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Arbitration

Expert Analysis

'Scrollwrap' Agreement to Arbitrate Held Enforceable While 'Clickwrap' Is Not

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In *Applebaum v. Lyft*, 2017 WL 2774153 (S.D.N.Y. June 26, 2017), the U.S. District Court for the Southern District of New York (per Judge John Koeltl) departed from a recent trend of enforcing "clickwrap" agreements by declining to enforce the arbitration provision contained within Lyft's "clickwrap" agreement but nonetheless compelling arbitration based on Lyft's subsequent "scrollwrap" agreement. In a scrollwrap agreement, a user must scroll through or view an agreement to proceed. With a clickwrap agreement, by contrast, a user need only click a button to indicate his acceptance, and might never view the agreement itself, before proceeding. At issue in *Applebaum* was an arbitration agreement contained within Lyft's terms of service, initially conveyed by a clickwrap agreement but with an update presented as a scrollwrap agreement. Even though clickwrap agreements generally have been held enforceable, see, e.g., *Cullinane v. Uber Technologies*, 2016 WL 3751652, at *6 (D. Mass. July 11, 2016), the court in *Applebaum* found that Lyft's initial clickwrap agreement was not enforceable due to the small print and ambiguity as to what the user was agreeing to. In line with recent precedent, the court did enforce the subsequent terms of service when presented as a scrollwrap agreement. See, e.g., *Bekele v. Lyft*, 199 F. Supp. 3d 284, 288, 290 (D. Mass 2016); *Loewen v. Lyft*, 129 F. Supp. 3d 945, 948-49 (N.D. Cal. 2015).

Background

In April 2016, plaintiff Josh Applebaum filed a class action lawsuit against Lyft, claiming that it charged passengers the non-discounted cash price for tolls rather than the discounted toll price that Lyft drivers pay through their use of "E-Z Pass." Lyft moved to dismiss the action or, in the alternative, to compel arbitration on the basis of a mandatory arbitration clause included in its terms of service agreement. The plaintiff contended that he never knowingly agreed to Lyft's terms of service, including the mandatory arbitration agreement. Arbitration clauses within two different terms of service were at issue: a Feb. 8, 2016 Terms of Service presented as a clickwrap agreement, and an updated Sept. 30, 2016 Terms of Service presented as a scrollwrap agreement.

Clickwrap Agreement

When Applebaum first registered for the Lyft mobile application, he did so through a series of screens presented on his smartphone. The plaintiff could not proceed until he entered his phone number and clicked on a box next to "I agree to Lyft's Terms of Service." The plaintiff entered his phone number and clicked the box, before continuing with the registration process. This method of clicking a box to indicate agreement with proposed terms of service, without ever viewing or being presented with the terms themselves, is called a clickwrap agreement. The terms of service could be viewed through a hyperlink, but were not present on the registration page.

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Lyft initially moved to compel arbitration based on the clickwrap agreement. Lyft argued that by clicking the

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box next to "I agree to Lyft's Terms of Service" and then clicking "Next," the plaintiff had agreed to the arbitration agreement contained within Lyft's terms of service. Relying on *Nguyen v. Barnes & Noble*, 763 F.3d 1171, 1179 (9th Cir. 2014) (holding that "where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice"), the court questioned whether there was "evidence that the [mobile application] user had actual knowledge of the agreement," as the "validity of the agreement turns on whether the [application] puts a reasonably prudent user on inquiry notice of the terms of the contract." Id. at 1177. Judge Koeltl concluded that "a reasonably prudent consumer would not have been on inquiry notice of the terms of the February 8, 2016 Terms of Service." *Applebaum*, 2017 WL 2774153 at *8.

In making this determination, the court evaluated the totality of the circumstances, considering the design and layout of the mobile application screen. The court took note of the small font size used for the text of "I agree to Lyft's Terms of Service" compared to the much larger text for the "Next" button and the "Add Phone Number" header at the top. Ultimately, the court determined that the "inconspicuousness of the hyperlink and the absence of cautionary language to indicate that there were contractual terms for review" made it "apparent that a reasonable consumer would not be on reasonable inquiry notice to search for the terms of a contract on the 'Add phone number' screen when the consumer clicked on the box." *Applebaum*, 2017 WL 2774153 at *8, 9.

The court's analysis of the text with which key wording was presented comes on the heels of a similar issue in *Meyer v. Kalanick*, 2016 WL 4073012 (S.D.N.Y. July 29, 2016), currently pending before the Second Circuit. *Meyer* concerns a sign-in wrap agreement, where a user of Uber's application allegedly manifested his assent to an arbitration agreement by signing in or registering for the Uber application, without having to click a box agreeing to terms of service or having to view it. Despite the different form in which the agreements were presented, the issues are similar. In *Meyer*, the court noted the small font size of the words "By creating an Uber account, you agree to the Terms of Service & Privacy Policy." Id. at *414. The court also noted that the only indication that the phrase "Terms of Service & Privacy Policy" was a hyperlink was the blue color and underlining, and that a user might register without actually viewing the terms of service. 2016 WL 4073012, at *415 (S.D.N.Y. July 29, 2016). While Judge Jed Rakoff's opinion in *Meyer* emphasized the fact that riders did not have to click on a box stating "I agree," it would seem that even when such a box is present, in it is not sufficient if the user is unclear what he or she is agreeing to.

Courts look to precedent concerning the enforceability of agreements such as clickwrap, scrollwrap, browsewrap, and sign-in wrap, but the enforceability of each individual agreement will hinge on "the totality of the circumstances."

Scrollwrap Agreement

After updating its terms of service, Lyft presented its "September 30, 2016 Terms of Service" to its existing users through a scrollwrap agreement. The plaintiff was presented with a screen that stated "Before you can proceed you must read & accept the latest Terms of Service." The terms of service were presented on the same screen as the message and could be scrolled through. The text began with a warning that "[t]hese Terms of Service constitute a legally binding agreement … between you and Lyft, Inc." Applebaum had to click a bar indicating his acceptance of these terms before he could proceed. Lyft had previously used this scrollwrap method for its terms of service, and it had been found enforceable. See, e.g., *Bekele*, 199 F. Supp. 3d at 288, 290; *Loewen*, 129 F. Supp. 3d at 948-49. Consistent with previous cases, the court found that the arbitration clause in the Sept. 30, 2016 Terms of Service was enforceable and granted Lyft's motion to compel arbitration.

Conclusion

While the rise of online transactions may have led to new language in the area of contract law, the basic principles themselves remain unchanged. Courts look to precedent concerning the enforceability of agreements such as clickwrap, scrollwrap, browsewrap, and sign-in wrap, but the enforceability of each individual agreement will hinge on "the totality of the circumstances." *Applebaum*, 2017 WL 2774153 at *8. Font size and color, clear presentation of terms and conditions, and plain agreement to those terms and conditions are all important factors when a court evaluates whether there was a meeting of the minds and mutual assent. Despite the evolving nature of internet commerce, "it has not fundamentally changed the principles of contract." *Register.com v. Verio*, 356 F.3d 393, 403 (2d Cir. 2004).

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