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Client Advisory

**Pennsylvania Raises the Bar on Jury Waivers and Arbitration Clauses: Are Your Terms and Conditions Still Enforceable?**

In this golden age of e-commerce, all consumers should be familiar with the concept of “terms and conditions,” the mile-long and oft-ignored script of legalese that comes with every service and purchase. However, courts remain concerned that consumers may be surprised by what these terms and conditions actually contain. Indeed, it has become commonplace for consumers to relinquish important constitutional rights, the right to seek redress in a court of law and the right to a trial by jury.

An essential element for every contract is a “meeting of the minds” between the contracting parties. This requires that a party is given adequate notice of their contractual rights and obligations. When important rights are being relinquished, greater notice is required. A recent decision by a Pennsylvania court of appeals has created more stringent notice requirements for waivers of jury trials and mandatory arbitration clauses in a company’s terms and conditions. All businesses providing services to Pennsylvania consumers need to be aware of these changes, or else their arbitration clauses and jury waivers could be deemed unenforceable.

**The Case: Chilutti v. Uber Technologies, Inc., et al.**

In 2019, a wheelchair-bound Pennsylvania resident named Shannon Chilutti was injured in an accident while using the well-known ride-sharing service provided by Uber Technologies, Inc. (“Uber”). Shannon and her husband Keith, who witnessed the accident, filed suit against Uber for her injuries. Uber sought to enforce the mandatory arbitration clause in its terms and conditions. Although the trial court found in Uber’s favor and compelled arbitration, the appellate court reversed and deemed Uber’s arbitration clause to be unenforceable.

The two most common approaches to terms and conditions are the “clickwrap” and “browsewrap” agreements. Clickwraps are the gold standard and are routinely enforced. This is where the website shows the terms and conditions on a pop-up screen that requires users to manually click an “agree” box before completing registration. Browsewrap agreements, on the other hand, are scrutinized more rigorously by courts. This is where the website provides a hyperlink somewhere on the webpage that redirects users to a different page with the terms and conditions, and the consumer supposedly consents to the terms by continuing to use the website. Browsewraps often do not require the user to manually manifest their consent or even view the terms and conditions.

Uber used a browsewrap agreement. The evidence showed that, when Shannon registered her Uber account in 2016, she was required to fill out her personal information and click on a blue “Create Account” button. At the bottom of the page was a sentence in smaller font that stated “By clicking ‘Create Account’, you agree to Uber’s Terms and Conditions and Privacy Policy.” The phrases “Terms and Conditions” and “Privacy Policy” were hyperlinks in blue font, but otherwise they were not distinctive, underlined or capitalized. A consumer could complete the entire registration process without clicking on these links, and possibly without even seeing them. If clicked, the links would redirect the user to a different website with the Terms and Conditions and Privacy Policy. The arbitration clause and jury waiver were buried in page nine of the twelve-page agreement.

Notably, the appellate court acknowledged that the agreement could have been enforceable under the federal standard established by the 9th Circuit Court of Appeals in *Berman v. Freedom Fin. Network, LLC*. This federal case required two things: “(1) the website provide[s] reasonably conspicuous notice of the terms to which the consumer will be bound; and (2) the consumer [takes] some action, such as clicking a button or checking a box, that unambiguously manifest[s] his or her assent to those terms.” 30 F.4th 849, 856 (9th Cir. 2022). However, the Chilutti court ruled that “because 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.”

The court went on to establish several requirements for businesses serving residents of Pennsylvania. First, the website must explicitly state on the registration websites and application screens that the consumer is waiving their right to a jury trial. Second, it cannot be possible to complete the registration process without seeing the notice and terms and conditions. Note, although the first and second requirements specifically refer to account registration, it should be presumed that websites without a registration process must still make a similar effort to put consumers on notice of the jury waiver. Third, on the terms and conditions, the jury waiver should not be buried deep in the agreement but should appear at the top of the first page in bold, capitalized text. Finally, the court expressed concern that a layperson may not even know what arbitration is, so the terms and conditions must clearly explain that the consumer is giving up the right to resolve disputes in court and that the decision of the arbitrator is binding and likely not subject to appeal.

## **Conclusion: Best Practices for Terms and Conditions**

As a result of *Chilutti*, Pennsylvania now has a heightened standard for the enforceability of arbitration clauses and jury waivers in terms and conditions. Any business that serves or intends to serve residents of Pennsylvania should follow the five recommendations below when using a browsewrap agreement. However, the absolute best practice is to utilize a clickwrap agreement, which should still adhere to recommendations three, four, and five.

1. Notice – Explicitly state on the registration page that by accepting the terms and conditions, the consumer is waiving their right to a jury trial and agreeing to submit all disputes to binding arbitration.
2. Conspicuous – Make the text of the notice distinctive from the rest of the text on the page; other elements of the page should not draw the consumer’s attention away from the notice. Put the notice in larger font, bold and all capitalized. Underline hyperlinks and put them in a different color than the other text. Also make sure to put the notice directly next to or above the “I Accept” button.
3. Unambiguous – Ensure that the consumer has to take an affirmative action to accept the terms and conditions, such as checking a box that says “I Agree.” This action should be separate from any other action, such as continuing to the next page.
4. Impassable – Ensure that the consumer cannot complete the registration process without agreeing to the terms and conditions. To make this even stronger, make it impossible to click the “I Agree” box until the consumer has clicked on the hyperlink for the terms and conditions.
5. Up Front – On the terms and conditions, put the jury waiver and a notice of the arbitration clause at the very beginning of the agreement, and make the text conspicuous—bold and all capitalized. Additionally, describe what binding arbitration is using plain language that a layperson can understand.

If you have any questions about terms and conditions, internet law or intellectual property, please contact Nicholas Yodock at (856) 673-7145 or [nyodock@archerlaw.com](mailto:nyodock@archerlaw.com).

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