New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 257—NO. 93
TUESDAY, MAY 16, 2017

Arbitration

Expert Analysis

Second Circuit to Decide If 'Sign-in Wrap' Agreements to Arbitrate Are Enforceable

By **Samuel Estreicher** And **Holly H. Weiss**

In *Meyer v. Kalanick*,[1] the U.S. Court of Appeals for the Second Circuit is set to decide whether a "sign-in wrap" agreement to arbitrate with a consumer is enforceable. "Clickwrap" agreements, which require consumers to click on an "I agree" box after being presented with the terms and conditions of using the service, have been enforced by the courts.[2] In contrast, "browsewrap" agreements, which present the consumer with a hyperlink to click to access the terms and conditions on the service provider's website, have encountered greater resistance.[3] For example, in *Specht v. Netscape Communication*,[4] the Second Circuit did not enforce a browsewrap agreement to arbitrate with a consumer, holding such agreements are enforceable only if there is: (1) "reasonably conspicuous notice of the existence of contract terms," and (2) "unambiguous manifestation of assent to those terms." A "sign-in wrap" agreement is one where the user is notified of the existence of the terms and conditions when signing in or logging on, but does not have to affirmatively agree to the terms and conditions.

The District Court's Opinion

In October 2014, plaintiff Spencer Meyer registered for the Uber mobile application, an on demand ride sharing service, using his smartphone. Meyer was prompted to sign up by entering his name, email address, cell phone number and password into the highlighted fields, and then to press a prominent button marked "NEXT." After pressing "NEXT," Meyer was required to enter his credit card information. This screen prompted Meyer to press another button marked "REGISTER." The following was displayed below the "REGISTER" button in smaller font: "By creating an Uber account, you agree to the terms of service & privacy policy." The phrase "terms of service & privacy policy" appeared as a hyperlink, and by clicking on that hyperlink users would see a nine page "User Agreement," which included a mandatory arbitration provision. Allegedly Meyer never noticed the hyperlink. Meyer filed a putative class action suit against Uber and its CEO Travis Kalanick alleging that Kalanick engaged in an antitrust conspiracy based on the algorithm Uber uses to determine ride prices. Uber and Kalanick moved to compel arbitration, and Meyer opposed the motion on the ground that no arbitration agreement was ever formed. In July 2016, U.S. District Judge Jed

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Rakoff denied the motion to compel arbitration, stating that "[t]his legal fiction" that Internet consumers knowingly and voluntarily waive their right to a jury trial "is sometimes justified, at least where mandatory arbitration is concerned, by reference to the 'liberal federal policy favoring arbitration.'"[5] Relying on *Specht*, however, Judge Rakoff determined that Meyer did not have "reasonably conspicuous notice of the existence of [the] contract terms and [did not provide] unambiguous manifestation of assent to those terms," in part, because he did not need to click on an "I agree" box. Further, the registration screen did not call Meyer's attention to the existence of the terms and conditions or that by registering for Uber, he was agreeing to those terms and conditions. Judge Rakoff reasoned "[w]hen contractual terms as significant as the relinquishment of one's right to a jury trial or even the right to sue in court are accessible only via a small and distant hyperlink titled 'Terms of Service & Privacy Policy,' with text about the agreement thereto presented even more obscurely, there is a genuine risk that a fundamental principle of contract formation will be left in the dust: the requirement for a 'manifestation of mutual assent.'"[6]

Arguments on Appeal

On appeal to the Second Circuit, Uber and Kalanick argued that the registration process provided conspicuous notice of the terms and conditions to which Meyer assented and that a reasonable consumer would understand that registering for a service entails agreeing to the terms and conditions. Uber and Kalanick urged that by taking the affirmative step of clicking "REGISTER," the consumer assented to Uber's terms and conditions, and there is no reason the enforceability of an offeror's terms should depend on whether the offeree states (or clicks), 'I agree.'"[7] Uber and Kalanick distinguished *Specht* on the ground that the consumers in that case had no reason to suspect that there were any license terms because they were downloading free software, whereas a reasonable consumer would understand that entering their credit card information and clicking "REGISTER" would likely form a contract that would govern the transactions. Uber and Kalanick also argued that the district court unfairly and improperly discriminated against arbitration. In opposition, Meyer argued that the court should defer to the district court's factual findings that the contractual language was not reasonably conspicuous and, as in *Specht*, did not provide a means for unambiguous assent. Meyer also noted that the Second Circuit has never upheld a "non-clickwrap" interface like Uber's "User Agreement."

Conclusion

Courts have rarely declined to compel arbitration based on the "liberal federal policy favoring arbitration" under the FAA, including in appropriate cases arbitration agreements with consumers.[8] If the Second Circuit affirms the district court's decision, it may signal a reversal of the trend of liberally favoring enforcement of agreements to arbitrate, or at the very least impose limits on the enforceability of electronic arbitration agreements with consumers.

1. No. 15 Civ. 9796 (S.D.N.Y. Jul. 29, 2016) (opinion and order denying motion to compel arbitration).
2. See, e.g., *Cullinane v. Uber Technologies*, 2016 WL 3751652, at *6 (D. Mass. July 11, 2016).
3. See, e.g., *Schnabel v. Trilegiant*, 697 F.3d 110, 129 n. 18 (2d Cir. 2012); see also *Berkson v. Gogo*, 97 F. Supp. 3d at 396 (E.D.N.Y. 2015) ("Following the ruling in *Specht*, courts generally have enforced browsewrap terms only against knowledgeable accessors, such as corporations, not against individuals.").
4. 306 F.3d 17 (2d Cir. 2002) (electronic contract formation case).
5. No. 15 Civ. 9796 at *2 (S.D.N.Y. Jul. 29, 2016).
6. Id. at 28.
7. *Register.com v. Verio*, 356 F.3d 393, 403 (2d Cir. 2004).
8. *AT&T Mobility v. Concepcion*, 563 U.S. 333, 339 (2011).

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