New York Court Of Appeals Roundup

The Majority Upholds Retroactive Application of Clickwrap Arbitration Agreement

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The New York Court of Appeals' recent decision in *Wu v. Uber Technologies, Inc.* underscores the growing tension between traditional contract law principles and the realities of digital consumer agreements. The case revolved around Uber's enforcement of a "clickwrap" arbitration agreement, embedded in its updated terms of use, against a plaintiff who had filed a personal injury lawsuit before allegedly agreeing to the new terms. While the Court ultimately upheld Uber's right to compel arbitration, the decision explored critical questions about notice, consent, and fairness in the age of online contracting.

In July 2020, plaintiff Emily Wu hailed an Uber ride in Brooklyn. According to her complaint, the driver dropped her off in the middle of a busy intersection, where she was struck by an oncoming vehicle moments after exiting the car. Wu sustained serious injuries and filed a personal injury lawsuit against Uber in Bronx County Supreme Court in November 2020, alleging negligence on the company's part under a respondent superior theory. At the time, Uber's terms of use did not explicitly require arbitration for claims already filed in court.

Two months later, Uber updated its terms of use to include an arbitration agreement covering all disputes—past, present, and future. Uber notified its U.S. users of the changes via a mass email and required them to assent to the new terms through an in-app "clickwrap" interface. The email encouraged users to review the updated terms, indicated that the changes included modifications to the arbitration agreement, and provided hyperlinks to the full text.

When Wu next accessed the Uber app, she was met with a pop-up screen stating, "We've updated our terms." Users were required to check a box affirming that they had reviewed and agreed to the terms before they could proceed with using the app. Wu, like millions of others Uber users, clicked the box and pressed the "Confirm" button.

The updated arbitration agreement included a key provision: all disputes, including personal injury claims that had accrued before the terms were accepted, were subject to mandatory arbitration. Additionally, the agreement featured a broad delegation clause that granted the arbitrator exclusive authority to resolve any disputes regarding the agreement's enforceability or scope. When Wu moved for a default judgment against Uber for failing to timely respond to her lawsuit, Uber countered by invoking the arbitration agreement and moving to compel arbitration.

Wu resisted, arguing that the arbitration clause was invalid and unenforceable, particularly with respect to claims that were already pending in court. She also alleged that Uber's direct communication with her, rather than her attorney, violated New York's Rules of Professional Conduct. The Supreme Court ruled in Uber's favor, finding that the clickwrap process provided sufficient notice of the arbitration agreement and that Wu's assent was valid. *Wu v. Uber Technologies, Inc.*, 186 N.Y.S.3d 500 (Sup. Ct. Bronx Cnty. 2022). The Appellate Division, First Department unanimously affirmed, 197 N.Y.S.3d 1 (1st Dep't

2023), but granted Wu leave to appeal to the Court of Appeals. 2023 NY Slip Op. 78234(U) (1st Dep't 2023).

Writing for a 5-2 majority, Judge Anthony Cannataro (joined by Judges Garcia, Singas, Troutman and Halligan) upheld the rulings, framing the case as an application of well-established contract principles and public policy favoring arbitration to modern, web-based agreements. The majority focused heavily on the process by which Uber notified users of the updated terms and solicited their assent. According to the majority, Uber's email and pop-up screen clearly informed users that their continued use of the app was contingent on agreeing to the new terms.

The email explicitly mentioned changes to the arbitration agreement and provided hyperlinks to the full terms. The pop-up screen required users to check a box acknowledging their acceptance of the terms before they could access the app's services. The majority reasoned that this method satisfied the requirements for contract formation under New York law: offer, acceptance, and a "meeting of the minds." The majority emphasized that Wu's actions—checking the box and clicking "confirm"—constituted an objective manifestation of assent to the terms, regardless of whether she actually reviewed them. This approach aligns with long-standing principles of contract law, which generally hold that individuals are bound by agreements they accept, even if they fail to read the terms.

The majority also rejected Wu's argument that the arbitration agreement's retroactive application to pending claims was hidden or misleading. The arbitration clause, the majority noted, was prominently disclosed in the updated terms with bolded and capitalized text drawing attention to its key provisions. The Court held that a reasonably prudent user would have been on inquiry notice of the arbitration agreement and its scope, and Wu's continued use of the app signaled her acceptance.

A pivotal aspect of the majority's decision was its treatment of the delegation clause. This provision expressly assigned to the arbitrator the authority to resolve "threshold" disputes, such as whether the arbitration agreement applied to a particular claim. The majority held that because Wu did not specifically challenge the validity of the delegation clause, her broader objections to the arbitration agreement—including claims of unconscionability and public policy violations—were for the arbitrator to decide. As interpreted by the majority, the United States Supreme Court's precedent on arbitration agreements under the Federal Arbitration Act emphasizes that delegation clauses must be enforced if they are "clear and unmistakable" and not independently challenged.

Finally, Wu argued that Uber's email and pop-up screen violated Rule 4.2 of New York's Rules of Professional Conduct, which prohibits attorneys from directly contacting a represented party about pending litigation without their lawyer's consent. She contended that Uber's communications constituted improper contact designed to undermine her legal representation.

The majority disagreed and affirmed the trial court's finding that there was no evidence that Uber knew of Wu's pending lawsuit or her representation at the time the email was sent. The trial court characterized Uber's mass communications as a standard business practice, not a targeted attempt to circumvent ethical rules. *See Wu,* 186 N.Y.S.3d at 541–43. Further, the majority noted that Wu had not requested the specific remedy of invalidating the arbitration agreement as a sanction for the alleged ethical violation.

Judge Jenny Rivera, joined by Chief Judge Wilson, dissented, and argued that Uber's updated terms failed to provide clear and unmistakable notice that the arbitration agreement applied to already-filed lawsuits. The dissent emphasized that the email and pop-up used prospective language, suggesting that the arbitration clause governed future disputes only. Accordingly, there was no meeting of the minds necessary to form a contract concerning the application of the arbitration agreement to Wu's already pending lawsuit.

The dissent also criticized Uber's failure to send the updated terms to Wu's attorney, as required by ethical rules. This omission, the dissent argued, deprived Wu of the opportunity to make an informed decision about the agreement's implications for her pending lawsuit. The dissent warned that the

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majority's decision set a dangerous precedent, allowing companies to impose significant legal obligations on consumers through opaque and unilateral processes.

The Court's decision represents a pivotal moment in the evolution of contract law in the digital era. By affirming the enforceability of Uber's clickwrap agreement, the majority applied traditional principles of notice and assent without granting exceptions for the challenges posed by web-based contracting or requiring a specific reference to the language change at issue in this litigation.

For companies, the ruling reinforces the need to ensure that material terms, such as arbitration clauses, are prominently disclosed and presented in a manner that satisfies legal standards for notice and assent by a reasonable person. For consumers, the case serves as a reminder of the risks inherent in accepting contractual terms without careful review. While it may be impractical for consumers to read every agreement they encounter, significant rights can be waived through seemingly innocuous actions like clicking a checkbox. Awareness and caution are essential in navigating the complexities of digital contracts.

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