

December 8, 2017

## Corporate Update

*“Read Before You Click” or Judicial Recognition of the ‘Terms of Service’ Agreement in smartphone apps*

An important and recent decision was issued by the Court of Appeals for the Second Circuit in Manhattan in relation to the continued judicial recognition of the Federal Arbitration Act’s policy favoring arbitration.

On August 17, 2017, Uber Technologies, Inc. (‘Uber’) won a victory in its effort to keep unhappy customers from suing in court, persuading a federal appeals court to send a Connecticut passenger’s price-fixing case against the ride-service company into arbitration. In that case, held before the US Court of Appeals for the Second Circuit, Uber won the right to arbitrate customer price-fixing claim and secured key win for app industry on ‘Terms of Service’ Agreements.

The Appeals Court in Manhattan reversed a 2016 decision by U.S. District Judge Jed Rakoff, who said Uber’s online user agreement didn’t provide the customer with enough notice that disputes would be heard in private arbitration for it to be binding.

The case is one of several cases testing the ride-hailing company’s attempts to force disputes into arbitration and away from public courtrooms. The decision represents a victory for developers of smartphone apps in obtaining judicial recognition of their Terms of Service Agreements.

**Factual Background.** Spencer Meyer (‘Meyer’), a user of a technology company’s car service smartphone application, downloaded the software application (“app”) offered by Uber onto his smartphone, and after downloading the app, he created and registered for an account with Uber using his smartphone. Meyer used the app approximately ten times and then sued Uber, on behalf of a putative class of Uber riders, alleging that Uber’s app allows drivers to fix prices amongst themselves, in violation of antitrust laws used to protect customers from price manipulation (Sherman Antitrust Act, 15 U.S.C. § 1, and Donnelly New York State Antitrust Act, N.Y. Gen. Bus. Law § 340). Meyer was seeking damages on behalf of millions of U.S. riders who rely on the company for transportation.

Uber moved in the District Court to compel arbitration, contending that the user agreed to a mandatory arbitration provision in the company’s Terms of Service when he registered for an account using the application.

Uber contended before Appeal Court that the District Court erred in concluding that the notice of the Terms of Service was not reasonably conspicuous and that the user did not unambiguously manifest assent to the arbitration provision by registering for an account.



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The Second Circuit began its legal analysis by quoting the Federal Arbitration Act and noting the "liberal federal policy favoring arbitration agreements"<sup>1</sup>. After discussing the scope and standard of review, and applicable substantive contract law, the court stated:

1. The ride-hailing service's mobile phone application provided reasonably conspicuous notice of the Terms of Service as a matter of California law because the "Notice of the Terms of Service" was provided simultaneously to enrollment, thereby connecting the contractual terms to the services to which they applied; a reasonably prudent smartphone user would understand that the terms were connected to the creation of a user account;
2. The consumer unambiguously manifested his assent to the Terms of Service because a reasonable user would know that by clicking the registration button, he was agreeing to the terms and conditions accessible via the hyperlink, whether he clicked on the hyperlink or not; Meyer signed up for an account, and entered his credit card information with the intention of entering into a forward-looking relationship with the service.

**Conclusion.** The *Uber* decision not only represents a further demonstration of continued judicial recognition of the Federal Arbitration Act's policy favoring arbitration, but also it is a boost to smartphone app developers in achieving enforcement of their Terms of Service and in providing guidance to the industry in presenting enforceable Terms of Service. For mobile phone application's users, it provides an important reminder to read before you click.

You may access the decision at <http://caselaw.findlaw.com/us-2nd-circuit/1871227.html>

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<sup>1</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983))