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## **Cullinane v. Uber Technologies, Inc.**

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*Cullinane v. Uber Technologies, Inc.*

64 N.Y.L. SCH. L. REV. 287 (2019–2020)

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CULLINANE v. UBER TECHNOLOGIES, INC.

“There’s an app for that.”<sup>1</sup> These days, there’s an app for nearly everything—be it a dinner reservation, cleaning service, or ride-sharing service.<sup>2</sup> Modern technology has brought about a shift to a sharing economy that is more collaborative than the traditional, competitive economy.<sup>3</sup> In a sharing economy, consumers are connected with companies through apps that utilize unused resources.<sup>4</sup> Because business laws were developed for a competitive economy, this collaborative approach does not always fit squarely within the current legal system—an issue that the First Circuit Court of Appeals faced in the 2018 case *Cullinane v. Uber Technologies, Inc.*<sup>5</sup>

In *Cullinane*, the court considered whether certain users had entered into an enforceable contract with Uber Technologies, Inc. (“Uber”).<sup>6</sup> The issues before the court were whether the plaintiffs had manifested their assent to Uber’s “Terms of Service & Privacy Policy” (“Agreement”) and whether the arbitration clause set out in the Agreement was “reasonably conspicuous”<sup>7</sup> to its users.<sup>8</sup> Relying on *Ajemian v. Yahoo!, Inc.*,<sup>9</sup> the court held that the arbitration clause in the Agreement was not reasonably conspicuous and the plaintiffs did not manifest their assent to form a contract.<sup>10</sup>

This Case Comment contends that the *Cullinane* court incorrectly held that Uber’s arbitration clause in the Agreement was unenforceable for two reasons. First, the court improperly relied on *Ajemian v. Yahoo!, Inc.*, because the issue of online contract formation is an area of unsettled law, and the court should have therefore relied on precedent from other jurisdictions. If it had done so, it would have held that the Agreement was enforceable because its terms were hyperlinked on an uncluttered page and part of the registration process.<sup>11</sup> Second, the court erred in holding that the Agreement was unenforceable because it failed to recognize that online contracts are on equal footing with paper contracts.<sup>12</sup> The court’s decision creates public policy

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1. Doug Gross, *Apple Trademarks ‘There’s an App for That’*, CNN (Oct. 12, 2010), <http://www.cnn.com/2010/TECH/mobile/10/12/app.for.that/index.html>.
  2. See Yanelys Crespo, *Uber v. Regulation: “Ride-Sharing” Creates a Legal Gray Area*, 25 U. MIAMI BUS. L. REV. 79, 81 (2016).
  3. *Id.*
  4. *Id.*
  5. See generally *id.* at 83; *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53 (1st Cir. 2018).
  6. *Cullinane*, 893 F.3d at 55.
  7. *Id.* at 62 (quoting *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604, 612 (Mass. App. Ct. 2013)).
  8. *Cullinane*, 893 F.3d at 62–63.
  9. *Ajemian*, 987 N.E.2d at 604.
  10. *Cullinane*, 893 F.3d at 64.
  11. *Id.* at 59; *Ajemian*, 987 N.E.2d at 611–13.
  12. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004) (explaining that while the internet has exposed courts to new contract issues, it has not changed contract principles).

concerns for the future of online contracts because it leads to confusion in the laws governing online contract formation.<sup>13</sup>

Uber is a popular ride-sharing service that licensed a mobile application (“Uber App”).<sup>14</sup> First-time users who wished to use Uber had to register by creating an account on either Uber’s website or through the Uber App.<sup>15</sup> Between December 31, 2012, and January 10, 2014, plaintiffs Rachel Cullinane, Ross McDonagh, Jacqueline Núñez, and Elizabeth Schaul downloaded the Uber App to their smartphones.<sup>16</sup> During 2013 and 2014, after their rides, Uber charged each plaintiff additional surcharges and tolls on top of the actual transportation charges.<sup>17</sup>

At the time, this registration process required navigation through three separate screens.<sup>18</sup> The first screen, titled “Create an Account,” prompted users to enter an e-mail address and phone number, and to create a password.<sup>19</sup> The next screen, titled “Create a Profile,” asked users to enter their full name and upload a picture.<sup>20</sup> The third screen, titled “Link Card” or “Link Payment,” required users to provide a method of payment.<sup>21</sup> This screen had a thick bar that read “Link Card.”<sup>22</sup> To the left was a “CANCEL” button, and to the right was a button, less visible and inoperable, that read “DONE.”<sup>23</sup> A blank field text prompted users to enter their credit card information with light grey numbers and depicted a credit card icon, as an example.<sup>24</sup> On this page, a pop-up automatic number pad filled up half the screen—further prompting users to

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13. See *Cullinane*, 893 F.3d at 60–61; see also Ty Tasker & Daryn Pakcyk, *Cyber-Surfing on the High Seas of Legalese: Law and Technology of Internet Agreements*, 18 ALB. L.J. SCI. & TECH. 79, 89 (2008).

14. *Cullinane*, 893 F.3d at 55. Uber licenses its Uber App to the public so that users can request transportation services. *Id.*

15. *Id.* Creating accounts on Uber allows users to request rides from independent third-party providers. *Id.*

16. *Id.*

17. *Id.* Núñez used the Uber App on September 13, 2013, for transportation to Boston Logan International Airport and was charged \$8.75 for the Massport surcharge and toll. *Id.* Cullinane used the Uber App from Boston Logan International Airport on June 29, 2014, and was charged \$5.25 for the East Boston Toll and \$8.75 for the Massport surcharge. *Id.* Schaul used the Uber App to and from Logan Airport and was also charged the \$8.75 Massport surcharge. *Id.* McDonagh used the Uber App for multiple trips, and on various occasions was charged \$5.25 for the East Boston Toll and \$8.75 for the Massport surcharge. *Id.*

18. *Id.* at 56.

19. *Id.* This screen notified users that Uber used e-mails and phone numbers for ride confirmations and receipts. *Id.*

20. *Id.* This screen also informed users that their name and photo are used to help their driver identify them. *Id.*

21. *Id.* Plaintiffs Núñez and Schaul were presented with a third screen that was titled “Link Card,” while plaintiffs Cullinane and McDonagh were presented with a screen that was titled “Link Payment.” *Id.* Although the titles of the payment screens were different, the court noted that these differences were immaterial to the underlying dispute. *Id.*

22. *Id.* at 57.

23. *Id.*

24. *Id.* The blank field text was white, which contrasted with the black background of the rest of the screen. *Id.*

enter their credit card information.<sup>25</sup> Below the blank text field, users were met with the instructions “scan your card,” that had a camera icon next to it, and “enter promo code,” that had a bullet-shaped icon in a circle.<sup>26</sup> On this screen, the phrase, “[b]y creating an Uber account, you agree to the Terms of Service & Privacy Policy,” appeared above a hyperlinked box that read “Terms of Service & Privacy Policy.”<sup>27</sup>

The “Link Payment” screen was similar to the “Link Card” screen, but instead of the automatic number pad, there was a PayPal<sup>28</sup> button.<sup>29</sup> In between the blank text field and the PayPal button, was text that said “OR,” indicating users had two payment options.<sup>30</sup> Below the PayPal button was identical text that read, “by creating an Uber Account you agree to the” directly above “Terms of Service & Privacy Policy” in bold white text enclosed by a gray rectangle.<sup>31</sup> If a user input their credit card information, the keyboard would change and the screen would almost identically resemble the “Link Card” screen.<sup>32</sup>

The Agreement was a ten-page document that was accessible during the registration process through a hyperlink.<sup>33</sup> If a user clicked on the “Terms of Service & Privacy Policy” hyperlink, they would be able to view another screen with “Terms & Conditions” and “Privacy Policy” buttons.<sup>34</sup> The Agreement was displayed once a user clicked “Terms & Conditions.”<sup>35</sup> However, users were not required to click any of these buttons, or access the Agreement, in order to complete their registration.<sup>36</sup> There was also a Dispute Resolution<sup>37</sup> section in the Agreement.<sup>38</sup> This section bound Uber users to arbitration and explained the process and governing body for

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25. *Id.*

26. *Id.* The record did not definitively conclude whether the “scan your card” or “enter promo code” buttons were clickable. *Id.*

27. *Id.* at 57–58.

28. PayPal is an “alternative payments services company,” that allows for buyers to purchase goods online without revealing their sensitive personal information to a seller. Eric Pacifici, *Making PayPal Pay: Regulation E and its Application to Alternative Payment Services*, 13 DUKE L. & TECH. REV. 89, 92 (2015).

29. *Cullinane*, 893 F.3d at 58.

30. *Id.*

31. *Id.* at 57.

32. *Id.* at 58.

33. *Id.* at 59.

34. *Id.*

35. *Id.*

36. *Id.*

37. See 9 U.S.C. §§ 1–16 (2020). See also Tala Esmali, *Alternative Dispute Resolution*, LEGAL INFO. INST. (June 8, 2017), [https://www.law.cornell.edu/wex/alternative\\_dispute\\_resolution](https://www.law.cornell.edu/wex/alternative_dispute_resolution). Alternative Dispute Resolution (ADR) refers to the process of settling disputes outside of the courtroom and may include negotiation, conciliation, mediation, and arbitration. *Id.* States have begun to experiment in implementing ADR programs due to the high cost of litigation and burdened court dockets. *Id.*

38. *Cullinane*, 893 F.3d at 59.

arbitration.<sup>39</sup> While the plaintiffs claim they neither clicked the “Terms of Service” and “Privacy Policy” links, nor viewed any of the subsequent screens, they all registered, created accounts, and used the App.<sup>40</sup>

In November 2014, Cullinane and Núñez filed a putative class action suit<sup>41</sup> against Uber in Massachusetts Superior Court.<sup>42</sup> The initial complaint alleged five causes of action.<sup>43</sup> One month later, Uber filed a Notice of Removal<sup>44</sup> in the United States District Court for the District of Massachusetts, relying on the Class Action Fairness Act.<sup>45</sup> Plaintiffs Cullinane and Núñez then amended their complaint by adding Schaul and McDonagh as plaintiffs and a new cause of action for unfair and deceptive practices.<sup>46</sup>

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39. *Id.* The Agreement indicated that the arbitration would be handled by the American Arbitration Association (AAA). *Id.* It also provided that the Commercial Arbitration Rules and Federal Arbitration Act (FAA) would govern the interpretation and enforcement of the Agreement. *Id.*

40. *Id.*

41. *See* MASS. GEN. LAWS ANN. ch. 93A § 9(2) (West 2020). A putative class action law suit allows a person to bring an action with a hypothetical group of people, that the plaintiff represents, against a party that has used unfair or deceptive practices and caused similar injuries to other persons. *Id.*

42. *Cullinane*, 893 F.3d at 59.

43. *Id.* at 60. The initial class action suit sought declaratory, injunctive, and monetary relief on behalf of a class of Uber passengers in Massachusetts. Complaint at 1, *Cullinane v. Uber Techs., Inc.*, No.14-14750-DPW, 2016 U.S. Dist. WL 3751652 (D. Mass. July 11, 2016), *rev'd* 893 F.3d 53 (1st Cir. 2018). Count I of the complaint alleged that Uber’s fictitious and inflated charges was a breach of contract because it violated the covenant of good faith and fair dealing. *Id.* at 13. Count II alleged that Uber breached an express warranty. *Id.* at 13–14. Count III alleged that Uber’s disclaimer of the warranty obligations created by its express representations of their services violated the prohibition on these types of disclaimers. *Id.* at 14. Count IV alleged that Uber’s express representations about safety and pricing transparency were contradicted and negated by its disclaimer of the warranties it created by those representations, and was therefore unreasonable. *Id.* at 14–15. Count V alleged that the plaintiffs unwittingly conferred economic benefits on Uber and that Uber’s demand and acceptance of these fictitious or inflated fees, knowing it was unentitled to them, was unjust and inequitable. *Id.* at 15.

44. *See* 28 U.S.C. § 1446(a)–(b) (2020). Civil actions can be removed from a state court to federal district court in the district and division where the action is pending. *Id.* Removal must be within thirty days after receipt by the defendant or thirty days after the service of summons has been filed. *Id.* *See also* 28 U.S.C. § 1441. Removal can be based on diversity of citizenship or the existence of a federal issue. 28 U.S.C. § 1446(a).

45. 28 U.S.C. § 1332(d)(2). The Class Action Fairness Act states:

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which—(A) any member of a class of plaintiffs is a citizen of a State different from any defendant; (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

*Id.* *See also Cullinane*, 893 F.3d at 60.

46. *Cullinane*, 893 F.3d at 60. Massachusetts law declares “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce” as unlawful. MASS. GEN. LAWS ANN. ch. 93A § 2(a).

Once in federal court, Uber moved to either compel arbitration and stay proceedings,<sup>47</sup> or to dismiss the case<sup>48</sup> because of the Agreement's arbitration clause.<sup>49</sup> Plaintiffs then amended their complaint in August 2015, dropping all causes of action except for the Chapter 93A violation and common law claim for unjust enrichment.<sup>50</sup> The district court granted Uber's motion to compel arbitration and dismissed the case.<sup>51</sup> In February 2017, plaintiffs appealed the district court's decision to the First Circuit Court of Appeals arguing that the arbitration clause was unenforceable.<sup>52</sup>

The arbitration agreements found in contracts today are rooted in Ancient Greek and Roman law.<sup>53</sup> Information on the earliest arbitration agreements is limited because these agreements were considered private matters, and thus, not published.<sup>54</sup> English law, which influenced American law, treated arbitration agreements with disdain because such agreements got in the way of the courts and what was considered the proper administration of justice.<sup>55</sup> Reflecting this notion, England passed a statute in the sixteenth century prohibiting agreements that barred lawsuits and courts held that arbitration agreements were revocable any time before the parties received awards.<sup>56</sup>

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47. 9 U.S.C. § 3 (2020), outlining a stay of proceedings, reads as:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is preferable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

*Id.*

48. *See generally* FED. R. CIV. P. 12(b).

A motion to dismiss may be granted if the other party can present any of the defenses, such as: (1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; and (7) failure to join a party under Rule 19.

*Id.*

49. *Cullinane*, 893 F.3d at 60.

50. *Id.*

51. *Id.*

52. *Id.*

53. *See* William M. Howard, *The Evolution of Contractually Mandated Arbitration*, 48 *ARB. J.* 27, 27–28 (1993) (discussing the history of arbitration agreements).

54. *Id.* at 27.

55. *Id.* at 28.

56. *Id.* at 27–28.

Historically, American law has similarly limited arbitration agreements.<sup>57</sup> In 1870, the Supreme Court held that a contract cannot “entirely close the access to the courts of law.”<sup>58</sup> Four decades later, however, the Sixth Circuit held that parties could not revoke an arbitration agreement after an award was given.<sup>59</sup> In 1920, New York passed the New York Arbitration Act,<sup>60</sup> which validated arbitration agreements, allowed the stay of court proceedings, and prohibited revocation of arbitration agreements.<sup>61</sup> Five years later, Congress passed the Federal Arbitration Act (FAA).<sup>62</sup> The FAA required courts to enforce arbitration agreements in maritime transactions and interstate commerce.<sup>63</sup> The Act was challenged in court, and in 1932, the Supreme Court held that the FAA did not unconstitutionally infringe on the Constitution’s maritime jurisdiction of federal courts.<sup>64</sup>

Courts began to view arbitration more favorably throughout the 1960s, whereas courts in the 1970s were unclear as to whether they favored or disfavored arbitration agreements.<sup>65</sup> In 1983, the Supreme Court indicated its preference for arbitration in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, holding that the FAA created a “federal substantive law of arbitrability applicable to any arbitration agreement.”<sup>66</sup>

Although there is a “liberal policy favoring arbitration agreements,”<sup>67</sup> arbitration agreements are subject to limitations and strict guidelines to ensure proper enforcement. In contracts, including online contracts, a company usually uses the

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57. *Id.* at 28.

58. *Ins. Co. v. Morse*, 87 U.S. 445, 452 (1874) (holding that arbitration agreements and agreements that limit access to courts may impede the “administration of justice” because courts and the law should give the right to remedy, not a pre-agreed upon contract).

59. *See generally* *Toledo S.S. Co. v. Zenith Trans. Co.*, 184 F. 391, 396 (6th Cir. 1911) (holding that because the question submitted to the arbitrator involved judicial functions, it could not be revoked).

60. N.Y. C.P.L.R. § 7503 (McKinney 2020).

61. *See* Howard, *supra* note 53, at 28.

62. *Id.*

63. 9 U.S.C. § 1 (2020).

64. *See* *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 279 (1932).

65. *Compare* *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974) (holding that an employee would not be forced to arbitrate an employment discrimination claim), *with* *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519–20 (1974) (holding that an arbitration agreement supersedes adjudication), *and* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 360 F.2d 315, 317–18 (2d Cir. 1966) (holding that an arbitration provision that incorporated a standard clause recommended by the AAA was broad and comprehensive, and would cover a fraud dispute, and thus arbitration was the proper method to resolve the dispute), *and* *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567–68 (1960) (holding that the Supreme Court has limited power when the parties have already agreed to an arbitration agreement).

66. 460 U.S. 1, 24 (1983). *See generally* *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding that any state law that restricts arbitration is preempted).

67. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011) (quoting *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24); *Oldroyd v. Elmira Sav. Bank*, 134 F.3d 72, 76 (2d Cir. 1998) (“There is a strong federal policy favoring arbitration as an alternative means of dispute resolution.”).



American Arbitration Association (AAA) to help administer the terms of service and arbitration clauses.<sup>68</sup> Typically, parties are not required to arbitrate unless they have agreed to arbitration in advance.<sup>69</sup> However, the transition from express written agreements to those that are embedded in online agreements has complicated the analysis of whether parties have actually agreed to arbitrate.

Online agreements fall into one of two categories: browsewrap agreements and clickwrap agreements.<sup>70</sup> Browsewrap agreements are agreements that website users agree to by merely using the website and are usually at the bottom of a page in a hyperlink.<sup>71</sup> Clickwrap agreements require affirmative assent to terms of service and use by the user, who is required to click a box that reads, “I agree.”<sup>72</sup> Although courts favor enforcing arbitration clauses in express written contracts, the law of arbitration clauses in online agreements is not as straightforward.<sup>73</sup> For instance, it is unclear whether a court will enforce browsewrap agreements because of the uncertainty as to whether a user has actually assented to the underlying terms of these agreements. Because this is a developing area of the law, there are jurisdictional splits on whether to enforce an online contract and its arbitration clause.<sup>74</sup>

The arbitration clause in Uber’s Agreement was the basis of one of these jurisdictional splits.<sup>75</sup> In *Cullinane*, Uber asserted that the online presentation of its Agreement was conspicuous enough to bind the plaintiffs to the contract.<sup>76</sup> It argued that whether the plaintiffs chose to click through the terms was irrelevant because the terms were visually and contextually conspicuous.<sup>77</sup> In asserting this argument, Uber noted that the page that linked to the Agreement had only twenty-six words that were in a larger, bolded font, and highlighted by a box.<sup>78</sup> Therefore, Uber argued, because it

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68. See Sherman Kahn, *Administering Arbitration Clauses in Online Terms of Service Agreements*, SOCIALLYAWARE (Apr. 29, 2013), <https://www.sociallyawareblog.com/2013/04/29/administering-arbitration-clauses-in-online-terms-of-service-agreements/> (explaining the use of arbitration clauses by companies in terms of use agreements).

69. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (holding that arbitration agreements are meant to be consensual and not coercive).

70. See Robert Terenzi, Jr., *Friending Privacy: Toward Self-Regulation of Second Generation Social Networks*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1049, 1078 (2010).

71. RESTATEMENT OF CONSUMER CONTRACTS § 2, at 35 (AM. LAW INST., Discussion Draft 2017). In a browsewrap contract, there is no “I agree” button to click on. *Id.* “The website includes a link to another page with the standard terms, and consumers, by proceeding with the purchase or simply by continuing to use the website, are deemed to have adopted the standard terms as part of the contract.” *Id.*

72. See Terenzi, Jr., *supra* note 70, at 1076.

73. See *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

74. Liz Kramer, *Federal Circuits Split on Whether Uber Can Enforce Arbitration Clause*, ARBITRATION NATION (July 1, 2018), <https://www.arbitrationnation.com/federal-circuits-split-whether-uber-can-enforce-arbitration-clause/>.

75. *Id.*

76. *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 62–63 (1st Cir. 2018).

77. *Id.*

78. *Id.*

was apparent that there was a hyperlink that would have brought users to the Agreement, the Agreement was sufficiently conspicuous, and thus, bound the parties.<sup>79</sup>

The plaintiffs argued that the arbitration clause was not enforceable because Uber's Agreement was unclear. Further, they asserted that because they did not mutually assent to its terms, the arbitration clause was unenforceable—as mutual assent is essential to contract formation.<sup>80</sup> The plaintiffs reasoned that an online contract's terms must be clear and conspicuous, and because the terms of the Agreement were not reasonably conspicuous, they should not have been bound to its terms.<sup>81</sup> Specifically, the plaintiffs argued that because they were not required to access, read, or assent to the Agreement, they should not be required to arbitrate.<sup>82</sup>

The *Cullinane* court agreed with the plaintiffs and refused to grant Uber's motion to compel arbitration.<sup>83</sup> It relied on the rule set forth in *Ajemian v. Yahoo!, Inc.*, which addressed the issue of forum selection clauses in online contracts.<sup>84</sup> The rule set forth by the *Ajemian* court outlines that contract terms must be reasonably communicated to the user and that user must unambiguously assent to its terms.<sup>85</sup> The terms in an online contract must be conspicuous so as to be written, displayed, or presented in a way that a reasonable person would notice them.<sup>86</sup> In *Cullinane*, the court found that the terms of the Agreement were not conspicuous, and thus, Uber did not reasonably communicate these terms to the plaintiffs.<sup>87</sup>

The *Cullinane* court first analyzed the hyperlink to the Agreement and noted that it was in a rectangular box in bolded text, as compared to most hyperlinks which are usually blue and underlined.<sup>88</sup> Because the hyperlink was not presented in its usual manner, the court held that a reasonable user may not have been aware that the box was a hyperlink connecting them to a contract.<sup>89</sup> The court further noted that the overall content of both the "Link Card" and "Link Payment" screens indicated that the hyperlink was not conspicuous, relying on the fact that all three screens contained other terms with similar features.<sup>90</sup> The court reasoned that because the hyperlink was included with other words that had similar or larger font, typeface,

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79. *Id.*

80. Brief for Plaintiff-Appellants at 26, *Cullinane*, 893 F.3d 53 (No. 16-023).

81. *Id.* at 31–39.

82. *Id.* at 36–48.

83. *Cullinane*, 893 F.3d at 64.

84. *See* 987 N.E.2d 604, 610–15 (Mass. App. Ct. 2013).

85. *Id.* at 611–12.

86. *See Cullinane*, 893 F.3d at 62 (quoting MASS. GEN. LAWS ch. 106, § 1-201(b)(10)); *see also* MASS. GEN. LAWS ch. 156D, § 1.40 (defining the term "conspicuous" as "written so that a reasonable person against whom the writing is to operate should have noticed it").

87. *See Cullinane*, 893 F.3d at 63–64.

88. *See id.*

89. *Id.*

90. *Id.*

and other noticeable attributes, a user's attention was probably not going to be focused on the hyperlink, and thus, it was not conspicuous.<sup>91</sup>

The First Circuit Court of Appeals erred in holding that the Agreement was unenforceable. First, the court erred by relying on the holding and reasoning of *Ajemian*. Because online contract formation is an area of unsettled law, the court should have analyzed precedent from other jurisdictions in order to reach its decision.<sup>92</sup> Had the court done so, it would have held the Agreement enforceable because its terms were hyperlinked on an uncluttered page and were connected to the registration process.<sup>93</sup> Second, the court failed to recognize that the online contract should have been treated the same as a paper contract. The court's decision leads to a multitude of public policy concerns because its decision creates unclear precedent as to the interpretation of online contract formation.

The first error of the court, in holding that the Agreement was unenforceable, was that it failed to analyze precedent from other jurisdictions in reaching its decision. The First Circuit had to apply Massachusetts state law when analyzing Uber's online contract.<sup>94</sup> However, if a federal court is faced with an unsettled area of law, it must look to "analogous state court decisions, persuasive opinions from courts of other jurisdictions, learned treatises, and any relevant policy rationales."<sup>95</sup> Here, the *Cullinane* court failed to recognize that the issue of online contract formation is an unsettled area of law in Massachusetts, and thus, should have considered precedent from other jurisdictions.<sup>96</sup> Instead, the court relied on the Massachusetts Appeals Court's decision in *Ajemian*—the only case in Massachusetts, at the time, involving online contract formation.<sup>97</sup>

Had the First Circuit analyzed persuasive precedent from sister circuit and state court decisions, it would have found Uber's arbitration clause to be enforceable because the plaintiffs were notified of the Agreement throughout the registration process.<sup>98</sup> A sign-in-wrap contract, a type of browsewrap agreement, does not require a website user's affirmative acceptance to the website's terms of use, so long as the

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91. *Id.*

92. *See Patterson v. Novartis Pharms. Corp.*, 909 F. Supp. 2d 116, 121 (D.R.I. 2012) (explaining that when a federal court must interpret unsettled state law, it should look at how the highest court would rule and decide based on that analysis).

93. *Cullinane*, 893 F.3d at 63.

94. *Erie R.R. v. Tompkins*, 204 U.S. 64, 72–73 (1938) (outlining that a federal court should typically apply state laws in analyzing contract formation).

95. *See Corporate Techs., Inc. v. Harnett*, 731 F.3d 6, 10 (1st Cir. 2013) (holding that when the highest court of a state has unsettled law, the court should look at "persuasive adjudications of sister states" and "public policy considerations"); *Bercovitch v. Baldwin Sch.*, 133 F.3d 141, 151 (1st Cir. 1998) (applying a sister circuit's rule on a matter of first impression); *Blinzler v. Marriott Int'l*, 81 F.3d 1148, 1151 (1st Cir. 1996) (holding that when a state court has not decided on an issue, a circuit court should look to other state court decisions, sister circuit decisions, treatises, and public policy).

96. *Patterson*, 909 F. Supp. 2d at 121.

97. *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604, 611 (Mass. App. Ct. 2013).

98. *Cullinane*, 893 F.3d at 59.

website notifies users of its “terms of use” when creating an account.<sup>99</sup> A sign-in-wrap agreement may be valid when the “terms and conditions” are hyperlinked and are next to the only button that allows the user to continue using the website.<sup>100</sup>

Courts have held contracts that hyperlink “terms and conditions,” next to the only button that allows a user to advance through the website, to be reasonably conspicuous.<sup>101</sup> Following this line of reasoning, Uber’s terms and conditions were reasonably conspicuous because the terms were hyperlinked as one of the only links on the payment page.<sup>102</sup> One of the most important factors courts consider when determining conspicuousness is whether the terms of service were buried at the bottom of a page or within a cluttered web page with other prompts and links.<sup>103</sup> In the 2012 case *Fteja v. Facebook*, the Southern District of New York found that Facebook’s agreement was sufficiently conspicuous because the terms of service were not buried at the bottom of a page and it was clear to users that Facebook was trying to convey its terms of service.<sup>104</sup> The plaintiff in *Fteja* clicked a “sign up” button in order to create a Facebook account and the court held that by doing so, he agreed to the terms of service.<sup>105</sup>

Applying this standard, the *Cullinane* court should have held that the Agreement was reasonably conspicuous. The hyperlinked Agreement was not buried in the bottom of the page, but rather, was one of the few items found on Uber’s registration page.<sup>106</sup> Similar to how Facebook users in *Fteja* agreed to the terms of service by signing up,<sup>107</sup> Uber users had to press “DONE” to indicate that they agreed to the

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99. *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 399 (E.D.N.Y. 2015).

100. *See Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 908–12 (N.D. Cal. 2011) (holding an arbitration agreement enforceable when users had to click “accept” before proceeding and were also informed that clicking the button indicated acceptance). There are two other situations in which online contracts are enforced. One situation is when the user signs up for the website by affirmatively agreeing to the “terms of service” and is then presented with “terms of use” hyperlinks on later visits. *Berkson*, 97 F. Supp. 3d at 399–401. The other is when the notice of the hyperlinked “terms and conditions” is present on multiple successive webpages. *Id.* at 401.

101. *See Fteja v. Facebook*, 841 F. Supp. 2d 829, 835–36 (S.D.N.Y. 2012) (noting that the hyperlinked terms and conditions “appear to be a so-called ‘browsewrap agreement’” and that “several courts have enforced browsewrap agreements”) (citation omitted).

102. *Cullinane*, 893 F.3d at 58.

103. *See generally Major v. McCallister*, 302 S.W.3d 227, 230 (Mo. Ct. App. 2009) (holding that several screens containing hyperlinks to a website’s terms of use located directly next to the link used to advance were so situated that a reasonably prudent internet user would know and take note of their existence); *Sultan v. Coinbase, Inc.*, 354 F. Supp. 3d 156 (E.D.N.Y. 2019) (noting that a link to relevant terms of agreement contained on a page with a “minimalist layout” and “few distractions” would provide users with a clear signal that their account would be subject to those terms and conditions).

104. *Fteja*, 841 F. Supp. 2d at 835.

105. *Id.*

106. *Cullinane*, 893 F.3d at 58.

107. *Id.* at 58.

Agreement's terms.<sup>108</sup> This "DONE" option was located next to the "Terms of Service & Privacy Policy" hyperlink. Because the Agreement was neither buried at the bottom of the page nor on a cluttered page during the registration process, it was reasonably conspicuous.<sup>109</sup>

In the 2017 case *Meyer v. Uber Technologies*, the Second Circuit also held that a sign-in-wrap contract was reasonably conspicuous when the webpage was uncluttered and required no scrolling to view the terms of service.<sup>110</sup> The fact that the user did not need to scroll, meaning the terms were plain for a reasonable user to see, coincided with the court's reasoning in *Fteja*.<sup>111</sup> The court in *Meyer* also considered whether the terms of service were tied to the registration process. If the terms of service were presented to the user to click on as part of the registration process, the court would hold it to be reasonably conspicuous, and the contract would be enforceable.<sup>112</sup> Again, displaying the terms of service plainly to the user guided the court's decision.<sup>113</sup> In *Cullinane*, the Agreement was tied to the terms of service, required no scrolling, and was on an uncluttered page.<sup>114</sup> The "Terms of Service & Privacy Policy" button was directly below the payment information input. Users could not proceed unless they filled in their payment information and thus, would likely have seen the hyperlinked terms.<sup>115</sup> The Agreement in *Cullinane* is similar to the agreement in *Meyer* in that users had to fill out the payment information before registering for the service.<sup>116</sup> The Agreement is also analogous to the agreements in both *Meyer* and *Fteja* in that "Terms of Service & Privacy Policy" link was plainly presented to the user and required no searching or scrolling. Had the *Cullinane* court analyzed whether the terms of service were tied to the registration process, as the *Meyer* court did, it would have likely found the Agreement enforceable.

The First Circuit ignored the distinctions made by other courts in determining whether Uber's online agreement was reasonably conspicuous.<sup>117</sup> The court mistakenly chose to analyze the online arbitration clause presented in *Cullinane* the same way the Massachusetts Appeals Court had in *Ajemian*. If the First Circuit had made a categorical distinction between the type of agreement in *Ajemian* and *Cullinane*, and analyzed online arbitration clauses as an unsettled area of law, the court's holding would have likely been different.<sup>118</sup>

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108. *Id.* at 57.

109. *Id.*

110. 868 F.3d 66, 78 (2d Cir. 2017).

111. *Fteja v. Facebook*, 841 F. Supp. 2d 829, 835 (S.D.N.Y. 2012).

112. *Meyer*, 868 F.3d at 77–78.

113. *Id.*

114. *Cullinane*, 893 F.3d at 59.

115. *Id.* at 63–64.

116. *Id.* at 63.

117. *Id.* at 64.

118. *See Meyer*, 868 F.3d at 78; *Fteja v. Facebook*, 841 F. Supp. 2d 829, 835 (S.D.N.Y. 2012).

The second error of the *Cullinane* court was that it failed to recognize that the rules of contract formation remain the same whether contracts are formed online or on paper.<sup>119</sup> Whether a party reads or understands a contract is irrelevant when determining if they will be bound to its terms.<sup>120</sup> Further, a party can be bound to a contract by implicit acceptance.<sup>121</sup> When an offeree accepts a benefit of services with knowledge of the offer, the taking of the offer is considered an acceptance and is binding.<sup>122</sup> Therefore, it should be irrelevant whether app or website users, like the plaintiffs, affirmatively agree to the terms of service by clicking a box signifying that they “read and understood the terms” so long as the terms are present in the contract.<sup>123</sup>

Furthermore, courts have bound parties to contracts whether or not they have read or understood the agreement.<sup>124</sup> Courts that applied these principles have found that online contract formation is no different from that of paper contracts, where a party may choose to sign an agreement without reading the terms. This is essentially the same as signing up for or using an online service without reading its terms of service.<sup>125</sup>

In 2014, the Second Circuit, in *Register.com v. Verio Inc.*, found that an online contract was enforceable even though the plaintiff never affirmatively clicked a button stating “I agree” to the terms of service.<sup>126</sup> The court found that because the plaintiffs used the service on a regular basis, they essentially assented to the terms of the contract through their continued use, despite there being no affirmative evidence that the plaintiffs read or understood the specific terms.<sup>127</sup> Similarly, the plaintiffs in *Cullinane* did not affirmatively click “I agree” to Uber’s Agreement, and yet they accepted the benefit of the services Uber offered, and so should have been bound to the Agreement.<sup>128</sup> Even if they did not click on the Agreement, the plaintiffs used the services of Uber and accepted its benefit—a ride-sharing service—and therefore, assented to the terms of the contract.<sup>129</sup> The First Circuit should have held that the

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119. *See Meyer*, 868 F.3d at 75; *Fteja*, 841 F. Supp. 2d at 835.

120. *Schwartz v. Comcast Corp.*, 256 F. App’x 515, 518 (3d Cir. 2007) (citing RESTATEMENT (SECOND) OF CONTRACTS § 23 (A.M. LAW INST. 1981)).

121. RESTATEMENT (SECOND) OF CONTRACTS § 23 (A.M. LAW INST. 1981).

122. *Id.* § 69 (1)(a). *See also Register.com, Inc. v. Verio Inc.*, 356 F.3d 393, 402 (2d Cir. 2004).

123. *See Register.com, Inc.*, 356 F.3d at 403 (holding that while the internet has exposed courts to new contract issues, it has not changed contract principles); *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604, 611–15 (Mass. App. Ct. 2013) (holding that legal principles of contract formation do not change just because an agreement is online).

124. *Schwartz*, 256 F. App’x at 518.

125. *See Register.com, Inc.*, 356 F.3d at 403.

126. *Id.*

127. *Id.*

128. *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 56 (1st Cir. 2018).

129. *Id.*

plaintiffs, in using Uber’s services, essentially accepted the contract.<sup>130</sup> Whether the plaintiffs read or even clicked on the terms of service button should have been irrelevant in the court’s analysis, as the Agreement would have been enforceable if it were on paper.<sup>131</sup>

Due to the prevalence of online contracts in today’s ever expanding technological world, the First Circuit’s decision creates a jurisdictional split that will cause confusion in contract formation in apps and on websites.<sup>132</sup> Because Uber and many other companies transact business online across all fifty states, their terms of service are susceptible to varying interpretations across jurisdictions—resulting in inconsistent applications of the law. For instance, the Second Circuit in *Meyer* held that the Uber arbitration clause was reasonably conspicuous, whereas the First Circuit found the same agreement to be unenforceable.<sup>133</sup> Courts will struggle with whether they should follow the First Circuit’s analysis of what constitutes an unreasonably inconspicuous agreement or the Second Circuit’s analysis of what constitutes a reasonably conspicuous agreement—further muddying the already conflicting jurisprudence.<sup>134</sup>

The First Circuit erred in its application of *Ajemian* and interpretation of online contract formation, and thus, should have looked to how other courts have handled similar issues. Instead of creating an arbitrary and confusing standard, the court in *Cullinane* should have concluded that the contract was enforceable because the Agreement was not buried at the bottom of a page, was uncluttered, did not require extensive scrolling, and was tied to the final process of paying.<sup>135</sup> As a result, a reasonable user would have seen that Uber was presenting the Agreement as part of the registration and payment process. Further, because online contracts are on equal ground with paper contracts, the court should have found that whether the plaintiffs agreed to the “Terms of Service” was irrelevant in enforcing the Agreement.<sup>136</sup> Because plaintiffs completed their registration with Uber and accepted its service, they implicitly accepted the Agreement, whether or not they affirmatively read the “Terms of Services.” Courts should be uniform in their enforcement of online contracts in order to avoid confusion and to protect the rights of companies and individuals.

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130. *See* *Schwartz v. Comcast Corp.*, 256 F. App’x 515, 518 (3d Cir. 2007).

131. *See Register.com, Inc.*, 356 F.3d at 401–02.

132. *See* *Crespo*, *supra* note 2, at 81.

133. *Cullinane*, 893 F.3d 53 at 63–64; *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 79 (2d Cir. 2017).

134. *Cullinane*, 893 F.3d at 64; *Meyer*, 868 F.3d at 77–81.

135. *Meyer*, 868 F.3d at 66; *Fteja v. Facebook*, 841 F. Supp. 2d 829, 829 (S.D.N.Y. 2012).

136. *Register.com, Inc.*, 356 F.3d 393 at 403.