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In Conspicuous Terms-- Arbitration Agreements for the Modern Reasonable App User

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IN CONSPICUOUS TERMS—ARBITRATION
AGREEMENTS FOR THE MODERN
REASONABLE APP USER

MICHELLE DUNBAR*

ABSTRACT

Two recent decisions regarding the validity of arbitration agreements in mobile apps have come to opposite conclusions despite utilizing the same legal standard and concerning the same app—Uber. While the Federal Arbitration Act strongly favors the validity and importance of arbitration agreements, it appears that judge’s subjectivity based on common knowledge and understanding of apps is influencing the outcome of cases concerning the validity of these arbitration agreements. To the modern app user, are these terms really inconspicuous? For businesses, this could mean that instead of competing in an already saturated app market by enhancing their design and integrating branding into their mobile app’s user interface, they may have to concern themselves more with compromising their branding strategy to comply with a legal standard that demands the terms to be the most conspicuous standard to include the common knowledge and understanding of app users into the perspective of the reasonable app users that courts use to analyze the conspicuousness of terms. By encompassing this heightened knowledge, reasonable access to terms, rather than the level of conspicuousness of terms, should suffice for putting a user on inquiry notice. Such a standard allowing for reasonable access should both accurately reflect the current knowledge and allow for further item to the user. This Note proposes a potential redefined advancements in the understanding of mobile technology.

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INTRODUCTION

The standard for determining the validity of arbitration agreements in apps and new digital technology is unclear. The Federal Arbitration Act (FAA) expresses “a liberal federal policy favoring arbitration agreements.”¹ However, by using a reasonable person standard to determine (i) whether someone has received notice of an arbitration agreement and (ii) whether the arbitration agreement has been agreed to in smartphone applications, courts allow subjective biases to creep into this inquiry which may vary from judge to judge, making the standard unclear.² If the FAA reads so liberally in favor of arbitration, how is it that the judicial interpretation has differed on the validity of arbitration terms for the same company’s app and terms?³

Two recent cases, *Cullinane v. Uber Technologies, Inc.* and *Meyer v. Uber Technologies, Inc.*, came to opposite conclusions regarding the validity of arbitration agreements despite the controversy stemming from the same app—Uber.⁴ In *Cullinane*, the plaintiffs filed a class action against Uber, asserting that Uber imposed fictitious or inflated fees; Uber, in turn, filed a motion to compel arbitration due to the arbitration agreement contained in the app’s Terms and Conditions.⁵ The First Circuit analyzed the validity of Uber’s arbitration agreement by evaluating whether the terms of the agreement were reasonably communicated to the plaintiffs.⁶ As a mobile contract, the court looked to whether the terms were conspicuous within the design and context of the interface.⁷ For these plaintiffs, Uber’s registration screen consisted of a black background with white and gray text, containing a total of twenty-six words.⁸ The First Circuit stated that “[i]f everything on the screen is written in conspicuous features, then nothing is conspicuous.” It held that Uber’s bold, white, hyperlinked terms—including its arbitration agreement—were

¹ *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 74 (2d Cir. 2017) (citations omitted).

² *See Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 62–64 (1st Cir. 2018); *Meyer*, 868 F.3d at 77–78.

³ *See Cullinane*, 893 F.3d at 63–64; *Meyer*, 868 F.3d at 78–79.

⁴ *Cullinane*, 893 F.3d at 63–64; *Meyer*, 868 F.3d at 78–79.

⁵ *Cullinane*, 893 F.3d at 55, 59.

⁶ *Id.* at 61–62.

⁷ *Id.* at 62.

⁸ *Id.* at 56–58, 62–63.

not sufficiently conspicuous in terms of the context of the screen to put users on inquiry notice of the terms.⁹

Similarly, in *Meyer*, the plaintiffs filed a class action alleging that the app allowed drivers to fix prices.¹⁰ Again, Uber moved to compel arbitration based on the app's Terms of Service.¹¹ The Second Circuit also utilized a "reasonably conspicuous notice" standard from the perspective of a reasonable smartphone user.¹² Taking a seemingly more progressive view on the pervasiveness and knowledge of mobile devices and users, the Second Circuit held that in the context of the entire interface, there was "ample evidence that a reasonable user would be on inquiry notice of the terms."¹³ In actuality, the screens in both *Cullinane* and *Meyer* contain much the same language and design features;¹⁴ the discrepancy appears to turn on Uber's branding and design during the relevant time period.¹⁵

The standard for determining whether someone has been provided notice of an arbitration agreement and whether they have agreed to those terms should be more clearly defined to better encompass the breadth of common knowledge of users of different smartphones and other pervasive technology.¹⁶ A potential resolution would be to incorporate the understanding of a reasonable person from the perspective of an app user.¹⁷ Such a standard would account for the specialized common knowledge held by the current paradigm of app users by tailoring the legal standard to what is commonplace in this technological era, thus ensuring its adaptability for future changes.¹⁸ Instead of the traditional common law test of *notice* for determining the validity of arbitration agreements, agreement to terms should turn on whether there is reasonable *access*.¹⁹ If a modern app user has

⁹ *Id.* at 62–64.

¹⁰ *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 70 (2d Cir. 2017).

¹¹ *Id.*

¹² *Id.* at 77–78.

¹³ *Id.* at 77, 79.

¹⁴ *See infra* Section II.E, Figure 1; Figure 2.

¹⁵ *See Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 62–64 (1st Cir. 2018); *Meyer*, 868 F.3d at 78–79.

¹⁶ *See infra* Section II.F.

¹⁷ *See infra* Part III.

¹⁸ *See id.*

¹⁹ *See infra* Section III.B.

reasonable access to the terms during and after registration, their use of the app expresses an outward manifestation of assent to the terms by nature of their knowledge and understanding of what use of the app entails.²⁰ Provided that an app user has reasonable access to the terms, such user should be subject to the terms in apps.²¹

I. ARBITRATION CLAUSES AND THEIR IMPORTANCE IN CONSUMER CONTRACTS

A. *The Federal Arbitration Act and Contract Law*

The Federal Arbitration Act (FAA) was enacted by Congress in 1925 in order to ensure validity and enforcement of arbitration agreements subject to the Act, construed to be those agreements that “affect[] interstate commerce in any way.”²² Section 2 of the Act states that:

A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.²³

Given that arbitration agreements had historically been treated with hostility in the law, the purpose of this section was “to place arbitration agreements ‘upon the same footing as other contracts, where [they] belong.’”²⁴ For that reason, the Act preempts state law that would otherwise invalidate arbitration

²⁰ *See id.*

²¹ *See id.*

²² JON O. SHIMABUKURO, CONG. RESEARCH SERV., RL30934, THE FEDERAL ARBITRATION ACT: BACKGROUND AND RECENT DEVELOPMENTS 1 (2002); Michael L. Ehren, *Getting Your Day Outside of Court: A Guide to Compelling Arbitration Under the Federal Arbitration Act*, A.B.A. (Dec. 9, 2014), https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/compelling_arbitration_under_faa/ [<https://perma.cc/Y2R9-DFFZ>].

²³ 9 U.S.C. § 2 (2012).

²⁴ *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); SHIMABUKURO, *supra* note 22, at 2 (quoting H.R. REP. NO. 96, 68th Cong., 1st Sess., 1 (1924)).

agreements.²⁵ State law invalidation would “frustrate congressional intent” to maintain the Act’s even footing with contracts.²⁶ Section 2 of the FAA also emphasizes “congressional declaration of a liberal federal policy favoring arbitration agreements.”²⁷ The extent of that favor has been interpreted such that as a matter of federal law, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”²⁸

Businesses are increasingly utilizing arbitration clauses as part of their user agreements and user contracts “as a way to quickly and quietly resolve disputes” in lieu of costly, burdensome litigation.²⁹ Part of the appeal to businesses is the sense of stability and predictability that arbitration agreements provide given the FAA’s favor of arbitration and aversion to class action.³⁰

By making arbitration agreements commensurate with contracts and favoring arbitration over litigation when interpreting arbitration agreements, courts allow businesses to control the amount of legal risk they take on.³¹ In arbitration agreements, use of clear language that details how parties are obligated to act mitigates risk associated with class action suits and the burdens of time and expense associated with litigation.³² Arbitration

²⁵ *Southland Corp. v. Keating*, 465 U.S. 1, 14–16 (1984).

²⁶ *Id.* at 15–16; SHIMABUKURO, *supra* note 22, at 4.

²⁷ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

²⁸ *Id.*

²⁹ Jason Cheung, *Business Use of Arbitration Clauses*, LEGAL MATCH (May 2, 2018), <https://www.legalmatch.com/law-library/article/business-use-of-arbitration-clauses.html> [<https://perma.cc/4SRK-QWQU>].

³⁰ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (“Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”); Tom Hagy, *The Future of Mandatory Arbitration Shock: Sides Square Off in Consumer Contracts and Employment Arenas*, LexisNexis Corporate Law Advisory (May 18, 2017), <https://www.lexisnexis.com/communities/corporate-counselnewsletter/b/newsletter/archive/2017/05/18/the-future-of-mandatory-arbitration-shock-sides-square-off-in-consumer-contracts-and-employment-arenas.aspx> [<https://perma.cc/QQ9Z-B8XD>].

³¹ Robert Fojo, *12 Reasons Businesses Should Use Arbitration Agreements*, LEGAL IO (May 11, 2015), <https://www.legal.io/guide/5550f4df7777765ebb80100/12-Reasons-Businesses-Should-Use-Arbitration-Agreements> [<https://perma.cc/88SK-4UK3>].

³² *Id.*

agreements accomplish this by providing companies with the flexibility of choosing the details of dispute resolution.³³ Companies can pick an arbitrator, keep matters private, and choose where they arbitrate.³⁴

The FAA sets out a “policy guaranteeing the enforcement of private contractual arrangements,” thereby honoring arbitration agreements.³⁵ By enforcing such agreements in favor of arbitration, courts realize this policy of the FAA.³⁶ Notwithstanding the FAA’s favor of arbitration agreements, the determination of whether a claim is arbitrable is still subject to (1) the existence of a valid agreement to arbitrate, (2) the claim falling within the scope of the arbitration agreement, and (3) the claim not being precluded from arbitration by applicable law.³⁷ Thus, a frequently contested issue in consumer contracts is whether an agreement has been made for courts to honor.³⁸ Despite the proliferation of arbitration clauses in consumer contracts,³⁹ much litigation and debate over these clauses stems from whether there was notice of the terms such that a consumer has agreed to the clause.⁴⁰

Per the FAA, there must be a valid agreement in order for an arbitration agreement to be enforceable.⁴¹ Like in the context of contracts, parties are not required to arbitrate unless they have

³³ See Jean Murray, *Mandatory Arbitration Clauses in Business Agreements*, THE BALANCE SMALL BUSINESS (May 31, 2018), <https://www.thebalancesmb.com/mandatory-arbitration-clauses-in-business-agreements-397425> [<https://perma.cc/Q64L-3XQS>]; Fojo, *supra* note 31.

³⁴ Murray, *supra* note 33.

³⁵ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625 (1985).

³⁶ *Id.*

³⁷ See *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 20–22 (2d Cir. 2002); Ehren, *supra* note 22.

³⁸ See generally Mandy Walker, *The Arbitration Clause Hidden in Many Consumer Contracts and the Consumer Rights You’re Giving Away as a Result*, CONSUMER REPORTS (Sept. 29, 2015), <https://www.consumerreports.org/cro/shopping/the-arbitration-clause-hidden-in-many-consumer-contracts> [<https://perma.cc/LL7Q-WTDE>].

³⁹ *Id.*

⁴⁰ See, e.g., *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 232–33 (2d Cir. 2016); *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175–77 (9th Cir. 2014); C. Celeste Creswell, *Arbitration Clauses in Online Agreements*, UBIQUITY (June 2000), <https://ubiquity.acm.org/article.cfm?id=339334> [<https://perma.cc/4JD9-94MA>].

⁴¹ Ehren, *supra* note 22.

agreed to do so.⁴² This threshold question of whether there was an agreement to arbitrate is determined by state contract law principles because arbitration is treated as “a matter of contract between the parties.”⁴³ Therefore, as with any other contract, the parties’ intentions control on this issue.⁴⁴ Even so, parties’ intentions “are generously construed as to issues of arbitrability.”⁴⁵ Accordingly, courts appear to construe arbitration clauses in consumer contracts in favor of arbitration lest the agreement emerged from fraud or undue influence.⁴⁶

As the scope of the FAA has been broadly construed to encompass congressional intent and federal policy favoring arbitration,⁴⁷ courts generally resolve any doubts regarding scope in favor of arbitration.⁴⁸ Thus, the final determinant of arbitrability (whether the arbitration agreement is precluded by applicable law) only becomes relevant if a statute specifically precludes waiver of judicial remedies by arbitration agreement.⁴⁹ Otherwise, statutory claims are arbitrable.⁵⁰

B. Business Use of Arbitration Agreements and Arbitration’s Impact on Business

The use of arbitration agreements provides many benefits to businesses, from saving time and expenses, to keeping any potential claims brought against the company confidential.⁵¹ Given

⁴² Schnabel v. Trilegiant Corp., 697 F.3d 110, 118 (2d Cir. 2012).

⁴³ *Nicosia*, 834 F.3d at 229 (citations omitted).

⁴⁴ Gregory Klass, *Interpretation and Construction in Contract Law*, THE SCHOLARLY COMMONS (Jan. 19, 2018) (draft at 1), <http://ssrn.com/abstract=2913228> [<https://perma.cc/RA9A-S2WF>] (“When faced with questions of contract interpretation, courts commonly begin with the principle that ‘[t]he primary goal in interpreting contracts is to determine and enforce the parties’ intent.’”) (quoting *Old Kent Bank v. Sobczak*, 243 Mich. App. 57, 63 (2000)).

⁴⁵ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 (1985).

⁴⁶ *Id.* at 627 (“[A]bsent such compelling considerations, the Act itself provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.”).

⁴⁷ *Id.*; *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

⁴⁸ *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24–25.

⁴⁹ Ehren, *supra* note 22.

⁵⁰ *Id.*

⁵¹ See Susan K. Leader & Jenna Nalchajian, *INSIGHT: The Brightening Spotlight on Mandatory Arbitration Clauses*, BLOOMBERG LAW (Aug. 24, 2018),

the strong favor of arbitration by the FAA, businesses are better able to predict and manage legal risk in an “effective and predictable fashion.”⁵² If a business does not include a mandatory arbitration agreement into consumer contracts, it could substantially raise the cost of business by opening the door to the possibility of consumer class action litigation.⁵³ In addition, arbitration saves time by streamlining the legal requirements of litigation.⁵⁴ For example, arbitration curtails otherwise broader rules for discovery and simplifies the applicable rules of civil procedure and evidence.⁵⁵ A business can also select arbitrators that have specialized knowledge or experience.⁵⁶ Further, arbitrations are confidential, as opposed to public court proceedings, and arbitration awards have little appeal rights and bases to vacate.⁵⁷

The primary “strategic advantage” that businesses gain by using arbitration clauses is in the decreased risk of class actions that they may otherwise face.⁵⁸ Class actions can be risky for businesses because of the possibility of substantial loss and heavy expense for the company.⁵⁹ Class actions create such a risk by making otherwise worthless individual claims worthwhile through

<https://news.bloomberglaw.com/daily-labor-report/insight-the-brightening-spot-light-on-mandatory-arbitration-clauses> [<https://perma.cc/6EZ3-2FLZ>]; Fojo, *supra* note 31.

⁵² Fojo, *supra* note 31.

⁵³ Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 467 (2010); Fojo, *supra* note 31.

⁵⁴ Fojo, *supra* note 31.

⁵⁵ *Id.*; Jay N. Varon & Jennifer M. Keas, *Shouldn't You Be Using Arbitration Agreements to Reduce Costs of Litigation and Risk of Class Action Claims?*, NAT. L. REV. (May 10, 2017), <https://www.natlawreview.com/article/shouldn-t-you-be-using-arbitration-agreements-to-reduce-costs-litigation-and-risk> [<https://perma.cc/CG39-UQJ3>].

⁵⁶ Varon & Keas, *supra* note 55.

⁵⁷ *Id.*

⁵⁸ Drahozal & Ware, *supra* note 53, at 467–68 (“[Arbitration clauses] prevent class actions and remit consumers to individual actions which, in light of the stakes, are usually not worthwhile to pursue.”) (quoting Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 888 (2008)).

⁵⁹ Gregory Brown, *What Are Class Actions and How Do They Impact Businesses?*, BROWN & CHARBONNEAU, LLP (July 25, 2017), <https://www.bc-llp.com/class-actions-impact-businesses/> [<https://perma.cc/W2AU-SXKL>].

pooled resources and reduced expenses.⁶⁰ By aggregating the number of plaintiffs and the resources dedicated to litigation, class action suits create “overwhelming settlement pressure.”⁶¹ This pressure stems from the high cost of defending large suits and the possibility of having to pay out a large verdict.⁶² Settlement itself is often expensive due to paying out a large number of class members.⁶³

The FAA allows businesses to reduce the risk of class actions by allowing class action arbitration proceedings only where the parties “express agreement is apparent from the contract.”⁶⁴ The FAA does not allow class action arbitration where the agreement is “silent as to whether such proceedings are permissible.”⁶⁵ By agreeing to terms containing a mandatory arbitration agreement, a consumer must pursue individual arbitration instead of class action claims.⁶⁶ However, individual arbitration requires a high investment of time and money and thus is pursued as infrequently as solo litigation.⁶⁷

II. DETERMINING AGREEMENT TO TERMS BY PROVIDING NOTICE OF ARBITRATION

A. Arbitration Clauses Are Determined by State Contract Law

The threshold question of whether an arbitration clause is valid is determined by state-specific contract law.⁶⁸ Many states’ contract laws are similar regarding whether parties have agreed to contract terms.⁶⁹ However, other differences in state contract

⁶⁰ Drahozal & Ware, *supra* note 53, at 467–68 (“[F]ew consumers will seek redress on an individual basis due to lack of information or the small amounts in dispute.”).

⁶¹ *Id.* at 468.

⁶² Brown, *supra* note 59.

⁶³ Drahozal & Ware, *supra* note 53, at 468; Brown, *supra* note 59.

⁶⁴ Richard Glucksman, *Arbitration Law as We Move Into 2017*, AMWINS GROUP, INC. (Jan. 26, 2017), https://www.amwins.com/docs/default-source/Insights/clientadvisory_arbitration-laws-1-1797c68c070c5e6535a197ff0000da176d.pdf?sfvrsn=6198e95f_2 [<https://perma.cc/T9KB-36E5>].

⁶⁵ *Id.*

⁶⁶ Brown, *supra* note 59.

⁶⁷ *Id.*

⁶⁸ Meyer v. Uber Techs., Inc., 868 F.3d 66, 74 (2d Cir. 2017).

⁶⁹ See Schnabel v. Trilegiant Corp., 697 F.3d 110, 119 (2d Cir. 2012) (stating in reference to which states’ law applied to the case, “neither that court nor

law could be a factor for businesses to weigh in consideration of choice of law for their contracts.⁷⁰ In most states, the proper inquiry is whether the parties have shown an outward manifestation of assent to a contract and its terms.⁷¹ The Restatement (Second) of Contracts defines conduct expressing manifestation of assent as “words or silence, action or inaction” so long as the party “intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.”⁷² Mutual assent is based on an objective standard “applied to the outward manifestations or expressions of the parties.”⁷³

Online- or application-based businesses have created new scenarios for courts to interpret contract law.⁷⁴ However, they have not changed the way that contract principles are applied to them.⁷⁵ As discussed below, assent to online contracts can be determined through applying traditional contract principles to new methods of assent, such as clickwrap or browsewrap agreements.⁷⁶ Nonetheless, all iterations of contracts require the same display of intent to engage in the contracted conduct such that others could infer assent.⁷⁷

this one need resolve this typically thorny choice-of-law question, because both Connecticut and California apply substantially similar rules for determining whether the parties have mutually assented to a contract term”).

⁷⁰ See D.C. Toedt, *Choice-of-Law Cheat Sheet for Contract Negotiators*, ON CONTRACTS (July 9, 2009), <https://www.oncontracts.com/cheat-sheets/choice-of-law-crib-sheet/> [https://perma.cc/K5BK-XH6T].

⁷¹ See *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 61–62 (1st Cir. 2018); *Meyer*, 868 F.3d at 74; *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 232 (2d Cir. 2016); *Schnabel*, 697 F.3d at 119–20.

⁷² Restatement (Second) of Contracts § 19(2) (1965); see *Schnabel*, 697 F.3d at 120.

⁷³ *Schnabel*, 697 F.3d at 119 (quoting *Chicago Title Ins. Co. v. AMZ Ins. Servs., Inc.*, 188 Cal. App. 4th 401, 422 (2010)).

⁷⁴ *Meyer*, 868 F.3d at 75.

⁷⁵ *Id.*

⁷⁶ *Nicosia*, 834 F.3d at 232–33 (“Clickwraps force users to ‘expressly and unambiguously manifest either assent or rejection prior to being given access to the product.’”) (quoting *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 429 (2d Cir. 2004)).

⁷⁷ *Id.* at 232 (stating that manifestation of assent for online contracts “can be accomplished by ‘words or silence, action or inaction,’ so long as the user ‘intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.’”) (quoting *Schnabel*, 697 F.3d at 120).

Further, regardless of an offeree's outward manifestations of assent, in most states the offeree is not bound "by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious."⁷⁸ This requires that the terms of the agreement be reasonably communicated to the person accepting the agreement.⁷⁹ Nonetheless, if an offeree has no actual notice of an arbitration agreement, he or she would still be bound by a provision if the offeree is on "inquiry notice of the term and assents to it through the conduct that a reasonable person would understand to constitute assent."⁸⁰ For example, the state of Washington provides two circumstances that put an offeree on inquiry notice: (1) when the offeree has reason to know that a term exists from all facts and circumstances known to him at the time, or (2) if the offeree has received notification of the information from someone who took steps that would have been reasonably required to inform the offeree.⁸¹

Given this interpretation, courts tend to apply a two-step inquiry to determine (1) whether the terms of the agreement were reasonably communicated (i.e., reasonably conspicuous notice), and (2) whether there was agreement to those terms as evidenced by an outward manifestation of assent.⁸²

California and Massachusetts, the states at issue in *Cullinane* and *Meyer*, are examples of utilizing the same standard for determining the existence of an agreement to terms of the same app based on each states' individual contract laws.⁸³ Both states, when approaching Uber's terms of agreement, asked whether there was sufficient notice of the arbitration clause based on the clarity and conspicuousness of the terms presented, followed by whether there was assent to those terms.⁸⁴ Regardless of a showing or manifestation of assent, offerees in both jurisdictions are not bound by contractual terms that are inconspicuous.⁸⁵

⁷⁸ *Meyer*, 868 F.3d at 74 (quoting *Specht v. Netscape Comm'ns Corp.*, 306 F.3d 17, 30 (2d Cir. 2002)).

⁷⁹ *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 61 (1st Cir. 2018).

⁸⁰ *Nicosia*, 834 F.3d at 233 (quoting *Schnabel*, 697 F.3d at 120).

⁸¹ See WASH. REV. CODE ANN. § 62A.1-202(a)(3), (d); *Nicosia*, 834 F.3d at 233.

⁸² See, e.g., *Cullinane*, 893 F.3d at 62; *Meyer*, 868 F.3d 77–80; *Nicosia*, 834 F.3d at 236–37.

⁸³ See *Cullinane*, 893 F.3d at 61–62; *Meyer*, 868 F.3d at 74–75.

⁸⁴ *Cullinane*, 893 F.3d at 61–62; *Meyer*, 868 F.3d at 74–75.

⁸⁵ *Cullinane*, 893 F.3d at 61; *Meyer*, 868 F.3d at 74–75 (discussing the validity of web-based and electronic contracts) ("There is nothing automatically

Thus, the crux of the issue presented by the differing outcomes of *Cullinane* and *Meyer* is based on the level of conspicuousness of the terms presented to each set of app users, despite the two states applying the same legal standard to the same smartphone app.⁸⁶

B. Online Agreements—Clickwrap, Browsewrap & Continuously Evolving Methods of Agreement

Despite technology continually changing and advancing, presenting the courts with new situations, courts continue to rely on the same principles of notice and assent from contract law in determining the validity of arbitration agreements in online- and application-based terms of conditions or user contracts.⁸⁷ While the same primary legal principles apply, the ever-changing means of conveying terms require different analyses to determine whether notice and assent are met.⁸⁸ Courts regularly uphold clickwrap agreements because the user must affirmatively assent to the terms of agreement by clicking “I agree”; if the user does not agree, they will be disabled from accessing or utilizing the site or application.⁸⁹ Courts have found that such an electronic “click can suffice to signify the acceptance of a contract” provided that the user has reasonable notice.⁹⁰

Alternatively, browsewrap agreements do not require an express assent to the terms by an affirmative action.⁹¹ A user of a website or application agrees to the terms of the site itself by merely visiting the site.⁹² In the browsewrap context, the terms

offensive about such agreements, as long as the layout and language of the site give the user reasonable notice that a click will manifest assent to an agreement.”) (quoting *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1033–34 (7th Cir. 2016)).

⁸⁶ See *Cullinane*, 893 F.3d at 62–64; *Meyer*, 868 F.3d at 77–78.

⁸⁷ *Cullinane*, 893 F.3d at 62–63; *Meyer*, 868 F.3d at 75.

⁸⁸ See *Cullinane*, 893 F.3d at 62–63; *Meyer*, 868 F.3d at 75–76; *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 232–34 (2d Cir. 2016); *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175–77 (9th Cir. 2014).

⁸⁹ See *Meyer*, 868 F.3d at 75; *Nicosia*, 834 F.3d at 233 (“Clickwraps force users to ‘expressly and unambiguously manifest either assent or rejection prior to being given access to the product.’” (quoting *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 429 (2d Cir. 2004))).

⁹⁰ *Meyer*, 868 F.3d at 75 (quoting *Sgouros*, 817 F.3d at 1033–34).

⁹¹ *Id.* at 75; *Nguyen*, 763 F.3d at 1176.

⁹² *Nguyen*, 763 F.3d at 1176.

are available via hyperlink somewhere on the website, but a user does not have to view or click to accept the terms before using the site.⁹³ These too are regularly enforced by courts so long as the user had actual notice of the agreement.⁹⁴ However, when there is no actual notice, the validity of browsewrap and other web-based agreements can be established if the website or application “puts a reasonably prudent user on inquiry notice of the terms of the contract.”⁹⁵ Inquiry notice for arbitration agreements in web-based contracts “turns on the [c]larity and conspicuousness of the arbitration terms” which are a “function of the design and content of the relevant interface.”⁹⁶ Thus, the validity of browsewrap agreements depends on knowledge, either actual or constructive, of the terms and conditions based predominantly on the conspicuousness of the terms on the user interface.⁹⁷

Because new technology and user platforms are constantly being created, updated, and redesigned, there are a myriad of ways to design online and mobile electronic user contracts which do not neatly fit into either the clickwrap or browsewrap categories.⁹⁸ For this reason, courts have generally found terms of agreement valid on various interfaces if the existence of the terms were reasonably communicated to the user.⁹⁹ Yet, as user understanding is advancing in step with technology,¹⁰⁰ the courts’ interpretations as to what is reasonably communicated appears to be lagging behind.¹⁰¹

⁹³ *See id.*

⁹⁴ *Id.* (“[C]ourts have consistently enforced browsewrap agreements where the user had actual notice of the agreement.”).

⁹⁵ *Id.* at 1177; *see Meyer*, 868 F.3d at 74–75.

⁹⁶ *Meyer*, 868 F.3d at 75.

⁹⁷ *See id.*; *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233 (2d Cir. 2016).

⁹⁸ *See Meyer*, 868 F.3d at 75.

⁹⁹ *See id.*; *Nicosia*, 834 F.3d at 233.

¹⁰⁰ *See* Michael H. Payne, *Technology Learning Curve Requires Patience, but It’s Worth It* (Jan. 21, 2019), <https://finance.yahoo.com/news/technology-learning-curve-requires-patience-012127183.html> [<https://perma.cc/P8KZ-BYNH>]; John Smith, *7 Technologies We Can Expect to Be Commonplace Soon* (Feb. 3, 2016), <https://www.business2community.com/tech-gadgets/7-technologies-can-expect-commonplace-soon-01445748> [<https://perma.cc/XCQ9-TKVA>].

¹⁰¹ *Compare Cullinane v. Uber Techs., Inc.*, 839 F.3d 53, 63–64 (1st Cir. 2018), *with Meyer*, 868 F.3d at 77–78.

C. Determining Reasonably Conspicuous Notice

Whether a web-based user has inquiry notice of the terms of an agreement depends on the clarity and conspicuousness of the terms.¹⁰² An agreement's clarity and conspicuousness is determined by looking to "the design and content of the relevant interface."¹⁰³ This includes whether there is clutter on the screen, the user has to scroll to see the terms, there is a lack of contrasting colors or fonts that stand out from the rest of the screen, or the terms are linked in "obscure sections of a webpage that users are unlikely to see."¹⁰⁴ Some examples of characteristics that make terms more conspicuous are larger and contrasting fonts, capital letter headings, or otherwise setting the terms off from surrounding text by use of symbols or other marks.¹⁰⁵ In addition, terms can be considered more conspicuous if they are spatially oriented near "the mechanism for manifesting assent" and if the terms are temporally coupled with the manifestation of agreement, by noting acceptance to terms as a consumer is registering for or purchasing from a website or app.¹⁰⁶ The level of conspicuousness of terms is subject to a reasonable person standard.¹⁰⁷ Such a malleable and subjective standard opens the door to varying interpretations of the conspicuousness of terms in the realm of apps.¹⁰⁸

D. A Reasonable Person Standard's Correlation to Reasonably Conspicuous Notice

A reasonable person standard is used to judge the conspicuousness of the terms to determine whether a website or app user had notice of electronic terms of agreement.¹⁰⁹ The reasonable

¹⁰² See *Meyer*, 868 F.3d at 74–75; *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 30 (2d Cir. 2002).

¹⁰³ *Meyer*, 868 F.3d at 75; see *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014).

¹⁰⁴ *Nicosia*, 834 F.3d at 233; see *Meyer*, 868 F.3d at 78.

¹⁰⁵ See *Cullinane*, 839 F.3d at 62.

¹⁰⁶ *Meyer*, 868 F.3d at 78; see *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 127 (2d Cir. 2012).

¹⁰⁷ See *Cullinane*, 839 F.3d at 62; *Meyer*, 868 F.3d at 77; *Nicosia*, 834 F.3d at 233.

¹⁰⁸ Compare *Cullinane*, 839 F.3d at 62–63, with *Meyer*, 868 F.3d at 77–78.

¹⁰⁹ See *Cullinane*, 839 F.3d at 62; *Meyer*, 868 F.3d at 77; *Nicosia*, 834 F.3d at 233.

person standard is utilized to “define the legal duty to protect one’s own interest and that of others.”¹¹⁰ In effect, it “requires one to act with the same degree of care, knowledge, experience, fair-mindedness, and awareness of the law that the community would expect of a hypothetical reasonable person.”¹¹¹

Thus, in determining the conspicuousness of terms for apps, the Second Circuit has considered reasonableness through the “perspective of a reasonably prudent smartphone user.”¹¹² In *Meyer*, the Second Circuit held that a reasonably prudent smartphone user would have knowledge of and would have encountered an app and could be presumed to have entered into a contract using a smartphone.¹¹³ In addition, both the First and Second Circuits recognized that a reasonably prudent user would know that a hyperlink would take them to another webpage containing additional information and that hyperlinks are typically identified by blue, underlined text.¹¹⁴ Moreover, utilizing hyperlinks to provide access to Terms of Service has been upheld as providing reasonable notice, as clicking on a hyperlink has been dubbed “the twenty-first century equivalent of turning over the cruise ticket ... [—]the consumer is prompted to examine terms of sale that are located somewhere else.”¹¹⁵ Nonetheless, whether terms are valid based on their reasonable conspicuousness is a fact-intensive inquiry which must be contextualized.¹¹⁶ Courts utilize similar factors in making the determination of whether a reasonable user would have inquiry notice of an electronic contract’s terms.¹¹⁷ However, such static factors as applied to specific, variable facts in cases of different apps may yield different results as technology and user

¹¹⁰ ENCYCLOPEDIA OF BUSINESS ETHICS AND SOCIETY 1772 (Robert Kolb ed., Sage Publ’ns 1st ed. 2008).

¹¹¹ *Id.*

¹¹² *Meyer*, 868 F.3d at 77.

¹¹³ *See id.*

¹¹⁴ *See Cullinane*, 839 F.3d at 63; *Meyer*, 868 F.3d at 77–78.

¹¹⁵ *Meyer*, 868 F.3d at 78 (quoting *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 839 (S.D.N.Y. 2012)).

¹¹⁶ *Cullinane*, 893 F.3d at 63 (holding that the objective conspicuousness of terms must be put in context with the rest of the display and process, and not just “read in a vacuum”); *see Meyer*, 868 F.3d at 76.

¹¹⁷ *See Cullinane*, 893 F.3d at 62–63; *Meyer*, 868 F.3d at 78; *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233, 236 (2d Cir. 2015).

interfaces continue to change. This scenario is exemplified by the diverging results in the First and Second Circuit opinions.¹¹⁸

E. Meyer v. Uber and Cullinane v. Uber: Different Interpretations of Contract Principles in the App Context

Despite molding well-established principles of contract law to evaluate new forms of electronic contracts, when they are applied to app-based technology, the outcomes can vary as in *Meyer* and *Cullinane*.¹¹⁹ As both courts decided the issue on inquiry notice, the basic question in both cases was essentially the same—was there reasonably conspicuous notice provided to the user in light of the user interface?¹²⁰ In *Meyer*, the Second Circuit looked to the interface of the Uber app from the perspective of a reasonable smartphone user to determine the conspicuousness of the terms.¹²¹ In doing so, the court explicitly noted the pervasiveness of smartphone and application use.¹²² Again, the Second Circuit accepted that such a reasonable person would understand that blue underlined text constitutes a hyperlink, which opens another webpage containing additional information and noted some familiarity with mobile contracts.¹²³ The First Circuit in *Cullinane* used a similar “reasonable user” standard to answer the same question of assent to terms based on their conspicuousness in relation to the user interface.¹²⁴ Compared to the Second Circuit, the First Circuit in *Cullinane* appears to take a less progressive view of mobile technology and user understanding.¹²⁵ The First Circuit also recognized common understanding of a traditional hyperlink, and while it appears open to recognizing non-traditional characteristics of hyperlinks,¹²⁶ it gave significant weight to the fact that the hyperlink was not presented in a

¹¹⁸ Compare *Cullinane*, 893 F.3d at 63, with *Meyer*, 868 F.3d at 78–79.

¹¹⁹ Compare *Cullinane*, 893 F.3d at 63, with *Meyer*, 868 F.3d at 78–79.

¹²⁰ See *Cullinane*, 893 F.3d at 62; *Meyer*, 868 F.3d at 77–78.

¹²¹ See *Meyer*, 868 F.3d at 76–77.

¹²² See *id.* at 77.

¹²³ See *id.* at 77–78.

¹²⁴ See *Cullinane*, 893 F.3d at 63.

¹²⁵ Compare *id.* at 62, with *Meyer*, 868 F.3d at 78–79.

¹²⁶ *Cullinane*, 893 F.3d at 63 (“While not all hyperlinks need to have the same characteristics, they are ‘commonly blue and underlined.’” (citation omitted)).

traditional manner.¹²⁷ The presentation of the hyperlink in a gray rectangular box raised concern as to whether a “reasonable user” would have understood that to constitute a hyperlink.¹²⁸

In analyzing the context of the hyperlinked terms in relation to the rest of the surrounding screen, the First Circuit in *Cullinane* also gave weight to the fact that the screen contained other, more conspicuous information, text, and buttons, which took away from the conspicuousness of the hyperlinked terms.¹²⁹ The court appeared to hone in on the conspicuousness and appearance of the actual hyperlink as compared to the surrounding text on the screen, despite conceding that other features of the screen would weigh in favor of Uber.¹³⁰ While the court determined that the “white bold font” of the hyperlink could have been considered conspicuous on its own, or within a more plain and limited screen, it held that in the context of other conspicuous features and text on the screen, the hyperlinked terms became inconspicuous.¹³¹ In other words, the court held that “[i]f everything on the screen is written with conspicuous features, then nothing is conspicuous.”¹³²

In contrast, when considering the overall context of the screen, the Second Circuit appeared to focus less on the hyperlink itself, and more so on the interface as a whole.¹³³ The court weighed in favor of conspicuousness partly due to the language located near the button that signaled manifestation of assent.¹³⁴ The Second Circuit reasoned that the language, “[b]y creating an Uber account, you agree ... ” clearly signaled to users that they would be subject to Uber’s terms of agreement.¹³⁵ In determining sufficient notice and assent to the terms, the court coupled

¹²⁷ *See id.*

¹²⁸ *See id.*

¹²⁹ *See id.* at 63–64.

¹³⁰ *Id.* at 63 (“[T]he language and the number of words found on the ‘Link Card’ and ‘Link Payment’ screens could be seen to favor Uber’s position.”).

¹³¹ *Id.*

¹³² *Id.* at 64 (“Even though the hyperlink did possess some of the characteristics that make a term conspicuous, the presence of other terms on the same screen with a similar or larger size, typeface, and with more noticeable attributes diminished the hyperlink’s capability to grab the user’s attention.”).

¹³³ *See Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 78 (2d Cir. 2017).

¹³⁴ *See id.* at 78–79.

¹³⁵ *Id.* at 78.

the spatial proximity of this language with the fact that the screen was uncluttered and entirely visible at once, and that the hyperlink itself contrasted with the background of the screen.¹³⁶

While applying the same standard and utilizing similar factors in their determination, the Circuits came to opposite conclusions about whether the users of the same application were put on reasonable notice to the terms of agreement when registering for the app.¹³⁷

The holdings in *Meyer* and *Cullinane* are so contradictory because the app at issue and the legal standard applied are the same—the Uber app and the reasonable person standard for notice.¹³⁸ The differing outcomes appear to turn on Uber’s marketing and design choices in the relevant time periods.¹³⁹ While the decisions were rendered only a year apart, the interface in which the Terms of Service were located and the appearance of the registration process were very different given the timing of when the plaintiffs registered for Uber.¹⁴⁰

In *Meyer*, the plaintiff registered for Uber in 2014.¹⁴¹ In 2014, the final registration screen was white, with minimal, uncluttered text and fillable data forms to insert the user’s payment method, as reflected in Figure 1.¹⁴² Underneath the “Register” button in smaller text was the language, “[b]y creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY.”¹⁴³ This “TERMS OF SERVICE & PRIVACY POLICY”

¹³⁶ *Id.*

¹³⁷ Caleb J. Schillinger, *First Circuit Invalidates Arbitration Clause in Mobile App User Agreement*, SEYFARTH SHAW (July 5, 2018), <https://www.consumerclassdefense.com/2018/07/first-circuit-invalidates-arbitration-clause-in-mobile-app-user-agreement/> [<https://perma.cc/FY7F-DWPS>].

¹³⁸ See *Cullinane v. Uber Techs., Inc.*, 839 F.3d 53, 64 (1st Cir. 2018); *Meyer*, 868 F.3d at 79.

¹³⁹ Compare *Cullinane*, 893 F.3d at 58, 63, with *Meyer*, 868 F.3d at 78–79. See generally Nathan McAlone, *This Is How Uber Used to Look When It First Started Out—and How It’s Changed Over Time*, BUSINESS INSIDER (Feb. 10, 2016, 4:54 PM), <https://www.businessinsider.com/ubers-design-history-2010-2016-2016-2> [<https://perma.cc/AD6J-UPFM>] (presenting a visual timeline of Uber’s evolving branding strategy from 2010 to 2016).

¹⁴⁰ Compare *Cullinane*, 893 F.3d at 56–58, with *Meyer*, 868 F.3d at 70–71.

¹⁴¹ *Meyer*, 868 F.3d at 70.

¹⁴² *Id.* at 78; see Figure 1.

¹⁴³ *Meyer*, 868 F.3d at 78.

text was a blue, underlined hyperlink.¹⁴⁴ Despite the small size of the text alerting the user to Uber's terms, the court held that the darker font and clearly hyperlinked Terms of Service against the backdrop of a plain, white screen that was entirely visible at one time were sufficient to make the terms conspicuous and therefore provide notice to Uber's terms.¹⁴⁵

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

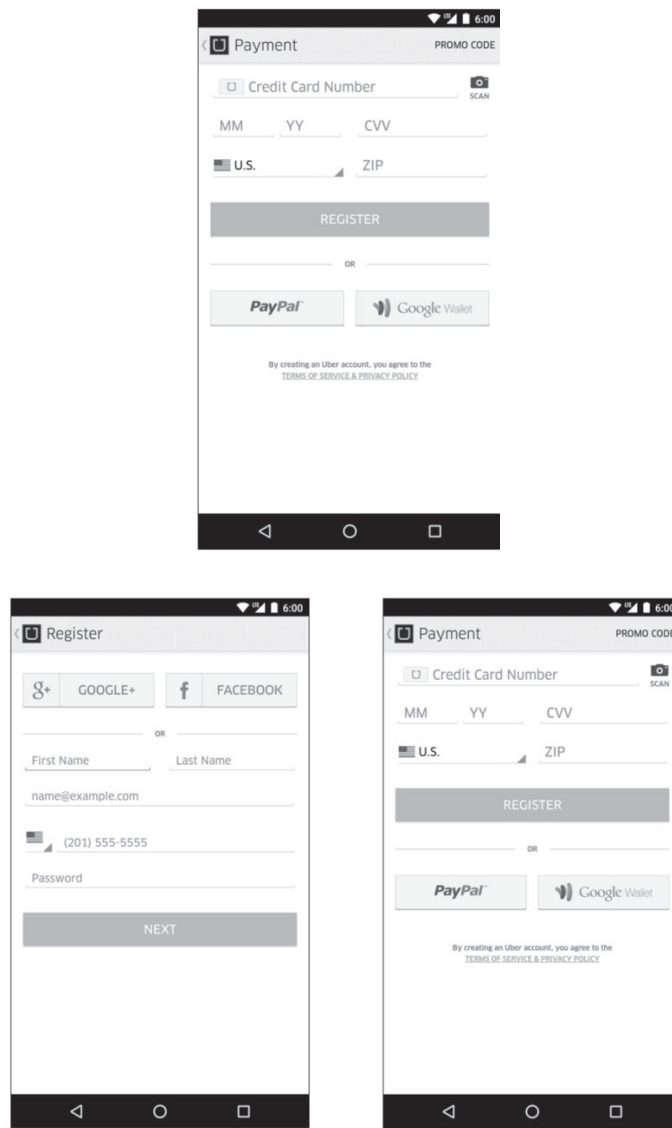


FIGURE 1. SCREENSHOTS OF REGISTRATION PROCESS IN *MEYER*¹⁴⁶

In contrast, the plaintiffs in *Cullinane* registered for Uber between the years 2012 and 2014 and experienced a very different

¹⁴⁶ *Id.* at 81–82. Screenshots in Figure 1 resemble the “actual-size screenshot of the last step in the registration process, as it would have appeared on Meyer’s Samsung Galaxy S5.” *Id.* at 78 n.9. While the sizing of the screenshots in this Note are not exact, they are copies of the actual-sized screenshots utilized by and appended to the court’s opinion.

user interface, as reflected in Figure 2.¹⁴⁷ While there existed two different screen options for payment that could be utilized by plaintiffs at this time (“Link Payment” and “Link Card” screens), both screens were stylistically the same for purposes of judicial analysis. During this period, the registration screen had a black background with a white text box to type in payment information and light gray instructional text.¹⁴⁸ Below the fillable field for payment was dark gray text that read, “[b]y creating an Uber account, you agree to the,” and below that read “Terms of Service & Privacy Policy” in bold white text in a gray rectangular box—a clickable hyperlink that would take users to Uber’s terms and privacy policy.¹⁴⁹ The court emphasized that the gray box containing Uber’s terms did not have the traditional characteristics of a hyperlink.¹⁵⁰ Taking this fact into account, in addition to the rest of the bolded and distinctive text on the screen presented at the same time, the court held that the text alerting users to the terms was no longer conspicuous and did not provide reasonable notice to the user.¹⁵¹

¹⁴⁷ *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 55, 57–58 (1st Cir. 2018). Compare Figure 1, with Figure 2.

¹⁴⁸ *Cullinane*, 893 F.3d at 57–58.

¹⁴⁹ *Id.* at 57–59.

¹⁵⁰ *Id.* at 63.

¹⁵¹ *Id.* at 63–64.

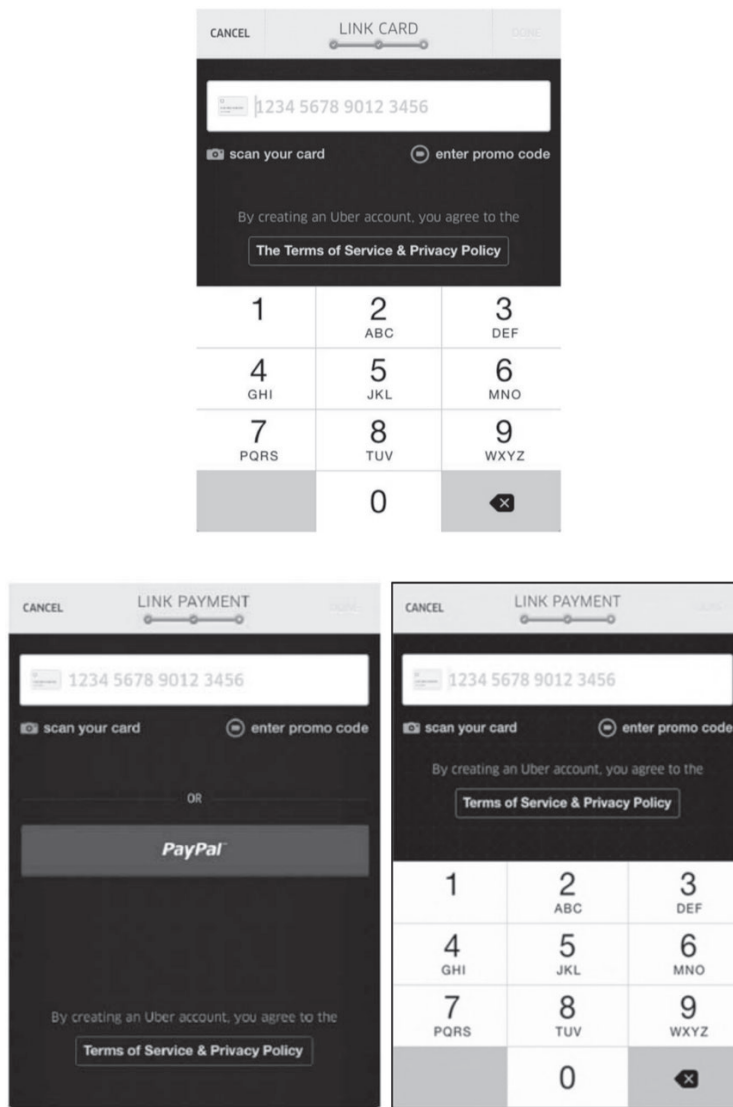


FIGURE 2. SCREENSHOTS OF REGISTRATION
PROCESS IN *CULLINANE*¹⁵²

Thus, it appears the Circuits divided due to design differences in Uber’s user interface and app design, which, according

¹⁵² *Id.* at 56–58. The screenshots in Figure 2 resemble and “accurately depict the content of the Uber App screens presented to the Plaintiffs.” *Id.* at 56 n.3. While the sizing of the screenshots in this Note are not exact, they are copies of the actual-sized screenshots utilized by and appended to the court’s opinion.

to the First Circuit, did not conform to a traditional concept of web contracts.¹⁵³ This could create an ongoing issue for Uber, and many other companies, as design changes and rebranding occur frequently.¹⁵⁴ Moreover, when the color is stripped away, the similarities among the two interfaces are readily apparent.¹⁵⁵ The court in *Cullinane* noted that Uber’s “Link Payment” and “Link Card” screens had a mere twenty-six words and that the language, “Terms of Service & Privacy Policy,” would tend to favor conspicuousness if not for other features.¹⁵⁶ However, the screen in *Meyer* contained approximately twenty-eight words and contained the same language to signal the user to the terms, yet the court held that in that context, they were conspicuous.¹⁵⁷ Thus, despite using similar features and language, as user interfaces for apps modernize, the courts may begin to lag behind in what a “reasonably prudent user” could be presumed to know, and continue to come to differing conclusions regarding notice, even when utilizing the same standard.¹⁵⁸

F. Current Mobile App Use and Modern Understanding of Technology

On its face, using a reasonable smartphone user to determine whether an individual is put on inquiry notice of the terms of an app appears to be an appropriate objective indicator for notice.¹⁵⁹ However, as technology rapidly changes, especially in mobile apps, and as the proliferation of app use continues,¹⁶⁰

¹⁵³ *See id.* at 62–64.

¹⁵⁴ *See, e.g.,* McAlone, *supra* note 139.

¹⁵⁵ Compare Figure 1, with Figure 2.

¹⁵⁶ *Cullinane*, 893 F.3d at 62–63.

¹⁵⁷ *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 78 (2d Cir. 2017); Figure 1.

¹⁵⁸ *See, e.g., Meyer*, 868 F.3d at 75, 77–78 (discussing the rapid adoption of mobile technology, its evolving applications, and pervasiveness).

¹⁵⁹ *See Cullinane*, 893 F.3d at 62–63; *Meyer*, 868 F.3d at 75, 77–78.

¹⁶⁰ *See* Celine Ledbury et al., *Something for Everyone: Why the Growth of Mobile Apps Is Good News for Brands*, IPSOS MORI 1, 8 (July 2017), <https://www.ipsos.com/sites/default/files/2017-08/Google-mobile-apps-report-2017.pdf> [<https://perma.cc/LV5T-9NNG>]; Joe Parker, *10 Years of Growth of Mobile App Market*, KNOWBAND, <https://www.knowband.com/blog/mobile-app/growth-of-mobile-app-market/> [<https://perma.cc/MN7H-LRKM>]; *Mobile App Trends That Will Dominate 2019*, EFUTURES (Oct. 5, 2018), <https://www.efuturesworld.com/mobile-app-trends-that-will-dominate-2019/> [<https://perma.cc/W2YF-NLUV>].

common knowledge of users may be changing faster than the courts can apply a standard that adequately captures whether a reasonable user would have notice of terms.¹⁶¹

In 2017, the number of smartphone users in the United States reached 246.6 million and is projected to reach 285.3 million by 2023.¹⁶² Of smartphone users between the ages of 18 and 64, over 90 percent use apps.¹⁶³ The average smartphone user has between 60 and 90 apps downloaded to their phone, spending an average of 2 hours and 15 minutes per day using at least 9 apps per day.¹⁶⁴ In 2016, overall app usage increased by 11 percent and the amount of time that people spent using apps grew by 69 percent.¹⁶⁵ As apps become even more pervasive and are created for use in nearly every aspect of people's lives, the market for them is expected to double to nearly \$290 billion by 2024. People's phones have become flooded with apps.¹⁶⁶ Not only are app users gaining a more specialized knowledge in functionality

¹⁶¹ See, e.g., *Meyer*, 868 F.3d at 75, 77–78.

¹⁶² *Number of Smartphone Users in the United States from 2010 to 2023 (in millions)**, STATISTA (Aug. 30, 2019), <https://www.statista.com/statistics/201182/forecast-of-smartphone-users-in-the-us/> [<https://perma.cc/9ENT-A3PP>].

¹⁶³ Ledbury et al., *supra* note 160, at 8.

¹⁶⁴ Ben Lovejoy, *The Average Smartphone User Spends 2h 15m a Day Using Apps—How About You?*, 9 TO 5 MAC (May 5, 2017, 7:17 AM), <https://9to5mac.com/2017/05/05/average-app-user-per-day/> [<https://perma.cc/5C87-E92M>]; Sarah Perez, *Report: Smartphone Owners are Using 9 Apps Per Day, 30 Per Month*, TECH CRUNCH (May 4, 2017, 1:16 PM), <https://techcrunch.com/2017/05/04/report-smartphone-owners-are-using-9-apps-per-day-30-per-month/> [<https://perma.cc/6NYP-TM8F>].

¹⁶⁵ Simon Khalaf, *On Their Tenth Anniversary, Mobile Apps Start Eating Their Own*, FLURRY ANALYTICS BLOG (Jan. 12, 2017), <https://flurrymobile.tumblr.com/post/155761509355/on-their-tenth-anniversary-mobile-apps-start> [<https://perma.cc/B68Q-E38U>].

¹⁶⁶ Neil Petch, *There's an App for That: Seven Apps Entrepreneurs Should Make Use Of*, ENTREPRENEUR MIDDLE EAST (Mar. 26, 2017), <https://www.entrepreneur.com/article/291928> [<https://perma.cc/3HXU-E2A4>]; see Bobby Emamian, *To Make Your App Stand Out in a Saturated Market, Offer Users What They Really Want*, FORBES (Apr. 9, 2015, 9:00 AM), <https://www.forbes.com/sites/theyec/2015/04/09/to-make-your-app-stand-out-in-a-saturated-market-offer-users-what-they-really-want/#6d8f6d877aba> [<https://perma.cc/A9WS-XGCQ>] (“On the smartphone Monopoly board, app real estate used to be like Baltic Avenue. But with the massive number of available apps and the finite amount of storage space on smartphones, it's now more like Park Place and is quickly approaching Boardwalk status.”).

and use of apps, but app developers are trying to keep up with competition through the advancement of superior interfaces, which in turn improve app usability and experience.¹⁶⁷

As everyday technology, smartphone technology, and apps evolve, app users are developing an expanded common knowledge base of how apps typically work and what their use entails.¹⁶⁸ Users' common knowledge is evident by the fact that users have become familiar with certain screens, such as "Getting Started" screens and other design features recognized even by the court in *Cullinane*.¹⁶⁹ It is further supported by the fact that "[p]redictability is a fundamental principle of [user interface] design," indicating that regardless of the app, users learn and adapt to interfaces across application type.¹⁷⁰ App users understand far more than "blue plus underline equals hyperlink"; they are currently gaining a common knowledge of gestures—"the new clicks."¹⁷¹ Far beyond the blue text hyperlinks of past websites, multi-touch technology, through which users can tap, pinch, spread, and swipe, has become mainstream since Apple introduced it with the iPhone.¹⁷² Users have quickly adapted to this technology and prefer to use it.¹⁷³

By recognizing this common knowledge among users and by taking into account user preferences, companies that utilize apps are strategizing their entry, prevalence, or permanence in the market through streamlining and enhancing user experience.¹⁷⁴

¹⁶⁷ See Nick Babich, *A Comprehensive Guide to Mobile App Design*, SMASHING MAGAZINE (Feb. 12, 2018), <https://www.smashingmagazine.com/2018/02/comprehensive-guide-to-mobile-app-design/> [https://perma.cc/J3WA-479P]; Emamian, *supra* note 166.

¹⁶⁸ See Babich, *supra* note 167 (stating that app users are familiar with certain screens that have "become de facto standards for mobile apps" which "don't require additional explanation because users are already familiar with them").

¹⁶⁹ See *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 58, 63 (1st Cir. 2018) ("[W]ithin the gray bar, [is] an illustration of three circles connected by a green line. These circles indicated the user's progress through Uber's registration process."); Babich, *supra* note 167.

¹⁷⁰ Babich, *supra* note 167.

¹⁷¹ Nick Babich, *In-App Gestures and Mobile App User Experience*, SMASHING MAGAZINE (Oct. 6, 2016), <https://www.smashingmagazine.com/2016/10/in-app-gestures-and-mobile-app-user-experience/> [https://perma.cc/Y5AM-5D5S].

¹⁷² *Id.*

¹⁷³ See *id.*

¹⁷⁴ See Babich, *supra* note 167; Emamian, *supra* note 166.

Streamlining and simplification includes minimizing cognitive load by decluttering, reducing user effort, and minimizing user data input.¹⁷⁵ Enhancing user experience consists of anticipating user needs and putting the user in control by keeping the app interactive, familiar, and predictable.¹⁷⁶ Visual design across the board is an important feature in order to create an accessible and navigable interface using bold, contrasting colors and visual cues, animations, and gestures.¹⁷⁷ A key aspect and common theme of a good user interface across developers and designers is having a simple and familiar design.¹⁷⁸

For businesses utilizing arbitration agreements, this means that through enhanced design and use of gestures, companies have the ability to declutter their app to “leav[e] more space for valuable content” and “make[] the app content-focused.”¹⁷⁹ Still, in moving away from traditional design and in an attempt to integrate branding, businesses have the common design question of how to emphasize a particular section in an app.¹⁸⁰ Companies like Intuit feel as if “call[s] to action” are a good opportunity to “incorporate brand elements, such as [their] ecosystem green color or line iconography.”¹⁸¹ By integrating their brand into their design, Intuit has “deliberately moved away from using text as calls to action, and instead use buttons with high contrast.”¹⁸² Integrating a brand into a company’s mobile app experience is a vital strategic move because brand identification has become “the

¹⁷⁵ Babich, *supra* note 167.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See 11 App Features, Trends & Innovations in Mobile Development, MOBIDEV (Apr. 1, 2018), https://mobidev.biz/blog/11_key_features_of_a_successful_mobile_app [<https://perma.cc/2F9C-NJLE>]; Babich, *supra* note 167; Emamian, *supra* note 166; Harnil Oza, *Importance of UI/UX Design in the Development of Mobile Apps*, HYPERLINK INFOSYSTEM (Oct. 17, 2017), <https://www.hyperlinkinfosystem.com/blog/importance-of-uiux-design-in-the-development-of-mobile-apps> [<https://perma.cc/6HH2-37N2>].

¹⁷⁹ Babich, *supra* note 171.

¹⁸⁰ See Yvonne So, *Designing for Mobile Apps: Overall Principles, Common Patterns, and Interface Guidelines*, MEDIUM (May 12, 2017), <https://medium.com/blueprint-by-intuit/native-mobile-app-design-overall-principles-and-common-patterns-26edee8ced10> [<https://perma.cc/GK5W-BTYL>].

¹⁸¹ *Id.*

¹⁸² *Id.*

cornerstone of the customer relationship” due to the fact that “customers live on mobile first.”¹⁸³ This methodology is not ill-founded; a York University case study found that “custom mobile safety apps received ... 50–100x more downloads than generic apps,” evidencing users’ preference for branded apps over generic apps.¹⁸⁴

Thus, based on app prevalence and the modern user’s understanding and experience with them, businesses have been leveraging the design of their user interface to compete in the app market and strengthen their branding.¹⁸⁵ However, given the current environment after the First and Second Circuit decisions in *Cullinane* and *Meyer*,¹⁸⁶ businesses may need to forego some aspects of user experience in order to be more conscientious of a legal standard that is not keeping pace with app users.¹⁸⁷

III. REDEFINING VALIDITY OF TERMS FOR APP USERS

Determining the validity of terms by notice and acceptance in apps should be updated to reflect the current knowledge and skill of app users.¹⁸⁸ The current legal standard for determining the validity of mobile contract terms is assessed by means of having notice via reasonably conspicuous terms.¹⁸⁹ Given that app use is so prevalent and carries with it a common understanding of app use, inquiry notice based on the conspicuousness of terms through the lens of a reasonable user should take into account the heightened knowledge and skill of the average app user.¹⁹⁰

¹⁸³ Tobias Dengel, *Four Ways to Rethink the Brand App Experience*, FORBES (June 11, 2018), <https://www.forbes.com/sites/forbestechcouncil/2018/06/11/four-ways-to-rethink-the-brand-app-experience/#71b6291f5e4e> [<https://perma.cc/SY25-DXJJ>] (“[T]he brand app experience needs to be not only consistent with other elements of the customer experience such as website or in-store but seamless.”).

¹⁸⁴ *How to Boost Your App’s Growth with Strong Branding*, APP PARTNER (Oct. 5, 2016), <https://www.apppartner.com/boost-apps-growth-strong-brand-image/> [<https://perma.cc/2QUE-HN3V>].

¹⁸⁵ See Mindfire Solutions, *7 Important Mobile App Branding Strategies*, MEDIUM (Jan. 25, 2018), <https://medium.com/@mindfiresolutions.usa/7-important-mobile-app-branding-strategies-8146ae42d995> [<https://perma.cc/78NK-9NHF>].

¹⁸⁶ See *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 64 (1st Cir. 2018); *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 79–80 (2d Cir. 2017).

¹⁸⁷ See *Cullinane*, 893 F.3d at 63.

¹⁸⁸ See *Meyer*, 868 F.3d at 77.

¹⁸⁹ See *Cullinane*, 893 F.3d at 62; *Meyer*, 868 F.3d at 76.

¹⁹⁰ See *Cullinane*, 893 F.3d at 62; *Meyer*, 868 F.3d at 77.

Such a standard would reflect the fact that app users have a heightened base knowledge and skill from their experience using apps.¹⁹¹ Further, it would account for the reality that fewer than 10 percent of individuals consent to legal terms after actually reading them.¹⁹² While a redefined standard encompassing these realities may anticipate some shortfalls, there are many ways to mitigate these downsides while still allowing businesses to adapt with advancing technology.¹⁹³

A. *Understanding the Scope of Who Reads Terms*

While contract law typically will not bind a party to an inconspicuous term,¹⁹⁴ the unfortunate reality for technology users is that these users rarely actually read terms of service, whether or not they are faced with having to agree in the affirmative.¹⁹⁵ Nonetheless, the current standard places heavy emphasis on whether the terms, or access to the terms, are conspicuous.¹⁹⁶

A Deloitte study of consumers found that 91 percent of people “consent to legal terms and services conditions without reading them,” a statistic which rises to 97 percent for those in

¹⁹¹ See Babich, *supra* note 167 (stating that app users are familiar with certain screens that are common across applications and prefer predictability in apps); Babich, *supra* note 171 (noting user familiarity of common gestures such as tap, double tap, drag, pinch, and spread); Gabriel Shaoolian, *Key Functionalities Your Mobile App Design Needs to Invest In*, FORBES (Oct. 4, 2017), <https://www.forbes.com/sites/gabrielshaoolian/2017/10/04/key-functionalities-your-mobile-app-design-needs-to-invest-in/#21941abd1424> [<https://perma.cc/3PSW-KJZ9>] (stating that users understand and use navigational functions intuitively).

¹⁹² Caroline Cakebread, *You’re not Alone, No One Reads Terms of Service Agreements*, BUSINESS INSIDER (Nov. 15, 2017), <https://www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11> [<https://perma.cc/6DHG-4Y4Y>].

¹⁹³ See, e.g., Martha Neil, *Litigation Over Arbitration*, A.B.A. J. (Jan. 2005), http://www.abajournal.com/magazine/article/litigation_over_arbitration [<https://perma.cc/FDQ8-8BAA>].

¹⁹⁴ See *Cullinane*, 893 F.3d at 63–64; *Meyer*, 868 F.3d at 74.

¹⁹⁵ See Cakebread, *supra* note 192; Alex Hern, *I Read All The Small Print On the Internet and It Made Me Want to Die*, THE GUARDIAN (June 15, 2015), <https://www.theguardian.com/technology/2015/jun/15/i-read-all-the-small-print-on-the-internet> [<https://perma.cc/2X9F-AUSR>].

¹⁹⁶ See, e.g., *Cullinane*, 893 F.3d at 63–64; *Meyer*, 868 F.3d at 77–78.

the age range of 18 to 34—the heaviest app users.¹⁹⁷ A York University study, through which student subjects were confronted with agreeing to privacy and service agreements of NameDrop, a fictitious network app, confirmed this statistic.¹⁹⁸ NameDrop’s terms required the subject users to “give NameDrop their future first-born children.”¹⁹⁹ In that study, only roughly a quarter of students “even bothered to look at the fine print,” and even so, all of the students agreed to the terms, which makes user’s affirmation of acceptance to terms “the biggest lie on the internet.”²⁰⁰

Further, whether or not users are actually confronted with the terms to which they must agree raises two additional issues that are not likely to be solved by the reasonably conspicuous standard: (1) the terms are extremely lengthy and often written in legal jargon, and (2) users would not have the bargaining power to negotiate their terms of use anyway.²⁰¹ Taking the time to read an “average American’s digital contracts” would exhaust almost 250 hours per year, with most individuals being confronted with a single 21,586-word user agreement just for their Apple smartphone and any Apple apps.²⁰² The terms are typically difficult to read, not only in terms of legibility and clarity, but also in substance.²⁰³ This is in part due to the legal requirements of conspicuousness and partly because of the attempt to encompass a myriad of legal situations in one text.²⁰⁴ Apart from how illegible terms can be, mustering through reading them will not give

¹⁹⁷ Cakebread, *supra* note 192; *Number of Mobile App Hours Per Smartphone and Tablet App User in the United States in June 2016, By Age Group*, STATISTA (Sept. 2016), <https://www.statista.com/statistics/323522/us-user-mobile-app-engagement-age/> [<https://perma.cc/TD9Q-2SE9>].

¹⁹⁸ David Berreby, *Click to Agree to What? No One Reads Terms of Service, Studies Confirm*, THE GUARDIAN (Mar. 3, 2017), <https://www.theguardian.com/technology/2017/mar/03/terms-of-service-online-contracts-fine-print> [<https://perma.cc/MF7X-SHQP>].

¹⁹⁹ *Id.*

²⁰⁰ *Id.* (stating that even those who read only skimmed: “on average, these more careful joiners spent around a minute with the thousands of words that make up NameDrop’s privacy and service agreements”).

²⁰¹ *Id.*; Hern, *supra* note 195.

²⁰² Berreby, *supra* note 198; Hern, *supra* note 195.

²⁰³ Hern, *supra* note 195.

²⁰⁴ *Id.* (stating that all-caps is hard to read, but, “[s]ince there’s no corresponding requirement that it be legible, the consensus is that capitalising the necessary parts fits the bill”).

a user any extra bargaining power.²⁰⁵ For example, even if a reader of terms does disagree with a clause, the only solution is to not use it; reading the terms does not give you an opportunity to negotiate out of a particular term.²⁰⁶ Nonetheless, even if users become aware of a term that they dislike, it is unlikely that they will stop using an application that they are loyal to.²⁰⁷

B. Redefining a Reasonable Person Standard for App Users

A modern standard would be to incorporate a heightened technological understanding into a “reasonable app user” standard and allow reasonable access to the terms to suffice for inquiry notice. App users should constitute a special group among all individuals such that they are held to a heightened standard of knowledge and skill, like professionals and tradespeople.²⁰⁸ Accordingly, by engaging in app activity, including registering and entering into app contracts, all app users should be held to the same level of responsibility, regardless of experience level, just as newly licensed drivers are held to the same standard as experienced drivers.²⁰⁹ Modern app users understand what various types of hyperlinks look like, and they understand what the various screens mean when they are first downloading or registering an app as well as when they are using it. Additionally, modern app users understand what the language “Terms and Conditions” means and what constitutes entering into such contracts.²¹⁰ Holding app users to this standard compels the user to understand the implications of using an app, and the fact that they are being subjected to contractual provisions in terms and conditions agreements.²¹¹ This incorporates a common understanding of the

²⁰⁵ *Id.*

²⁰⁶ *Id.* (“If you hit ‘disagree’ while setting up an iPhone ... it doesn’t call up an Apple lawyer and offer you the opportunity to renegotiate the terms ... [i]nstead, it simply bounces you back to the page before, and waits for you to try again.”).

²⁰⁷ *Id.*

²⁰⁸ See ENCYCLOPEDIA OF BUSINESS ETHICS AND SOCIETY 1772 (Robert Kolb ed., Sage Publ’ns 1st ed. 2008).

²⁰⁹ See *id.*

²¹⁰ See *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 77 (2d Cir. 2017); Babich, *supra* note 167; Babich, *supra* note 171.

²¹¹ See Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 300 (1997).

current paradigm of app users into the legal standard, in a similar manner to how general contractual principles interpret a contract to have the meaning that a reasonable person would give it “if he knew everything he *should* plus everything he actually knew.”²¹²

This modern, redefined standard may have been one that both the First and Second Circuits attempted to apply in *Cullinane* and *Meyer*,²¹³ but without fully understanding the extent of an average app user’s knowledge. This may be partly due to the fact that judges add a layer of subjectivity on to the objective standard of a reasonable person.²¹⁴ Consequently, a redefined standard should incorporate this knowledge such that reasonable *access* to the terms suffices for a user having inquiry notice of the terms.²¹⁵ Reasonable access affords app users the opportunity to review terms before use, if they so choose, but will not impede businesses from designing and branding their app in a progressive way.²¹⁶ So long as a user has the ability to reasonably access the terms before they register or use an app, and so long as the terms are not hidden or absent in any way, the user will be put on inquiry notice of these terms.²¹⁷ Thus, by providing a hyperlink to the terms on a page during the registration process, regardless of the level of conspicuousness, the screens in both *Cullinane* and *Meyer* would have provided a user with reasonable access to the terms.²¹⁸ In such a standard, utilization of the app itself would constitute a user’s manifestation of assent, much like the all-familiar browsewrap agreements.²¹⁹

C. Addressing Additional Consumer Protection

This redefined standard is not without its shortcomings. While a learning curve is still underway for app technology, it

²¹² *Id.* (emphasis added).

²¹³ See *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 62 (1st Cir. 2018); *Meyer*, 868 F.3d at 76.

²¹⁴ See DiMatteo, *supra* note 211, at 343–44 (“[T]he fact remains that the mantle of objectivity must be viewed through the subjective gaze of the judicial mind.”).

²¹⁵ See *Meyer*, 868 F.3d at 74–75.

²¹⁶ See *id.* at 75–76.

²¹⁷ See *id.* at 74–75.

²¹⁸ See *supra* Section II.E, Figure 1; Figure 2.

²¹⁹ See *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014).

could present issues for unknowing users.²²⁰ However, while this standard attempts to take into account technological advancements and future learning, regulation of the language of mobile contract terms containing arbitration clauses should be advocated for in order to protect users with a more limited knowledge.²²¹ For example, rather than making the terms conspicuous, terms can be signaled by the same language across all apps, such as “Terms and Conditions” or “Terms of Service” so that all users know what to look for and what the language means.²²² Further, in exchange for the ability to present and design an app as a business chooses, regulations can require that arbitration clauses contain more consumer-friendly provisions.²²³

Notwithstanding any additional consumer protection, while arbitration can become costly to the consumer, some argue that it is “look[ing] more and more like litigation,” in that it is both thorough and tailored.²²⁴ Moreover, if consumers become more active in reading the terms that they are subject to, they may find that opt-out provisions are included in such terms, to which they can object or abstain from a provision that they do not want.²²⁵

CONCLUSION

Cullinane and *Meyer* reflect a current standard that allows for different judicial interpretations of app-based contracts containing arbitration terms.²²⁶ While the FAA strongly favors enforcement of arbitration agreements, analyzing mobile contracts for conspicuousness of terms based on a reasonable person standard does not necessarily further this policy, depending on how much knowledge the judge affords the “reasonable smartphone user.”²²⁷ A

²²⁰ See *Meyer*, 868 F.3d at 79.

²²¹ See Richard Frankel, *Corporate Hostility to Arbitration*, 50 SETON HALL L. REV. (forthcoming 2020).

²²² See Babich, *supra* note 167.

²²³ See Neil, *supra* note 193.

²²⁴ *Id.*

²²⁵ *Id.* (“Thus, with a little effort, a consumer can find the provision, follow its instructions and send a brief letter to the company rejecting the arbitration provision.”).

²²⁶ *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 62–63 (1st Cir. 2018); *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 77–80 (2d Cir. 2017).

²²⁷ See *Meyer*, 868 F.3d at 77–78.

redefined standard to apply in the context of app-based terms of service that include arbitration agreements should analyze the app interface in terms of a reasonable app user, incorporating such a user's common technological knowledge and the fact that users are reasonably aware that they are subject to terms when they use apps.²²⁸ Taking into account this heightened knowledge, reasonable access to the terms of a mobile app should be sufficient to satisfy inquiry notice for purposes of validating terms.²²⁹ This standard not only accounts for the current understanding of app users but will incorporate a progressive understanding of new and modernized technology.²³⁰ Further, it will allow businesses to tailor their mobile apps toward a more in-demand and engaging user interface while also allowing businesses to build their brand given that they can be less consumed with designing solely with "conspicuous terms" in mind.²³¹

²²⁸ *See id.* at 77.

²²⁹ *See id.* at 74–75.

²³⁰ *See id.* at 77.

²³¹ *See id.* at 79.