1st Circ.'s Uber Ruling Imposes Burdens On App Design

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In the modern economy, contracts governing consumer transactions can be made at the push of a button. Courts have generally recognized that these online contracts are to be enforced like any other agreements.[1] A recent decision from the First Circuit, Cullinane v. Uber Technologies Inc., purports to apply that rule of law, but effectively calls it into doubt, invalidating an arbitration clause in an electronic contract simply because the link provided was in the wrong font and color.[2]

This decision represents a distinct minority view, and it fundamentally misunderstands the nature of internet commerce. Although it remains to be seen how Cullinane will fare beyond the First Circuit, courts outside that jurisdiction would be wise not to follow it.

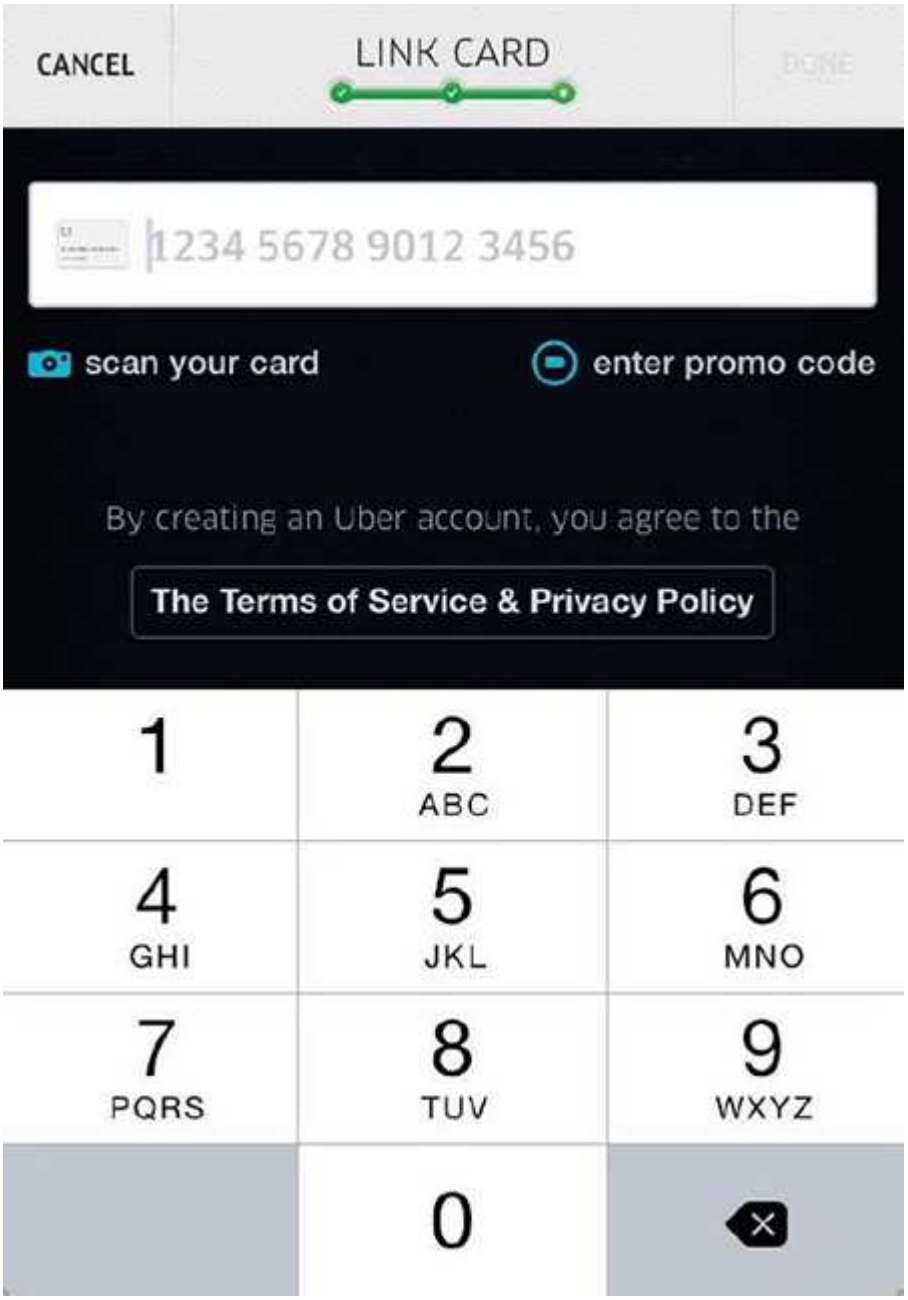
In Cullinane, a group of consumers brought suit against Uber — the maker of a ride-sharing application for mobile phones — contending that it unlawfully overcharged passengers for toll fees. Uber moved to compel arbitration, citing an arbitration clause in the application's terms and conditions.

The consumers opposed the motion, contending that they had never agreed to the terms and conditions, which were accessible by hyperlink during the signup process. Although the district court was skeptical of arbitration agreements in consumer contracts as a matter of public policy, it nevertheless applied clearly established Massachusetts contract principles and the federal policy of favoring arbitration, and granted the motion to compel.[3]

The First Circuit reversed. It concluded that the hyperlink to the terms and conditions was insufficiently "clear and conspicuous" to become part of the contract, because it was not "blue and underlined," and because other links on the same page were of "similar or larger size."[4]

It did so even though the screen featured the phrase "Terms of Service & Privacy Policy" in a white box in the middle of the screen, with a statement preceding it that provided "By creating an Uber account, you agree to the" terms and policy. The screen was relatively uncluttered with

other information, making the notification prominent:



The demands imposed by the First Circuit in Cullinane are at odds with better-reasoned decisions. Several other courts, including the Second Circuit, have found Uber's terms of service sufficiently conspicuous to provide notice and therefore to bind the parties under the contract law of other states.[5]

And at least one other court has reaffirmed the principle that Uber's terms of service are sufficiently conspicuous, though it denied the motion to compel arbitration, because the plaintiff in that particular case alleged that the terms of service hyperlink was blocked by a pop-up keypad.[6]

Courts should not follow the First Circuit's outlier decision in Cullinane, because it is premised on an outdated understanding of the internet — in essence, that hyperlinks are

not conspicuous unless they take on the blue, underlined characteristics of the decades-past Netscape age.[7] While this may have been true in an earlier era, and may remain true to a limited degree on traditional webpages, it certainly is not true on modern mobile phone applications such as Uber — a commonsensical fact that the modern smartphone consumer undoubtedly knows.

Indeed, as the Second Circuit highlighted in Meyer, nearly two-thirds of American adults owned a smartphone as of 2015, and a 2015 study showed that approximately 89 percent of smartphone users surveyed reported using the internet on their smartphones over the course of the weeklong study period. Against this backdrop — and because smartphone users routinely shop for online services through mobile applications like the Uber application — a consumer's understanding should be judged from the "perspective of a reasonable smartphone user."[8]

And as multiple other courts have recognized, a reasonable smartphone user knows that language used in the Uber application registration process stating that "by creating an Uber account, you agree" is "a clear prompt directing users to read the terms and conditions and signaling that their acceptance of the benefit of registration would be subject to contractual terms."[9] The Cullinane decision failed to grapple with the pertinent consumer perspective, and perpetuated an outdated view of the Internet, even as an increasing percentage of commerce shifts to mobile applications.

Fortunately, the bulk of courts that have confronted Uber's terms of service (which include mandatory arbitration) have correctly found them binding. Courts confronting similar situations in the future should seek guidance from those cases instead of Cullinane. Indeed, as phone-based internet applications continue to evolve quickly, courts must endeavor to stay abreast of technological changes, and assume that reasonable consumers will likewise be using and understanding applications based on contemporary design elements, rather than require companies to employ designs based on decades-old standards.

Particularly where, as here, the application used a prominent prompt that indicated that proceeding to open an account demonstrated agreement to terms of service, a court should not refuse to enforce that agreement on the ground that some consumers would be unable to figure out how to load those terms — because of the employment of modern application design features — and would proceed to open an account anyway. Rather, a user who is informed that proceeding entails agreement should bear the risk of dissatisfaction with the terms he or she did not read.[10]

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[1] See, e.g., Ajemian v. Yahoo! Inc. , 987 N.E.2d 604, 612 (Mass. App. Ct. 2013) ("We see no reason to apply different legal principles simply because a ... clause is contained in an online contract").

[2] See Cullinane v. Uber Technologies Inc. , --- F.3d ---, 2018 WL 3099388 (1st Cir. June 25, 2018).

[3] Cullinane v. Uber Technologies Inc. , No. 14-14750-DPW, 2016 WL 3751652 (D.

Mass. July 11, 2016).

[4] Cullinane, 2018 WL 3099388, at *7.

[5] See Meyer v. Uber Technologies Inc., 868 F.3d 66 (2d Cir. 2017); Cubria v. Uber Technologies Inc., No. A-16-CA-544-SS, 2017 WL 1034731, at *5 (W.D. Tex. Mar. 16 2017) (relying on the district court order in Cullinane); Cordas v. Uber Technologies Inc., No. 16-CV-04065-RS, 2017 WL 658847, at *4 (N.D. Cal. Jan. 5, 2017) (also citing the Cullinane district court decision).

[6] See Metter v. Uber Technologies Inc., No. 16-cv-06652-RS, 2017 WL 1374579, at *3 (N.D. Cal. July 17, 2017) (noting that "generally speaking, the alert's font, size, color, and placement relative to the 'REGISTER' button render it sufficiently conspicuous").

[7] See 2018 WL 3099388, at *7 (attempting to distinguish the Second Circuit's contrary conclusion on this basis).

[8] Myer, 868 F.3d at 77.

[9] Id. at 78-799.

[10] See, e.g., Hill v. Gateway 2000 Inc., 105 F.3d 1147, 1148 (7th Cir. 1997) ("A contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome").

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