were hyperlinked in blue text. [See image below]



Plaintiffs argued that the parties never reached a valid, binding contract because DoorDash failed to provide reasonable notice of the terms because the text notifying users about the existence of the terms was “displayed as a gray font on a lighter-shade of gray background” and the font was “unreasonably small,” particularly on a mobile screen.

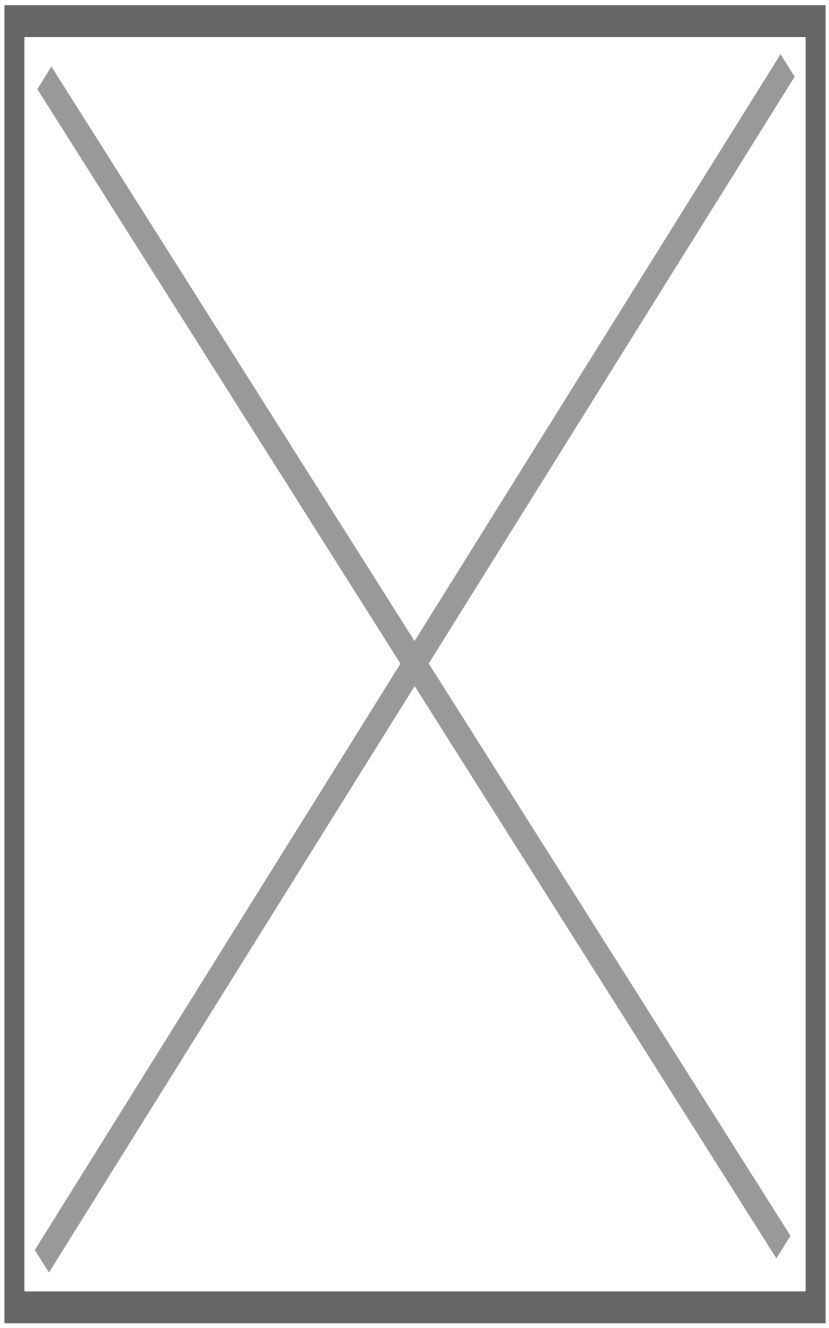
To decide the question, the court had to determine whether the plaintiffs had inquiry notice of the terms based the design and content of the website and the agreement's webpage.

In enforcing the terms, the court followed the Second Circuit's *Meyer* decision (which was decided under California law). In *Meyer*, the Second Circuit concluded that a reasonable user would know that by clicking the "Register" button on the "uncluttered" account registration screen on a mobile app, the user was agreeing to the terms and conditions accessible via a conspicuous hyperlink. As the court noted, the DoorDash sign-up page looked "markedly similar" to the page approved by *Meyer*, with the screens being "similarly uncluttered and wholly visible" and the call to action language located close to the sign-up button. Ultimately, the California district court granted the motion to compel arbitration and ruled that the plaintiffs were bound by the terms.

Babcock v. Neutron Holdings

In *Babcock v. Neutron Holdings, Inc.*, No. 20-60372 (S.D. Fla. Apr. 13, 2020), the plaintiff suffered personal injuries after renting an electric scooter or "e-scooter" from defendant Neutron Holdings, Inc. (*d/b/a* Lime) ("Lime"). Lime moved to compel arbitration based upon the user agreement, stating that the plaintiff was on inquiry notice of the user agreement when she created an account. The plaintiff countered that the arbitration provision was unenforceable under California law because she was never put on reasonable notice of user agreement containing the arbitration provision.

Under Lime's mobile contracting process, before a user can rent a Lime e-scooter, the user must download the Lime app, which prompts a user to create an account and agree to Lime's user agreement. After entering basic user information, the user is directed to the sign-up page shown below bearing a notice that states: "By tapping 'I Agree', I confirm that I am at least 18 years old or other legal age of majority, and that I have read and agreed to Lime's **User Agreement** and that I have read **Privacy Note**."



The issue before the court was whether plaintiff had inquiry notice of the user agreement by virtue of the blue boldface hyperlink to the user agreement's terms, which appeared directly above the "I Agree" button that plaintiff tapped to finalize her account registration. While the court stated that a user could not be bound by "inconspicuous contractual provisions" of which she was "unaware" and that were "contained in a document whose contractual nature was not obvious," it found that Lime had provided reasonable notice in this instance:

> "Here, the Court finds that the blue boldface hyperlink to the User Agreement's terms (where the user could read the full Arbitration Provision), combined with the unambiguous warning that "[b]y tapping 'I Agree,'" the user confirms that he or she "read and agreed to Lime's User Agreement," is conspicuous enough to put a reasonably prudent smartphone user on inquiry notice of the Arbitration Provision."

The court went further to highlight the orderly design of the final sign-up screen presenting the terms. It stated the notice to users about the "User Agreement" was "conveniently shown at the page's center in large black boldface font" and pointed out how the words were "larger than any other on the page" and how the explanatory language explaining the import of clicking "I Agree" was "the only full sentence on the entire sign-up page" and that the terms were hyperlinked in blue boldface, signifying that they are links.

The court's final take on Lime's user interface encapsulates the lessons from the Second Circuit's Meyer decision of how prudent web design enhances enforceability:

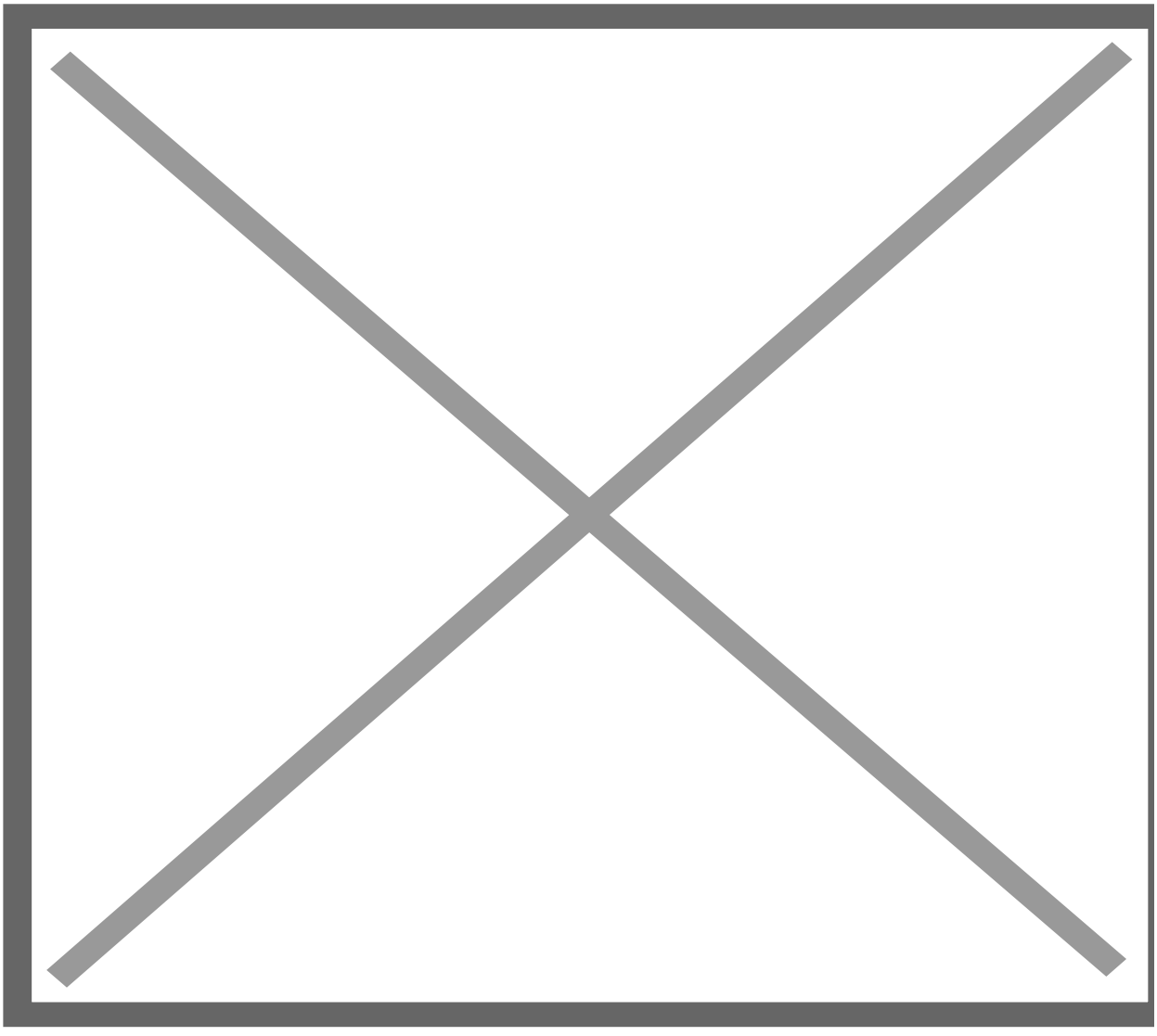
> "Taken together, the large black boldface User Agreement title, the non-bold black User Agreement acknowledgement, the blue boldface User Agreement hyperlink, and the lime-green 'I Agree' confirmation button create a user friendly display. The assortment of contrasting colors, and bold and non-bold fonts, combine with empty white space to visually separate each piece of information so that the user clearly understands that by tapping 'I Agree,' he or she is agreeing to be bound by the User Agreement's terms, which are readily accessible by tapping on the blue boldface hyperlink."

Rojas v. GoSmith

In contrast, one recent dispute highlights that an online service may risk having its terms deemed unenforceable when it fails to provide reasonable notice of the existence of terms of service or, in this instance, uses pre-checked boxes to obtain the user's assent to the terms.

In *Rojas v. GoSmith, Inc.*, No. 17-281 (N.D. Ind. Feb. 20, 2020), the plaintiff brought mobile privacy claims against GoSmith, Inc. ("GoSmith"), a lead generation service, after allegedly receiving multiple unsolicited text messages. GoSmith moved to compel arbitration based on an arbitration provision contained in its terms; plaintiff countered that he never assented to the terms.

GoSmith claimed the terms were accessible from its account sign-up webpage, shown below, by clicking the word "terms" in the text "I have read and agree to the terms & privacy policy" that was adjacent to a check box near the bottom of the webpage underneath a "SIGN UP" or "See Job Matches" button.



However, the plaintiff claimed that the check box was pre-checked and that he neither saw the check box nor affirmatively clicked it or indicated acceptance of the terms when creating his account (plaintiff's counsel also stated that the acceptance box was pre-checked when he visited the webpage to create the screenshot).

At this early procedural stage, the court assumed for the purpose of this motion that the acceptance box was pre-checked. Additionally, Plaintiff alleged that the button to complete his account set up said “See Job Matches” and not anything about “Signing Up” or agreeing to or accepting the terms and conditions.

In denying the motion to compel arbitration, the court stated that the “See Job Matches” button did not indicate assent or connect clicking the button to agreeing to an online contract, but suggested that plaintiff only wished to view job matches. Thus, the court found that, on the assumed facts, the site did not provide reasonable notice that clicking “See Job Matches” signified assent to the terms. The court rejected the argument that that plaintiff’s failure to “opt out” by unchecking the check box should bind him to the terms, finding that the opt-out option here was not so “conspicuous” as to bind the plaintiff. The court also noted that the site’s design did nothing to draw attention to the pre-checked box, which “was not in bold typeface and was below the button clicked by Plaintiff, instead of appearing in the line of boxes to fill out to create an account.” Further, the court stated that there was no indication that plaintiff was advised to view the entire web page or the terms before searching for job matches.

> “Here, Plaintiff’s actions were clicking a ‘See Job Matches’ button and taking no action regarding a check box below that button. On the evidence before the Court viewed in the light most favorable to Plaintiff, Plaintiff did not in any way interact with the part of the webpage regarding the arbitration agreement. His actions stopped with the ‘See Job Matches’ button, which was above the arbitration agreement check box. The factual question of whether Plaintiff assented to the arbitration agreement cannot be determined on this briefing. Therefore, the Court cannot order arbitration at this time.”

* * *

With courts continuing to scrutinize online contracting procedures and processes, businesses might take time to reexamine online interfaces to ensure screens, particularly mobile presentations, are relatively uncluttered and notices to the relevant terms are reasonably conspicuous to the average user. While no business wants to design a burdensome registration process that sours users on a purchase or registration, given the examples above, it is feasible to create a consumer interface with both usability and legal enforceability in mind.

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