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Assent Uber Alles: Enforcing Browsewrap Agreements in Smartphone Applications

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Assent Uber Alles:[1] Enforcing Browsewrap Agreements in Smartphone Applications

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I. INTRODUCTION

When a smartphone user browses a website or downloads a new application (app), the user will most likely be met by a pop-up or hyperlink providing the infamous "terms and conditions."[2] How many users click and explore the terms and conditions posed by the website or app before clicking "I Agree" and continuing on?[3] Unbeknownst to most users, the terms contained within that seemingly insignificant link can have long-standing consequences if litigation were to arise.

The terms and conditions hyperlink a smartphone user often sees when signing on to an app is called, in the world on internet contracts, a browsewrap agreement (browsewrap(s)).[4] To determine the enforceability of browsewraps, courts consider whether the terms and

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1. "Uber Alles" is German for "above all." When courts consider the validity and enforceability of browsewrap agreements, finding assent by the user is paramount.

2. As the use of electronic commerce has increased, online contracts are frequently utilized to govern transactions and the use of websites and smartphone applications. Two principle means of internet contracting are known as "clickwrap" and "browsewrap" agreements. *See* 1 Computer Contracts § 2.06 (2021). The enforcement of browsewrap agreements and the process by which courts analyze the validity of a browsewrap agreement is the central focus of this Casenote.

3. *See* Caroline Cakebread, *You're Not Alone, No One Reads Terms of Service Agreements*, BUSINESS INSIDER (Nov. 15, 2017, 7:30 AM), https://www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11?utm_source=copy-link&utm_medium=referral&utm_content=topbar.

4. 1 Computer Contracts § 1.02(c) (2021).

conditions are reasonably conspicuous and whether the user, while on notice of the terms, continues using the app.[5] These two elements—conspicuous terms and continued use—are critical to support a finding that a browsewrap agreement and its terms are enforceable against a user.

The enforceability of a browsewrap imbedded in a smartphone app came before the Georgia Court of Appeals in May 2021 as an issue of first impression in *Thornton v. Uber Technologies, Inc.*[6] Relying on the reasoning of the United States Court of Appeals for the First and Second Circuits regarding the enforceability of browsewrap agreements, the Georgia Court of Appeals reversed the trial court's order compelling arbitration and held that the lower court erred by finding Thornton assented to the hyperlinked terms as a matter of law.[7]

II. FACTUAL BACKGROUND

In February 2018, Ryan Thornton was murdered by a driver working for Uber Technologies, Inc.,[8] (Uber).[9] The decedent's mother later filed a lawsuit against Uber, claiming wrongful death and negligence. This case came before the Georgia Court of Appeals on an interlocutory appeal by the Plaintiff after the trial court granted a motion to compel arbitration in favor of Uber. On appeal, the Plaintiff argued Thornton never assented to the terms and conditions presented by Uber, and thus he did not agree to the arbitration clause Uber sought to enforce.[10]

To use the services offered by Uber, a user must first create and register an account through Uber's smartphone app and enter their payment information.[11] Thornton created his account with Uber using the Uber app on his Android smartphone on May 15, 2016. When creating an account in the Uber app, a user is first brought to a screen to input contact information and create a password for the account.

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5. This is the two-step analysis courts typically apply to determine the enforceability of browsewraps. *See* Meyer v. Uber Techs., Inc., 868 F.3d 66, 77–80 (2d Cir. 2017) (holding a browsewrap agreement to be enforceable against the smartphone user after applying this two-step analysis).

6. 359 Ga. App. 790, 793, 858 S.E.2d 255, 258 (2021).

7. *Id.* at 791, 858 S.E.2d at 257.

8. Uber Technologies, Inc. is a ride-sharing technology company with software applications for transportation and food delivery service. *See* UBER, https://www.uber.com/ (last visited Nov. 17, 2021).

9. *Thornton*, 359 Ga. App. at 790, 858 S.E.2d at 257.

10. *Id.* at 790–91, 858 S.E.2d at 257.

11. *Id.* at 791, 858 S.E.2d at 257.

Then, the user is guided to the payment screen to complete his registration.[12]

At the bottom of this payment screen on the version of the Uber app Thornton used was the following language in dark gray, uppercase text: "BY CREATING AN UBER ACCOUNT, YOU AGREE TO OUR TERMS & CONDITIONS AND PRIVACY POLICY."[13] While in a small font, the dark gray text stood out on a bright white background and the phrase "TERMS & CONDITIONS AND PRIVACY POLICY" were in blue and underlined, indicating a hyperlink. If this phrase was clicked, the hyperlink would direct the user to another webpage presenting Uber's full terms and conditions for use of its services. These terms and conditions contained the arbitration agreement at issue in the present case.[14]

On the payment screen in the Uber app during the registration process, the user may enter his credit card information or click a button to link to a PayPal account.[15] If a user on an Android device clicked on the information field to enter his credit card information, an on-screen keyboard would rise from the bottom of the screen to allow the user to input the information. During registration on his Android, Thornton elected to enter his credit card information for his payment method. When this on-screen keyboard rises, the keys cover the bottom portion of the screen—including the hyperlinked terms and conditions.[16]

After registering his account, Thornton used Uber's services beginning in July 2016.[17] Uber in an affidavit asserted that in November 2016, Thornton was sent an email from Uber providing an updated version of the terms and conditions. This new version contained updates to portions of the arbitration agreement. After November 2016, Thornton continued using Uber's services.[18]

After Thornton was murdered by his Uber driver in 2018, Thornton's mother filed suit in Dekalb County State Court.[19] Uber filed a motion to dismiss and a motion to compel arbitration, seeking the enforcement of the arbitration clause contained in the terms and conditions presented in the app during Thornton's registration and in the November 2016 email. The trial court granted Uber's motion and ordered the parties to

12. *Id.* at 792, 858 S.E.2d at 257.
13. *Id.* at 791, 858 S.E.2d at 257.
14. *Id.*
15. *Id.*
16. *Id.* at 792, 858 S.E.2d at 257.
17. *Id.*
18. *Id.*
19. *Id.*

arbitrate upon a finding that Thornton assented to Uber's terms and conditions.[20]

On interlocutory appeal, the question of assent to the terms of a contract on a smartphone app presented an issue of first impression for the Georgia Court of Appeals.[21] The court ultimately agreed with the Plaintiff, holding that the trial court erred as a matter of law in its finding that Thornton assented to Uber's terms and conditions.[22] However, the court declined to hold that the terms and conditions were so inconspicuous that, as a matter of law, Thornton could not have assented to the terms.[23] Rather, it determined that a question of fact remained as to whether the pop-up, on-screen keyboard concealed the terms and conditions such that Thornton did not have an opportunity to see or access the terms. Thus, Thornton could not have assented to the terms.[24]

III. LEGAL BACKGROUND

A. Internet Contracts

A contract can be established over the Internet through a variety of methods, and each methodology involves a different manifestation of assent. Two of the most common methods are "clickwrap" and "browsewrap" agreements.[25] Clickwraps entail a presentation of the terms and conditions to the user and a button containing a phrase such as "I Agree" or "I Accept."[26] Similarly, there are "scrollwraps," in which the user must physically scroll through the terms in their entirety and then click an "I agree" button before moving forward.[27] For clickwraps and scrollwraps, when the user clicks the "I Agree" button, the user

20. *Id.* at 792, 858 S.E.2d at 257–58.

21. *Id.* at 793, 858 S.E.2d at 258.

22. *Id.* at 792, 858 S.E.2d at 258.

23. *Id.* at 793, 858 S.E.2d at 258.

24. *Id.* at 792, 858 S.E.2d at 258.

25. Internet agreements do not always fall squarely into the clickwrap or browsewrap categorization but rather may contain characteristics of both. *See* Kurtis A. Kemper, Annotation, *Validity, Construction, and Application of Browsewrap Agreements*, 95 A.L.R. 6th 57, *3 (2014). These agreements evolve as technology progresses, therefore creating change in the legal categorization of the agreements. For example, in Berkson v. Gogo LLC, Judge Weinstein coined the term "sign-in wrap" for agreements that fall between browsewraps and clickwraps. 97 F. Supp. 3d 359, 366 (E.D.N.Y 2015).

26. 1 Computer Contracts § 1.02(b) (2021).

27. 1 Computer Contracts § 1.02(e) (2021).

expressly manifests his assent to the terms and conditions and a contract is formed.[28]

Then there are browsewraps. To establish a browsewrap agreement, the terms and conditions governing use of the site are displayed on the webpage, typically using a hyperlink that connects the user to another page containing the agreement in its entirety.[29] For browsewrap agreements, the user is said to exhibit assent through continued use of the website or application, as long as the user has actual or constructive knowledge of the terms and conditions provided by and through the hyperlink.[30] This continued use amounts to a manifestation of assent once the user is on notice of the terms; the user does not have to otherwise provide an express, affirmative act to manifest assent.[31] Because of the difference in manifestation of assent in these different types of internet contracts, courts consider issues regarding assent to browsewrap agreements in a unique manner.

B. Evaluating the Validity of Internet Contracts

Internet contracts are analyzed using general principles of contract law, just like written contracts.[32] Central to contract law in Georgia is the principle that mutual assent by the parties is required to create a binding, enforceable contract.[33] To determine whether there was mutual assent by the contracting parties, courts apply the objective theory of intent, whereby "one party's intention is deemed to be that meaning a reasonable man in the position of the other contracting party would ascribe to the first party's manifestations of assent, or that meaning which the other contracting party knew the first party ascribed to his manifestations of assent."[34] Relevant to finding mutual assent is evidence of the circumstances surrounding the formation of the

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28. 1 Computer Contracts § 1.02(b).

29. Kemper, *supra* note 25, at *2.

30. *Id.*

31. *Id.*; Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1176 (9th Cir. 2014) ("[A] browsewrap agreement does not require the user to manifest assent to the terms and conditions expressly . . . [a] party instead gives his assent simply by using the website.").

32. *See* Register.com Inc. v. Verio, Inc., 356 F.3d 393, 403 (2nd Cir. 2004) ("While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract."); Ajemian v. Yahoo!, Inc., 987 N.E.2d 604, 612 (Mass. App. Ct. 2013) (reasoning there was "no reason to apply different legal principles simply because a forum selection or limitations clause [was placed] in an online contract.").

33. *See* O.C.G.A § 13-3-2 (1933).

34. Turner Broadcasting System v. McDavid, 303 Ga. App. 593, 597, 693 S.E.2d 873, 878 (2010).

contract, including communications between the two parties.[35] Lastly, like with traditional, written contracts, the "duty to read" principle applies to internet contracts.[36] When a person who can read signs a contract without apprising himself of the contents, the failure to read generally does not excuse the party from the terms contained therein.[37]

These traditional principles govern the construction and enforceability of internet contracts as well. In evaluating whether an arbitration clause in an internet contract created though a browsewrap agreement is binding and enforceable, courts apply state contract law on traditional contract formation.[38] However, the application of such principles to internet contracts has been an issue of first impression for many courts, prompting the development of a new framework specific to browsewrap agreements to determine enforceability.[39]

1. Enforcement of Browsewrap Agreements

Since the rise of internet contracts has occurred in only the past two decades, it is a relatively new area of case law, and courts are still developing the legal framework to test the enforceability of browsewrap agreements. While it remains an evolving area of law, over time courts have developed a two-step analysis to evaluate the enforceability of browsewraps.[40] The first step assesses the communication of the terms to the user(s), which hinges on the conspicuousness of the terms.[41] The second step evaluates the manifestation of assent, which involves the notice given to the user and his continued use of the website or app.[42]

In the development of this framework, courts have created the "reasonably prudent smartphone user" standard.[43] To determine the enforceability of a clause in a browsewrap agreement, courts consider

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35. *Id.* at 597, 693 S.E.2d at 878.

36. *See* Lovelace v. Figure Salon, 179 Ga. App. 51, 53, 345 S.E.2d 139, 141 (1986) ("One who can read, must read.") (citing Cochran v. Murrah, 235 Ga. 304, 305, 219 S.E.2d 421, 423 (1975)).

37. *Lovelace*, 179 Ga. App. at 53, 345 S.E.2d at 141.

38. First Options of Chi, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

39. 1 Computer Contracts § 1.02(c) ("Despite their ubiquity, browsewrap agreements are still relatively new to courts.").

40. Cullinane v. Uber Technologies, Inc., 893 F.3d 53, 61–62 (1st Cir. 2018).

41. *Id.* at 62; *See also* Defontes v. Dell Computers Corp., C.A. No. PC 03-2636, 2004 R.I. Super. LEXIS 32, *17 (R.I. Super. 2004) (holding a browsewrap agreement to be unenforceable when it failed to be conspicuous such that customers would be on notice of the terms and conditions).

42. *Cullinane*, 893 F.3d at 62.

43. *Meyer*, 868 F.3d at 77 ("In considering the question of reasonable conspicuousness, . . . we consider the perspective of a reasonably prudent smartphone user."); *See also* Specht v. Netscape Communs. Corp., 306 F.3d 17, 30 (2d Cir. 2002).

whether the hyperlinked terms and conditions are reasonably conspicuous such that a reasonably prudent smartphone user would have constructive notice of those terms.[44] The primary factors courts consider when evaluating reasonable conspicuousness include the placement of the terms, regarding both the context and physical location on the app's interface;[45] the timing, such as duration the link is displayed; font size and color;[46] language and phrasing; and whether the terms are attention-grabbing relative to the rest of the features on the screen.[47] These factors have proven to be crucial in finding browsewraps enforceable.

i. Browsewrap Agreements Held to Be Enforceable

Several courts applying this framework have found that a user assented to terms in a browsewrap located in a smartphone app. In *Meyer v. Uber Technologies, Inc.*[48], the Second Circuit found the terms and conditions contained in the Uber app registration page were sufficiently conspicuous such that the user had constructive notice of the terms upon registration.[49] Given this constructive notice, the user effectively assented to the terms contained in the hyperlinked agreement by completing the registration and continuing use of the app.[50]

To reach this holding, the court considered whether a reasonably prudent smartphone user would have constructive notice of the terms and conditions on the interface of the Uber app during registration.[51] The court reasoned that a reasonably prudent smartphone user would have constructive notice of the terms if the terms were reasonably conspicuous.[52] The reasonably conspicuous standard involves the terms having certain qualities and characteristics to communicate to the user

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44. *Meyer*, 868 F.3d at 79.

45. *Nguyen*, 763 F.3d at 1177 ("Where the link to a website's terms of use is buried at the bottom of the page or tucked away in obscure corners of the website where users are unlikely to see it, courts have refused to enforce the browsewrap agreement.").

46. The color of the hyperlink is particularly important to indicate the terms and conditions are linked. *Meyer*, 868 F.3d at 77–78 ("[A] reasonably prudent smartphone user knows that text that is highlighted in blue and underlined is hyperlinked to another webpage where additional information will be found.").

47. *Id.* at 78 (holding a browsewrap agreement enforceable when the terms and conditions appeared in a dark print on a white, uncluttered background screen).

48. 868 F.3d 66 (2d Cir. 2017).

49. *Id.* at 79.

50. *Id.* at 79–80.

51. *Id.* at 77.

52. *Id.*

that (1) the full terms and conditions are available through the hyperlink and (2) registration and use of the goods or services is subject to these terms and conditions, and these terms could impact the user in the future.[53] The browsewrap in *Meyer* satisfied this standard.[54]

In *Meyer*, the app interface containing the browsewrap in question was a clear, uncluttered screen during the account registration process.[55] At the bottom of the screen was the following language: "[B]y creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY."[56] The user did not have to scroll to see this notice; it was visible for the user once he entered this stage of registration in the app. Of importance here, the language "TERMS OF SERVICE & PRIVACY POLICY" appeared in blue with underlined text, indicating a hyperlink.[57] The full phrase appeared in small but dark print against a bright white background, creating a stark contrast which grabbed the user's attention.[58]

As a result, the Second Circuit determined that this presentation of the terms was reasonably conspicuous such that a reasonably prudent smartphone user would recognize the hyperlink as connected to account registration.[59] The hyperlink was recognizable as such due to the distinctive blue, underlined text. The screen was not cluttered with other distracting terms that could have prevented the user from noticing the terms at the bottom of the screen. Further, the placement of the browsewrap occurred at the point where the user officially registered his account.[60] Based on these critical findings, the court reasoned that a reasonably prudent smartphone user would understand the hyperlink gave notice that account registration would be contingent upon certain hyperlinked terms and conditions.[61] This provided the constructive notice sufficient to find the user assented to the terms.[62]

Likewise, if the hyperlink containing the terms and conditions is presented conspicuously on each page of a website, continued use of the website or application is sufficient to show the user assented to the

53. *Id.* at 78–80.
54. *Id.* at 80.
55. *Id.* at 78.
56. *Id.* at 71.
57. *Id.*
58. *Id.* at 78.
59. *Id.* at 79–80.
60. *Id.* at 78–79.
61. *Id.* at 78.
62. *Id.* at 79–80.

terms. In *Cairo, Inc. v. Crossmedia Services, Inc.*,[63] the United States District Court for the Northern District of California enforced the contract terms where each page on the website had a textual notice that read: "By continuing past this page and/or using this site, you agree to abide by the Terms of Use for this site, which prohibit commercial use of any information on this site."[64] This explicit notice that continued use constituted assent to the terms made the court more amenable to enforcing the browsewrap.[65] Further, the phrase "Terms of Use" was clearly hyperlinked, signaling to the user that the terms could be accessed by clicking the link.[66]

The conspicuous display of the hyperlinked terms and a clear signal that continued use will constitute acceptance are two findings that are crucial to find a valid browsewrap agreement. If the terms are inconspicuously displayed, this will almost certainly destroy the validity of the browsewrap.

ii. Browsewrap Agreements Held to Be Unenforceable

Other courts deciding issues involving the enforceability of browsewrap agreements have found these contracts to be unenforceable. In *Cullinane v. Uber Technologies, Inc.*,[67] the First Circuit held that the terms and conditions in the Uber app interface at issue were not reasonably conspicuous, and the Plaintiffs did not assent to the terms when the hyperlink did not include the common characteristics of a hyperlink (blue, underlined text), and failed to stand out relative to other terms on the same screen.[68] The language presenting notice of the terms and the hyperlink were in large, bold font contained in a gray, rectangular box at the bottom of the registration screen.[69] However, there were additional features on the screen which were displayed with large font and with equally, if not more, noticeable and attention-grabbing attributes. The court reasoned that having such similar terms and features elsewhere on the screen "diminished the conspicuousness" of the terms and conditions Uber sought to include.[70]

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63. No. C-04-04825-JW, 2005 U.S. Dist. LEXIS 8450, *1 (N.D. Cal. Apr. 1, 2005).

64. *Id.* at *4 (emphasis in original).

65. *Id.* at *13–14.

66. *Id.* at *4.

67. 893 F.3d 53 (1st Cir. 2018).

68. *Cullinane*, 893 F.3d at 63–64. The enforceability of this internet contract and whether the app user assented to the terms was an issue of first impression for the court.

69. *Id.* at 62–63.

70. *Id.* at 63.

That is, courts do not view the disputed browsewrap in a vacuum separate from the rest of the screen the user would view.[71]

In the court's finding that the terms presented by Uber were not reasonably conspicuous and the Plaintiffs did not provide unambiguous assent to the terms, the *Cullinane* court heavily emphasized the detrimental effect of the hyperlink's appearance on the browsewrap's enforceability.[72] How prominently this link is displayed is a key factor in determining the browsewrap's enforceability.[73] If the hyperlink is not presented in the traditional format with blue, underlined text, it is less likely that the court will conclude that a reasonably prudent smartphone user would have notice of the terms signaled by the link.[74]

Moreover, when the link to the terms and conditions is buried or hidden at the bottom of a website or app screen where it would be difficult for the user to notice the link, courts are unlikely to find the user assented to the terms.[75] In *Specht v. Netscape Communications Corp.*,[76] the Second Circuit refused to enforce a browsewrap agreement when the link was placed at the bottom of a website's screen far below a "download" button users would click.[77] The court reasoned that the user—downloading a free software application—had no reason to know about a license agreement contained within the terms when the link was located at the bottom of the screen away from the download button.[78]

Taking an even stricter approach on browsewrap enforceability, the United States Court of Appeals for the Ninth Circuit in *Nguyen v.*

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71. *Id.*

72. *Id.* at 64. Interestingly, the court critiqued, almost as an aside, Uber's choice to utilize a browsewrap agreement as opposed to a clickwrap agreement, where the user would have to physically click "I Agree" before moving past the terms and continuing to register for the service. While binding contracts may be made and enforced through browsewrap agreements, the court's reasoning suggests electing to use a clickwrap agreement, which garners the express assent of the user, would be a safer and more effective approach to establishing internet contracts. *But see Meyer*, 868 F.3d at 78 ("That the Terms of Service were available only by hyperlink does not preclude a determination of reasonable notice.").

73. *See Cullinane*, 893 F.3d at 64.

74. *Id.* at 63 (holding a browsewrap agreement to be unenforceable when the hyperlink appeared in a gray, rectangular box and did not have the common blue, underlined style of a hyperlink).

75. *Nguyen*, 763 F.3d at 1177; In re Zappos, Inc., 893 F. Supp. 2d 1058, 1064 (D. Nev. 2012); Hines v. Overstock.com, Inc., 380 F. App'x. 22, 24–25 (2d Cir. 2010); *Specht*, 306 F.3d at 31–32.

76. 306 F.3d 17 (2d Cir. 2002).

77. *Specht*, 306 F.3d at 20.

78. *Id.*

Barnes & Noble Inc.[79] held a browsewrap on a website was unenforceable when, although there was a conspicuous hyperlink provided on every page of the website, there was otherwise no notice provided to the user of binding terms nor a prompt for the user to take affirmative action to assent to terms.[80] In *Nguyen*, there was relatively close proximity between the hyperlink and the buttons a user would click to complete his purchase.[81] However, the court reasoned that this proximity was insufficient to place the user on notice of the terms because "[g]iven the breadth of the range of technological savvy of online purchasers, consumers cannot be expected to ferret out hyperlinks to terms and conditions to which they have no reason to suspect they will be bound."[82]

While browsewraps still pose new and frequently evolving questions of enforceability to the courts, there are general principles that guide courts in framing and evaluating browsewrap agreements.

2. Guiding Principles for Valid Browsewrap Agreements

The key principle in the enforcement of browsewrap agreements is that the terms must be reasonably conspicuous such that a user would have actual or constructive knowledge of the terms.[83] If objective, reasonable notice of the terms is impressed upon the smartphone user, courts have found that the user need not expressly assent to the terms or the arbitration agreement contained therein.[84] A court may still consider the user's assent as unambiguous, allowing for enforcement of the agreement, when the user is sufficiently put on constructive notice through the presentation of the terms on the app's interface and the user continues using the website or app.[85]

Further, if the terms are presented in a proper, conspicuous manner, then a reasonably prudent smartphone user would understand that, by following through with registration, his registration is subject to the

79. 763 F.3d 1171 (9th Cir. 2014).

80. *Id.* at 1177–79.

81. *Id.* at 1177.

82. *Id.* at 1179.

83. *Hines*, 380 F. App'x at 25 (affirming the district court's denial of defendant's motion to compel arbitration when the defendant failed to show the plaintiffs had actual or constructive knowledge of the terms, which were displayed in a browsewrap agreement format).

84. *Meyer*, 868 F.3d at 74–75 ("Browsewrap agreements . . . do not require the user to expressly assent."). This is reinforced by the principle that when a party fails to read the contract terms to which he assents, his failure to read is not a defense. *See Lovelace*, 179 Ga. App. at 53, 345 S.E.2d at 141.

85. *See e.g.*, *Meyer*, 868 F.3d at 79.

hyperlinked terms and conditions—regardless of whether the user clicks on the hyperlink or not.[86] This reasonably conspicuous notice—imparting constructive notice to the user, leading to unambiguous manifestation of assent through use of the app—is the finding a court must make to render the browsewrap agreement and the clauses contained within as valid and enforceable.[87] As the Second Circuit has reasoned when examining browsewrap enforceability, "[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."[88] This framework courts have developed to analyze browsewraps provides a standard ensuring mutual assent—an axiomatic and integral element of contract law.

IV. COURT'S RATIONALE

Whether Thornton assented to Uber's terms and conditions associated with the app presented an issue of first impression before the Georgia Court of Appeals.[89] The *Thornton* court ultimately followed the First and Second Circuit court's reasoning, focusing on whether Uber's hyperlinked terms were conspicuous and gave Thornton notice of the terms. In holding that the trial court erred in finding Thornton agreed to the hyperlinked terms during his registration and continued use, the court issued a significant holding for companies utilizing smartphone apps in Georgia: inconspicuous terms and conditions will likely preclude a finding that the user assented to the terms as a matter of law.[90]

A. Assent to the Terms During Account Registration

Applying the Second Circuit's reasonably prudent smartphone user standard put forth in *Meyer*, the *Thornton* court examined the link to the terms and conditions provided in the Uber app used by Thornton to determine whether there was sufficient notice.[91] Similar to *Meyer*, the

86. Wilson v. Huuuge, Inc., 351 F. Supp. 3d 1308, 1316 (W.D. Wash. 2018) (reasoning that a key determination in browsewrap enforceability is whether the app adequately informs a reasonably prudent user that clicking to register includes agreeing to be bound by the hyperlinked terms).

87. Temple v. Best Rate Holdings LLC, 360 F. Supp. 3d 1289, 1302 (M.D. Fla. 2018) (holding that the validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice).

88. *Specht*, 306 F.3d at 35.

89. *Thornton*, 359 Ga. App. at 793, 858 S.E.2d at 258.

90. *Id.* at 794, 858 S.E.2d at 259.

91. *Id.* at 793–94, 858 S.E.2d at 258–59.

use of dark font on a bright white background created contrast that draws the user's notice.[92] Uber crafted the language in uppercase text, with the phrase "TERMS & CONDITIONS AND PRIVACY POLICY" hyperlinked.[93] The court held this hyperlink satisfied the common appearance of a hyperlink, such that the user would understand it is linked to another webpage, because the phrase was in blue, underlined text.[94] The court concluded—based on this presentation of the terms and conditions—that Thornton *could* have been found to have assented to Uber's terms and conditions upon registering his account, regardless of whether he clicked the hyperlink.[95]

Since a party is still bound by the duty to read, any failure to click on the hyperlink to access the full agreement does not excuse the party from the obligations contained therein, including any arbitration agreement.[96] Under this theory and that of the objective standard of assent, the court reasoned Thornton certainly could have been found to have assented to the terms. However, the decisive factor that shifted the court's holding was the evidence regarding the potential concealment of the terms and conditions hyperlink on the Android interface of the Uber app that Thornton used.[97]

The interface of the Uber app on Thornton's Android included an on-screen keyboard that appeared on the bottom of the screen below the payment information.[98] If this keyboard covered the terms and conditions language and hyperlink at the bottom of the screen, this would be problematic in finding Thornton assented to the terms.

Drawing from Georgia's objective theory of intent, the court reasoned that if the interface of the app was such that Thornton might not have seen the terms and conditions or had the opportunity to click the hyperlink, then he might not have assented to Uber's terms and conditions.[99] The court held that this could be the case if the terms and conditions were hidden entirely by the on-screen keyboard, or if the terms were displayed for an unreasonably short period of time, hindering Thornton from taking notice of the language.[100]

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92. *Id.* at 794, 858 S.E.2d at 259; *Meyer*, 868 F.3d at 71.
93. *Thornton*, 359 Ga. App. at 794, 858 S.E.2d at 259.
94. *Id.*
95. *Id.* (emphasis added).
96. *Id.*
97. *Id.* at 794–95, 858 S.E.2d at 259.
98. *Id.* at 792, 858 S.E.2d at 257.
99. *Id.* at 794–95, 858 S.E.2d at 259.
100. *Id.*

B. Assent to the Terms Through the Email Update

In addition to the browsewrap presented during registration, an email was sent by Uber to users later to apprise users of updated terms and conditions.[101] Uber argued that Thornton assented to the terms through his continued use of the app after the email was sent from Uber containing updated terms and conditions.[102] However, Uber could not present specific evidence showing Thornton's email address as a recipient.[103]

In response, the court concluded that—since there was a question of fact regarding whether Thornton received this update—the email update and Thornton's continued use of the app did not constitute assent.[104] The court's decision to withhold assuming receipt of the email by Thornton highlights an important distinction in Georgia law and illustrates why parties may not want to rely on the mailbox rule.[105] Georgia courts have not extended the assumption of delivery under the mailbox rule to communications including telegram or email. Therefore, evidence of Uber's updated terms and conditions email, without Thornton's specific email address, was insufficient to show Thornton received the email.[106]

The court of appeal's holding regarding the browsewrap's lack of enforceability will remain intact and authoritative for app developers and consumers in Georgia—reconsideration for this appeal was denied on June 16, 2021, and certiorari was denied on October 5, 2021.[107]

V. IMPLICATIONS

The use of smartphone apps to buy and sell goods and services has become widespread in the modern economy, and the use of this technological tool will only increase in the future. While companies using smartphone apps to market and sell goods or services enjoy the benefits of more efficient business transactions and access to a wider consumer base, companies should exercise caution in the presentation of the terms and conditions to minimize costly disputes in the future. A

101. *Id.* at 796, 858 S.E.2d at 260.

102. *Id.* at 795, 858 S.E.2d at 259.

103. *Id.* at 796, 858 S.E.2d at 260.

104. *Id.*

105. *Id.* at 796 n.2, 858 S.E.2d at 260 ("Georgia courts have not applied any presumption of delivery or receipt to other forms of communication, such as telegram or e-mail.").

106. *Id.* at 796, 858 S.E.2d at 260.

107. *Id.* at 790, 858 S.E.2d at 255.

frequent point of contention involved in these disputes is the use of an arbitration clause.

The party seeking to compel arbitration bears the burden of showing a written agreement to arbitrate exists.[108] Given this burden and the standard courts apply to terms and conditions incorporated within a mobile app, companies using such smartphone apps should take a more cautious, thorough approach in garnering the assent of the user through careful display of the terms.

Companies should present terms and conditions as clear as possible on the websites or smartphone apps it utilizes. This includes presenting the terms in a text designed to be eye-catching and attention-grabbing. This includes contrast, such as dark text on a bright white background; proper hyperlinks with blue, underlined text; and minimal distractions elsewhere on the page where the terms are presented.

Furthermore, companies may find it advantageous to use a clickwrap agreement to present the terms and conditions as opposed to a browsewrap agreement.[109] Using a method like clickwraps, which require an affirmative act by the user in clicking "I Accept" or "I Agree," is likely a more effective, reliable manner of garnering the assent of the user to the terms.[110] The more definite manifestation of assent that comes with a physical expression is a safer choice for companies and minimizes the risk of a finding in future disputes that the user never assented to the terms.[111] Likewise, additional low-risk options include requiring the user's signature or providing an email verification that the user assented to the terms.[112]

However, companies should not rely solely on sending later emails updating the terms and conditions to establish the user's assent to the terms. Evidence of receipt is necessary to enforce the updated agreement against the user, and a lack of such documentation could prove costly for a party seeking to enforce the contract. This should inspire careful action by companies using smartphone apps and websites to garner assent from the initial use rather than solely rely on

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108. Ashburn Health Care Ctr., Inc. v. Poole, 286 Ga. App. 24, 25, 648 S.E.2d 430, 432 (2007).

109. *See Nguyen*, 763 F.3d at 1176 ("Were there any evidence in the record that Nguyen had actual notice of the Terms of Use or was required to affirmatively acknowledge the Terms of Use before completing his online purchase, the outcome of this case might be different.").

110. *Id.* at 1176–77.

111. *Berkson*, 97 F. Supp. 3d at 397 (finding that the active role a user plays in assenting to a clickwrap agreement makes these agreements generally enforceable by the courts).

112. *Id.* at 403.

future communication. Ultimately, while companies may successfully utilize browsewraps to form a binding contract from the initial use of the website or app, the alternative methods requiring a physical manifestation of assent by the user may prove to be a lower risk option.