

## Uber Can Boot Rider's Cancellation Fee Suit To Arbitration

By **Cara Bayles**

*Law360, San Francisco (January 5, 2017, 10:28 PM EST)* -- An Uber rider must arbitrate claims that the ride-hailing service gives misleading wait times and charges unfair ride cancellation fees, a California federal judge ruled Thursday, saying the consumer who brought the putative class action hadn't proved the app's click-through agreement was invalid.

At Thursday's hearing, U.S. District Judge Richard Seeborg said the arbitration clause was accepted as part of the terms of conditions riders agreed to when they signed up for the app, and was skeptical of the plaintiffs' argument that the agreement was not valid because users clicked "Done," not "I agree to the terms and conditions," when they set up their accounts.

"You think there's a qualitative difference? 'I accept the terms and conditions' would be binding, but 'Done' is not enough for you?" the judge asked. "What do you think a customer thinks they're doing when they click 'Done?'"

Joseph Holland Hunter of Badame and Associates APC said a reasonable user would think he was finishing putting in his credit card information, not assenting to a contract. He cited multidistrict litigation over Zappos.com's data breach, in which a Nevada federal judge decided not to enforce the site's arbitration provision, saying the link to its "browsewrap" terms were buried among other links.

Hunter said a link to Uber's terms and conditions only appeared in small grey font at the bottom of the page where customers input their credit card information.

"Placing a hyperlink at bottom of the page does not constitute a clickwrap or binding agreement, it's a browsewrap at best," Hunter said. "We're going down slippery slope where we're playing horseshoes and hand grenades, where close is close enough. There's nothing directly adjacent to the button that says, 'By clicking this, you agree to the terms and conditions.' ... We're taking away more and more consumer rights."

He also argued that when users held their phones horizontally, the terms and conditions link wasn't visible on the screen.

But the judge shot that argument down, saying Hunter couldn't "throw out speculation," by saying someone may turn the phone sideways. His order, filed Thursday evening, elaborated on that view.

"[The plaintiff] does not claim to have had his phone in a horizontal orientation, does not say what his settings were at the time he signed up, offers no testimony or evidence regarding what he did see on his screen, and offers no evidence to rebut [Uber engineer manager Christopher] Brauchli's reasoned declaration other than his own conclusory allegations that he never received notice of the terms and conditions and that Brauchli's declaration is false and inadequate," the judge wrote. "In short, [the plaintiff] raises no genuine dispute of any material fact, and it is proper to conclude, as a matter of law, that he was on notice of Uber's terms and conditions, and assented to them in signing up for Uber."

The suit, filed in July, alleges that named plaintiff Michael Cordas ordered Ubers on several occasions, and when the drivers were 10 minutes late, he tried to call and text them, only to learn they'd provided nonworking numbers. The app then told him he would be charged a \$5 to \$10 cancellation fee. The suit alleges Uber's business model relies on such fees. It includes claims for unfair or unlawful business practices, fraud, misrepresentation, false advertising, breach of contract, willful misconduct and unjust enrichment.

Uber attorney Tiffany Cheung of Morrison & Foerster LLP told the judge at Thursday's hearing that the agreement was identical to the one found valid in the Cullinane et al. v. Uber litigation over extra fees for airport trips, which a Massachusetts federal court sent to arbitration last year.

Cheung said the "Done" button was the culmination of several screens a user had to go through in order to set up an account.

"When you start that flow, one of the screens says, 'By creating an account, you agree to terms and conditions,'" she said. "His argument is he didn't see it, but none of that matters as a matter of law."

She also said that under the Ninth Circuit's 2015 Brennan v. Opus Bank decision, an arbitrator should decide if an arbitration clause is unconscionable.

After the hearing Thursday, Cordas' attorney Kristopher Philip Badame of Badame & Associates APC said he would appeal the ruling if the judge adopted his tentative decision, which he called "a pretty landmark decision" that would violate California law, citing the 2014 Ninth Circuit decision in Nguyen v. Barnes & Noble Inc., which found that a customer must know he is agreeing to terms for them to be binding.

"It would mean that by simply downloading the application, you're accepting the terms whether or not you know they exist," he said.

The judge's ruling said the Uber agreement was not a browsewrap agreement comparable to the Nguyen case, because user "must affirmatively assent to Uber's terms and conditions by clicking 'Done'

to complete his sign-up process on a page clearly displaying the notice."

Attorneys and representatives for Uber did not immediately respond to requests for comment.

Cordas is represented by Kristopher Philip Badame, Joseph Holland Hunter and Michele Eileen Pillette of Badame & Associates APC.

Uber is represented by William L. Stern, Tiffany Cheung, Claudia M. Vetesi and Lucia X. Roibal of Morrison & Foerster LLP.

The case is Cordas v. Uber Technologies Inc., case number 3:16-cv-04065, in the U.S. District Court for the Northern District of California

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