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Southern District of New York Decision Suggests Increasing Scrutiny of Electronic Agreements

Introduction

On July 29, 2016, in *Meyer* v. *Kalanick*, Judge Rakoff of the Southern District of New York denied a motion to compel arbitration where the agreement to arbitrate was found in an electronic contract, concluding that the process by which the company sought the user's consent to that contract did not demonstrate the meeting of the minds necessary to form a binding agreement.[1] This decision runs counter to the "abundance of persuasive authority" holding that when the user of a website or mobile application clicks on a button or takes some other affirmative action to demonstrate consent to an electronic contract, an enforceable agreement is formed.[2]

Background

Courts have generally distinguished between two categories of electronic agreements. "Clickwrap" agreements are those for which the website or mobile application requires the user to affirmatively indicate consent to the proposed agreement, which is often made available to the user via a hyperlink or pop-up; the user consents by pressing a button or checking a box. Courts have generally held that this affirmative act creates an enforceable agreement, which can include an agreement to arbitrate.[3] On the other hand, "browsewrap" agreements are those for which the website or mobile application does not require the user to take an affirmative action to consent to the website or application's terms of use, and instead claims that the user's very use of the site or application signifies assent. With some limited exceptions, courts have held that "browsewrap" agreements are not enforceable against individual consumers.[4]

In *Berkson* v. *Gogo LLC*, Judge Weinstein of the Eastern District of New York questioned this binary sorting of electronic contracts. That case involved efforts by Gogo, the in-flight wireless internet service provider, to enforce electronic arbitration agreements against individual users.[5] For the first time, Judge Weinstein proposed two additional categories of online agreements, "scrollwrap" and "sign in wrap" agreements. Judge Weinstein defined the latter as a process by which the user provides her consent to the terms of the contract through the act of signing in to the website or signing up for the mobile application.[6] He characterized this process as a "questionable form of internet contracting," but did not hold that they are unenforceable *per se*.[7]

For more than a year, the new categorical approach advocated by Judge Weinstein was an outlier, as several federal courts continued to rely on and apply the binary distinction between "clickwrap" and

"browsewrap" agreements.[8] On July 29, 2016, however, Judge Rakoff rejected a motion to compel arbitration against one of its users by Uber, an online transportation network company that permits users to locate, request, and pay for car services from their mobile device.[9] Uber, like Gogo, argued that the plaintiff had agreed to arbitrate any dispute by consenting to Uber's Terms of Service ("TOS") in the form of a "clickwrap" agreement that included an arbitration clause. Without adopting the categorical approach advocated in *Berkson*, Judge Rakoff rejected that argument, instead undertaking a fact-intensive review of the process by Uber communicated electronically with its users.

The Court's Holding

The legal analysis in *Meyer* begins with an acknowledgment of the current judicial landscape concerning electronic agreements. The opinion describes the distinction between clickwrap and browsewrap agreements, noting that the former "are more readily enforceable," while the latter are typically enforced only against sophisticated businesses.[10] The opinion nevertheless expresses skepticism at the very notion of electronic agreements, describing the process of online users "supposedly agreeing to lengthy 'terms and conditions' that they had no realistic power to negotiate or contest and often were not even aware of" as a "legal fiction."[11] According to *Meyer*, the Second Circuit set forth the test to sustain that fiction in *Specht* v. *Netscape Communications Corp.*, where it held that "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility."[12]

The bulk of the *Meyer* opinion is a detailed analysis of whether the process by which Uber disclosed the TOS to the plaintiff and obtained his consent to the TOS meets the standards of "reasonably conspicuous notice" and "unambiguous manifestation of assent." Judge Rakoff highlights several factors supporting the conclusion that it did not. These include that (1) the plaintiff was not required to check a box expressly confirming his agreement or consent; (2) he did not have to review the TOS before registering; (3) the references to consent and the TOS were "far below and in much smaller font" than the "Register" button which the user would have had to click; (4) even if the plaintiff saw the reference to Uber's TOS, he could mistake the phrase "Terms of Service" for a description of the services Uber would provide to the user, without recognizing that the TOS included a waiver of the right to bring an action in court; (5) even if the plaintiff clicked on the hyperlink, he would only have been taken to a new screen that did not itself contain the TOS; and (6) even if the plaintiff had actually accessed the TOS, he would have "had to scroll down several pages in order to come across" the agreement to arbitrate.[13] Based on these facts, the court concluded that no enforceable agreement arose between the plaintiff and Uber.[14]

Meyer holds that the TOS was not a clickwrap agreement because the plaintiff "did not need to affirmatively click any box saying that he agreed to Uber's 'terms and conditions.'"[15] Although Judge Rakoff suggests that the agreement "might be characterized as a 'sign-in wrap'" under *Berkson*, the *Meyer* opinion rejects any rigid or formalistic test for enforcing electronic agreements. Rather, the opinion explains that "electronic agreements fall along a spectrum in the degree to which they provide notice, and it is difficult to draw bright-line rules because each user interface differs from others in distinctive

ways."[16] Thus, a "fact-intensive inquiry" is required to resolve disputes over whether an electronic agreement was formed.[17]

Analysis

While both Judge Weinstein and Judge Rakoff expressed skepticism of the process by which internet and mobile companies seek to enter into electronic contracts, neither *Meyer* nor *Berkson* calls into question the ability for such companies to bind their users through electronic contracts. The *Meyer* and *Berkson* decisions, however, call upon courts to closely scrutinize the exact methods of online bargaining and indicate a trend toward more thorough evaluation of the process by which a company presents, and obtains consent to, an electronic contract.

Companies in the online and mobile space should avoid processes that could be characterized as "designed to encourage users to overlook contractual terms in the process of gaining access to a product or service," and instead adopt processes that ensure that the prospective user receives clear notice of an electronic agreement and gives clear evidence of consent.[18] There are several prophylactic measures that a company might consider, including: separating the process for signing in to a website or signing up for a mobile application from the process of obtaining consent to an electronic agreement by requiring that the user take a distinct, separate action, such as checking a box to confirm their consent; ensuring that the text calling attention to the electronic agreement is visible, no less prominent than other text on the same screen, and has an unambiguous title, such as "User Agreement" or "Service Contract"; highlighting the language binding the user to arbitrate; providing immediate access to the proposed electronic agreement, either through a pop-up or a clearly delineated hyperlink that takes the user directly to the agreement; emailing a copy of the agreement to the user upon the user's initial agreement to it; and creating a separate "consent event" requiring the user to reaffirm assent to the agreement whenever its terms are modified as a prerequisite for continued use of the website or application. While individual judges might not require any (or all) of these steps, *Berkson* and *Meyer* suggest that some judges will not enforce contracts in the absence of such steps.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Jay Cohen	Roberta A. Kaplan	Eric Alan Stone
212-373-3163	212-373-3086	212-373-3326
jaycohen@paulweiss.com	rkaplan@paulweiss.com	estone@paulweiss.com

Associates Christopher L. Filburn and Michael L. Nadler contributed to this client alert.

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1 *Meyer* v. *Kalanick*, No. 15 Civ. 9796, 2016 WL 4073012 (S.D.N.Y. July 29, 2016).

2 *Whitt* v. *Prosper Funding LLC*, No. 15 Civ. 136, 2015 WL 4254062, at *5 (S.D.N.Y. July 14, 2015) (collecting cases); *see also*, *e.g.*, *Sgrouros* v. *TransUnion Corp.*, 817 F.3d 1029, 1036 (7th Cir. 2016) (explaining that websites can "bind users to a service agreement by placing the agreement, or a scroll box containing the agreement, or a clearly labeled hyperlink to the agreement, next to an 'I Accept' button that unambiguously pertains to that agreement.")

3 *See Cullinane* v. *Uber Techs., Inc.*, No. 14 Civ. 14750, 2016 WL 3751652, at *6 (D. Mass. July 11, 2016) (holding that "clickwrap" agreements "permit courts to infer that the user was at least on inquiry notice of the terms of the agreement, and has outwardly manifested consent by clicking a box"); *see also, e.g.*, *Whitt* v. *Prosper Funding LLC*, 2015 WL 4254062 (S.D.N.Y. July 14, 2015); *Bassett* v. *Elec. Arts, Inc.*, 93 F. Supp. 3d 95 (E.D.N.Y. 2015); *Nicosia* v. *Amazon.com, Inc.*, 84 F. Supp. 3d 142 (E.D.N.Y. 2015).

4 *See Fjeta* v. *Facebook, Inc.*, 841 F. Supp. 2d 829, 836 (S.D.N.Y. 2012).

5 *Berkson* v. *Gogo LLC*, 97 F. Supp. 3d 359 (E.D.N.Y. 2015).

6 *Id*. at 395. "Scrollwrap" agreements, by contrast, were defined by Judge Weinstein as a process that requires the user to physically scroll through the content of an agreement, which is often presented on its own webpage or in a pop-up screen, before clicking a button or checking a box to provide her consent. *Id*.

7 *Id*. at 399.

8 *See, e.g.*, *Salameno* v. *Gogo, Inc.*, No. 16 Civ. 487, 2016 WL 4005783 (E.D.N.Y. July 25, 2016); *Cullinane*, 2016 WL 3751652; *Bynum* v. *Maplebear*, --- F. Supp. 3d ---, 2016 WL 552058 (E.D.N.Y. Feb. 12, 2016).

9 *Meyer*, 2016 WL 4073012, at *1–2.

10 *Id*. at *6.

11 *Id*. at *1.

12 *Specht* v. *Netscape Commc'ns Corp.*, 306 F.3d 17 (2d Cir. 2002).

13 *Meyer*, 2016 WL 4073012, at *4–10.

14 *Id.* at *9 (quoting *Specht*, 306 F.3d at 35).

15 *Id*. at *6.

16 *Id.* at *8.

17 *Id*.

18 *Id.* at *10.