PENNSYLVANIA SUPERIOR COURT APPLIES A STRICTER BURDEN OF PROOF TO ENFORCE "BROWSEWRAP" ARBITRATION CLAUSES, DEPARTING FROM OTHER JURISDICTIONS

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US Litigation and Dispute Resolution Judicial Opinion Summary

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On 19 July 2023, the Pennsylvania Superior Court established a set of requirements for companies that rely on "browsewrap" agreements in order to secure consumers' consent to arbitration. In a departure from other courts that have considered the issue, the court held in *Chilutti v. Uber Technologies, Inc.*[1] that any company seeking to compel arbitration must show (1) that the registration website and application screen specifically state that the consumer is waiving its right to a jury trial when the consumer agrees to the company's terms and conditions and that the registration process cannot be completed until the consumer is fully informed of that waiver, and (2) that the waiver appears at the top of the terms and conditions page in bold, capitalized text.[2] Companies doing business in Pennsylvania should revisit their consumer arbitration agreements carefully to ensure that they comply with these requirements.

THE *CHILUTTI* CASE

Plaintiff Shannon Chilutti sued Uber after being injured in a motor vehicle accident while using the service.[3] Chilutti, who uses a wheelchair, arranged for an Uber to take her to a medical appointment.[4] After the driver allegedly took an aggressive turn, Chilutti fell out of her wheelchair and hit her head, rendering her unconscious.[5] Chilutti sued Uber, seeking to recover for injuries she sustained in the accident.[6]

In response, Uber moved to compel the claims to arbitration.[7] Uber argued that the Chiluttis agreed to arbitrate their claims when they registered for Uber's services and agreed to its terms and conditions (the Terms).[8] The Terms were contained in a "browsewrap" agreement, accessible only when the consumer clicked a hyperlink to the Terms.[9] The arbitration provision was then buried in the middle of the Terms.[10] The Chiluttis opposed the motion, arguing that they never read the Terms when they registered for Uber's services, and they had no knowledge that those Terms contained an arbitration agreement.[11] The trial court granted Uber's motion to compel arbitration, and the plaintiffs appealed.[12]

THE SUPERIOR COURT'S DECISION

The Superior Court, reversing the trial court's decision, held that Uber failed to show there was a valid agreement to arbitrate the underlying dispute.[13] In so holding, the court emphasized the Pennsylvania Constitution's provision of a fundamental right to a jury trial, and it explained that to waive this fundamental right, the party seeking to

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enforce the agreement must show that there was an unambiguous manifestation of assent between the parties.[14] The court distinguished between "clickwrap" agreements and "browsewrap" agreements: "Clickwrap" agreements "present[] users with specified contractual terms on a pop-up screen," whereas "browsewrap" agreements are only readable once a user clicks on a hyperlink.[15] Courts have generally enforced "clickwrap" agreements, but "browsewrap" agreements, like Uber's, have been subject to increased scrutiny in other jurisdictions.[16]

The Superior Court, applying ordinary state law principles that govern the formation of contracts, concluded that Uber's website did not provide reasonably conspicuous notice of the Terms.[17] Notably, the court declined to apply the standard set in *Berman v. Freedom Financial Network, LLC*[18] that other jurisdictions have applied when analyzing the enforceability of a "browsewrap" agreement. In *Berman*, the Ninth Circuit explained that a notice defect in a "browsewrap" agreement can be cured by including language such as, "By clicking the Continue >>> button, you agree to the Terms & Conditions."[19] Explaining its departure, the court reasoned: "[B]ecause the constitutional right to a jury trial should be afforded the greatest protection under the courts of this Commonwealth, we conclude that the Berman standard is insufficient under Pennsylvania law, and a stricter burden of proof is necessary to demonstrate a party's unambiguous manifestation of assent to arbitration."[20]

TAKEAWAY FOR COMPANIES DOING BUSINESS IN PENNSYLVANIA

Since the Superior Court's decision constitutes a departure from other jurisdictions that have considered the issue, review by the Pennsylvania Supreme Court is likely. In the meantime, any company doing business in Pennsylvania that requires its customers or consumers to agree to arbitrate when they agree to online terms and conditions should consult with counsel to ensure that its arbitration provision complies with Pennsylvania's new test.

FOOTNOTES

[1] --- A.3d ----, No. 1023 EDA 2021, 2023 WL 4611931 (Pa. Super. Ct. July 19, 2023).

[2] *Id*. at *15.

[3] *Id*. at *2.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id*. at *6.

[10] *Id*. at *14.

[11] *Chilutti v. Uber Techs*., No. 1023 EDA 2021, 2022 WL 6886984, at *21–22 (Pa. Super. Ct. Oct. 12, 2022).

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[12] *Chilutti*, 2023 WL 4611931, at *2.

[13] *Id*. at *1.

[14] *Id*. at *15.

[15] *Id*. at *10.

[16] *Id*.

[17] *Id*. at *14.

[18] 30 F.4th 849 (9th Cir. 2022).

[19] *Chilutti*, 2023 WL 4611931, at *14 (citing Berman, 30 F.4th at 858).

[20] *Id*. at *15.

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