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Arbitration by Hyperlink: Or Not?

In the somewhat prosaic case of *Kemenosh v. Uber Technologies, Inc.*, No. 181102703, Control No. 19042403 (C.P. Philadelphia January 3, 2020), Judge Fletman addressed the question of whether an Uber arbitration clause bound an injured passenger.

Ms. Kemenosh asserted that while she did register for Uber in 2013, she did not see the terms of service hyperlink, did not click on any hyperlinks and did not review the terms of service. In her affidavit, Ms. Kemenosh declared she did not review and was not required to review the arbitration provisions when she registered to use Uber in October of 2013. Updated terms were sent to plaintiff in 2016. The updated terms referred to legal issues and the email was displayed in a bright green hyperlink text which when clicked led to the updated terms and conditions.

Kemenosh continued to use the Uber app regularly after that email was sent. The terms and conditions referred to binding arbitration. Kemenosh said she never read the 2016 email or the 2016 terms and conditions. Uber relied upon the Federal Arbitration Act.

The Court found that the screens presented to Ms. Kemenosh in the 2013 registration process did not properly communicate an offer to arbitrate under Pennsylvania law. A hyperlink message does not constitute an offer to arbitrate. Had Kemenosh been required to open the hyperlink and scroll through the terms of service and privacy policy, which contained the arbitration agreement, there may have been an effective offer to arbitrate. If Kemenosh had been required to check a box certifying that she had read and agreed to the terms of service and privacy policy, perhaps an offer to arbitrate would have been made. Or, even if Uber had somewhere conveyed that Ms. Kemenosh should read the terms of service as it did in its 2016 email, an offer to arbitrate may have been properly conveyed. Uber did none of these.

The hyperlink contained no indication that it contained further essential terms other than the implicit agreement of offering transportation in exchange for money and privacy policy. The hyperlink did not have the typical appearance of a hyperlink, blue underlined text. There was a significant factual dispute about whether plaintiff ever received the November 2016 email containing the 2016 terms.

In sum, the opinion, thoughtfully rendered by Judge Fletman, essentially can be read as follows:

- Motor vehicle accident March 18, 2018.
- Uber pleads arbitration.
- Ms. Kemenosh and Uber did not enter into a valid agreement to arbitrate either in 2013 or 2016.
- Registering for Uber is not sufficient to compel arbitration.

- There are factual disputes over when an agreement to arbitrate had been entered into.
- There must be an intent to enter into arbitration.
- Hyperlink message does not constitute an offer to arbitrate.
- Plaintiff was not required to open the hyperlink and scroll through Terms of Service and Privacy Policy, which contained the arbitration agreement.
- Plaintiff was not required to check a box certifying that she had read and agreed to the Terms of Service and Privacy Policy.
- Uber did not convey that the plaintiff should read the Terms of Service as it did in its 2016 email.
- The hyperlink did not have the typical appearance of a hyperlink, blue underlined text.
- The 2016 email was linked to new "US Terms of Use" which contained an arbitration clause.
- Uber failed to meet its burden of proving that plaintiff entered into an arbitration agreement through the purported receipt of this email.
- It is petitioner's burden of proof that a valid agreement to arbitrate exists.
- There is a factual dispute as to whether plaintiff ever received the 2016 email containing the terms.
- The evidence is that an email was sent and did not bounce back.
- Plaintiff claims she never received or read the 2016 email or terms.
- There was no live testimony for the court to evaluate.

Arbitration continues to occupy a great amount of judicial ink.

The seminal case on the subject is a little-known but often cited decision in *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51 (3rd Cir. 1980). This author handled that case for the plaintiff, which involved a standard predispute arbitration clause on the back of an invoice. The Court held that there must be an intent to arbitrate, which is a question of fact. While no decision has expressly overruled *Par-Knit Mills*, it continues to be ignored by the United States Supreme Court. See, i.e., *Kindred Nursing Ctrs. P'ship, et al. v. Clark*, 137 S.Ct. 1421 (2017). Even more distressing is that the United States Supreme Court has never seriously undertaken an analysis of the Federal Arbitration Act juxtaposed to the Seventh Amendment of the Federal Constitution.

The Third Circuit decided *Aliments v. Krispy Kernals, Inc. v. Nichols Family Farm*, 851 F.3d 283 (3d Cir. 2017). *Ailments v. Krispy Kernals* made clear that when determining whether there is a valid agreement to arbitrate between the parties, "we apply ordinary state-law principles of contract law," relying upon *First Options of Chicago v. Kaplan*, 19 F.3d 1503, 1512 (3d Cir. 1994) (internal quotations omitted). It is clear that the state defines how stringent the standard is in connection with an arbitration agreement.

Pennsylvania has recently passed the RUAA, Revised Uniform Arbitration Act. The Act, hotly contested and seriously negotiated, continues to provide for determination of factual disputes with respect to whether there has been an agreement to arbitrate. While prior

versions of the Bill were watered down by a variety of interest groups, it still adheres to Pennsylvania common law that no contract comes into being absent "intent". The United States Supreme Court continues to exalt the Federal Arbitration Act wherever state law conceivably treats pre-dispute arbitration clauses differently than any other contractual term. However, "intent" to arbitrate still survives the U.S. Supreme Court's onslaught against state law.

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