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COURT OF APPEALS
STATE OF NEW YORK

WU,

Appellant,

-against-

NO. 90

UBER TECHNOLOGIES, INC.,

Respondent.

20 Eagle Street
Albany, New York
October 15, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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1 CHIEF JUDGE WILSON: Next case on the calendar is
2 Wu v. Uber Technologies.

3 MR. KELNER: Good afternoon, Your Honors. And
4 may it please the court. My name is Joshua Kelner, and I
5 represent Emily Wu. May I reserve five minutes for
6 rebuttal, please?

7 CHIEF JUDGE WILSON: Yes.

8 MR. KELNER: Your Honors, this case is about
9 whether New York law contains any safeguards to protect
10 consumers doing business on the internet. Emily Wu clearly
11 and explicitly chose the forum where she wanted her case
12 against Uber to be litigated, the Supreme Court of the
13 State of New York. And if Uber's attorneys had come to a
14 preliminary conference in this case and asked Ms. Wu's
15 counsel if she would agree to give up her right to trial by
16 jury and go arbitrate in a forum of Uber's choosing, the
17 answer we all know would have been no.

18 JUDGE GARCIA: But what if they had chosen to
19 enforce the 2016 arbitration agreement that she
20 acknowledged when she got the car?

21 MR. KELNER: Well, there's a number of courts
22 around the country, including the Massachusetts Supreme
23 Court in Kauders, the Maine Supreme Court in Maine, the
24 Federal First Circuit, and even a court in New York before
25 that time have all held the 2016 terms didn't bring about



1 legitimate contractual assent. And that's true for a
2 couple of reasons.

3 JUDGE GARCIA: But it seemed when I was reading
4 your briefs at first, that this was as you were just
5 describing, and all of a sudden Uber comes in and says,
6 wow, too bad you signed this 2021 arbitration agreement.
7 And I know that's what they put in their notice, but there
8 is this 2016 agreement out there. So how does that affect
9 the analysis here? We have 2021, but we also have 2016.

10 MR. KELNER: Well, I think first, the 2021 terms
11 shouldn't be viewed in a vacuum apart from 2016. This
12 quote, unquote, "update" was circulated. It's no
13 coincidence, very shortly after Kauders dropped down the
14 2016 terms. But even looking at the terms - - -

15 JUDGE GARCIA: Are there courts that have not
16 struck down the 2016 terms?

17 MR. KELNER: Yes. Of course, Judge. But looking
18 at the 2016 terms, they are problematic. They created an
19 assembly line of repetitive clicking, where they would have
20 prompts at the top of the page. And then every time you
21 were allowed to go forward, an arrow would turn from gray
22 to black telling you to go ahead. Then on the very last
23 page of that process, it said at the top, what's your name.
24 And if you entered your name, then that arrow would turn
25 from gray to black, prompting you to go forward.

1 JUDGE TROUTMAN: Okay. So if you say you don't
2 look at them without considering the other agreement, the
3 2021 is a clickwrap agreement. You have to affirmatively
4 act. So is she bound by the terms of that agreement?

5 MR. KELNER: No, judge. So looking at the 2021 -
6 - -

7 JUDGE TROUTMAN: Why is she not bound when she
8 clicks? She has to do something.

9 MR. KELNER: Sure. So the test that all of the
10 courts have applied or at least done with some consensus
11 is, first, is there a reasonable notice? And second, is
12 there a manifestation of acceptance? Whether there is a
13 box to click goes to the action you need to manifest
14 acceptance, but it doesn't go to reasonable notice. What
15 this case is about is what do you need to do to have
16 reasonable notice.

17 JUDGE HALLIGAN: Are there any cases - - -
18 setting aside the question of pending lawsuits, right? Are
19 there any cases that have found that the 2021 click-through
20 is not sufficient for contract formation purposes?

21 MR. KELNER: There have been a handful of very
22 low court cases around the country, but this is something
23 that is very recent. And this is the first court other
24 than the Massachusetts Supreme Court in - - -

25 JUDGE CANNATARO: I'm sorry. What's - - - what's



1 very recent? Clickwrap or - - -

2 MR. KELNER: I'm saying - - -

3 JUDGE CANNATARO: - - - the 2021 agreement?

4 MR. KELNER: The 2021 terms have been subject to
5 a lot of different action - - -

6 JUDGE HALLIGAN: I thought that Massachusetts
7 case, but correct me if I'm wrong, pertained to either the
8 identical or an equivalent of the 2016 agreement, not the
9 2021 agreement. Am I wrong about that?

10 MR. KELNER: Well, Kauders is 2016 and then the
11 Good case, which is more recent and is in the supplemental
12 letter briefing, that goes to 2021. And certainly as to
13 Good, we think that the dissent is more persuasive in its
14 analysis.

15 JUDGE RIVERA: Well, is there any way - - - I'm
16 over here. Is there any way, in your view, that they could
17 have written this update that would have - - - if she had
18 clicked it through, would have resulted in both reasonable
19 notice and - - - and assent?

20 MR. KELNER: Well, I think it's important to pull
21 apart the thread of arbitration in general and retroactive
22 - - -

23 JUDGE RIVERA: Yeah.

24 MR. KELNER: - - - arbitration to a represented
25 litigant. For arbitration in general, reasonable notice



1 would have said something about how this contains an
2 arbitration clause, it may affect your right to trial by
3 jury.

4 JUDGE RIVERA: Okay.

5 MR. KELNER: For a represented litigant,
6 describing it as an update that would go into effect at a
7 future time, no reasonable person encountering that
8 language would have understood it to apply retroactively.

9 JUDGE RIVERA: So would they have had to include
10 something in - - - I think it's section 2 on the
11 arbitration agreement language in - - - in the terms that -
12 - - of - - - of how a pending lawsuit would - - - would be
13 treated given this term?

14 MR. KELNER: Putting aside the no contact issues,
15 I think it's problematic in general - - -

16 JUDGE RIVERA: So put that - - - yes, put that
17 aside.

18 MR. KELNER: I think it's problematic in general
19 to call it an update. But putting that aside, yes, there
20 would have to be something explicit.

21 JUDGE SINGAS: So your argument is not that
22 notice itself was not sufficient - - - notice in this
23 particular case because she had pending - - - legislation
24 was insufficient?

25 MR. KELNER: I don't think that we need to get to

1 get to the question of whether notice was sufficient for a
2 general arbitration clause here, say, for a new user, but
3 certainly somebody. And what makes this case different
4 from any that my colleagues cite in their brief is that
5 it's somebody who was a represented party with a pending
6 lawsuit, who was already in litigation. And everything
7 about these terms from the notice to even once you get
8 through the hyperlinks - - -

9 JUDGE TROUTMAN: So do you agree, though, that
10 simply saying, I didn't read it, doesn't get you off the
11 hook of being bound?

12 MR. KELNER: Sure. So we have no quarrel with
13 the idea that there is a duty to read a contract. That is
14 a valid concept in the law. The real question here is
15 whether there is any stopping point on the duty to read
16 when you get to the outer boundaries of it.

17 JUDGE HALLIGAN: But - - - but if you are asking
18 us to focus specifically on the issue here, which I take it
19 from what you just said is that there was a pending lawsuit
20 and - - - and you're saying that differentiates it from the
21 more generic contract formation question, why doesn't that
22 issue about the pending lawsuit go to the question of
23 unconscionability as opposed to the standard for contract
24 formation?

25 MR. KELNER: Sure. So what I'd go to on that is



1 the concepts expressed both in the Restatement on Contracts
 2 and also the Restatement on Consumer Contracts, which,
 3 since our supplemental letter briefs has been finalized and
 4 published and also just to the concept of inquiry notice as
 5 a whole. And what all of those say is that when you are
 6 dealing with standardized contracts, one where consumers we
 7 know are highly unlikely to read and are very likely unable
 8 to understand, that for terms that are beyond the realm of
 9 reasonable expectations for the transaction, that those
 10 terms require notice.

11 JUDGE HALLIGAN: So you'd have us pull out
 12 specific terms with respect to the contract formation test
 13 and - - - and suggest that - - - that some heightened
 14 standard of - - - of notice applies?

15 MR. KELNER: Well, that's what the Restatement
 16 does. Though, it's not a heightened standard. It's just,
 17 if you're putting something in your terms, that materially
 18 exceed the realm of reasonable expectations - - -

19 JUDGE HALLIGAN: Right.

20 MR. KELNER: - - - for this sort of transaction -
 21 - -

22 JUDGE HALLIGAN: So why isn't the - - - the
 23 description that's set forth in the terms for 2021
 24 sufficient to do that? What more would you - - - would you
 25 require them to say for it to constitute reasonable notice

1 in your view?

2 MR. KELNER: Well, this one's actively misleading
3 because they say it's an update, that it's going into
4 effect at a future time. Even if you get past the
5 hyperlink, it says that it affects how cases can be
6 brought. That further signifies that it is prospective,
7 not retroactive. And all of those - - -

8 JUDGE HALLIGAN: But there was some language
9 which indicated it applied to - - - to existing disputes,
10 but - - - but maybe I misread that.

11 MR. KELNER: I mean, if there is some language,
12 at best, what you have is somebody who is very
13 sophisticated, who knows what they're doing and has
14 designed a misleading and unclear process. And no
15 layperson represented by counsel in a pending lawsuit
16 thinks that a generally applicable or allegedly generally
17 applicable update sent to them while they're trying to hail
18 a taxi is going to take their pending lawsuit out of the
19 court. It flouts those expectations.

20 JUDGE CANNATARO: Could we just go back to
21 reasonable expectations for one second? And I'm just
22 curious, what is your definition of a reasonable
23 expectation with respect to this kind of provision?
24 Because my understanding from the commentary to the
25 Restatement is that it has to really be - - - I think the

1 word they use is bizarre or oppressive. In this pending
2 litigation term, you know, it's - - - it's damaging to your
3 client, but I don't know that it would be considered
4 bizarre or - - - or oppressive even.

5 MR. KELNER: I think that the commentaries go a
6 little beyond that and also the Consumer Contracts
7 Restatement does as well. But reasonable expectations goes
8 to what anybody would expect when entering a transaction.
9 And it is certainly oppressive to tell a litigant who
10 already has elected a trial by jury that we are going to
11 take away that right where we approached you outside the
12 presence of your counsel, and that you have unwittingly
13 agreed to affect your pending case without the chance to
14 talk to your lawyer. And also - - -

15 JUDGE CANNATARO: And - - - and that - - - to - -
16 - to just echo a question that I think you already got,
17 that strikes at the heart of the creation of the agreement
18 itself?

19 MR. KELNER: Sure. Because it goes to inquiry
20 notice. Everybody agrees that what we're talking about
21 here is inquiry notice. What we say is that inquiry notice
22 means, what are you expected to inquire after? Uber's
23 answer to that is: we can put anything behind a hyperlink,
24 and it's your responsibility to click the hyperlink and
25 ferret out whatever we have put in it. The burden

1 shouldn't rest - - -

2 JUDGE CANNATARO: Well, in this case, though, the
3 - - - the email that went out prior to the - - - the
4 clickwrap that comes through on the app did mention that
5 this is going to impact your - - - or it says that there
6 are going to be changes to the arbitration agreement. So
7 there is some amount of notice. We're just quibbling over
8 how specific that paragraph needed to be, aren't we?

9 MR. KELNER: Well, I read that paragraph almost
10 as consciousness of guilt because they make the vaguest,
11 most anodyne possible reference to changes or updates to
12 the arbitration clause that will go into effect in the
13 future. They could easily have said, if you have a pending
14 lawsuit, this arbitration clause will take it out of the
15 courts. They didn't do that. And it's fair to wonder why
16 weren't they explicit.

17 JUDGE RIVERA: And if they did that, from your
18 perspective, you wouldn't be here, correct?

19 MR. KELNER: Well, at least there would be no
20 contact issue.

21 JUDGE RIVERA: They did that and she clicked on -
22 - - and she clicked, I consent. Your position is - - -
23 well, that looks like assent. That looks like it's enough
24 notice. She's clicked it. It's - - - it's assent.

25 MR. KELNER: On the - - - the question of



1 contract formation, yes. If there is notice of a provision
2 that's beyond expectations - - -

3 JUDGE RIVERA: Yes. Yes.

4 MR. KELNER: - - - then sure. Like, if they know
5 what they're doing, they know what they're entering into,
6 then that forms a contract. But when - - -

7 JUDGE RIVERA: Isn't that unconscionable?

8 MR. KELNER: Then we would get to
9 unconscionability. But at least there's contract formation
10 in the first place.

11 JUDGE RIVERA: Yes. Okay.

12 JUDGE GARCIA: Why would Uber ever put that
13 notice in if their view is the 2016 agreement is effective?
14 Because then they're basically admitting that it wasn't
15 effective to already remove your case from - - -

16 MR. KELNER: I would say - - - well, they could
17 have used may, but it's also a predicament of Uber's
18 creation because they played fast and loose in 2016 and
19 tried to get people through an assembly line without
20 knowing they were entering into a very, very consequential
21 clause.

22 JUDGE RIVERA: Why - - - why isn't she bound with
23 - - - by the fact that she - - - after they - - - they
24 sought the mandatory arbitration, she continued to ride
25 Uber taxis. Why - - - why is she bound by that? Her

1 conduct, why is that - - -

2 MR. KELNER: So I think that that goes to their
3 citation to the Second Circuit's non-precedential decision
4 in Nicosia. And it said this isn't supposed to be
5 precedent. But that case, Amazon actually told its users,
6 by buying a product on our website, you agree to be bound
7 by our terms. That's not what we have factually in this
8 case. What we have factually in this case - - - so I'm
9 putting aside the notice - - - Uber was very explicit about
10 what you have to do to manifest assent. It said, check a
11 box and click confirm. They never said to Emily Wu during
12 - - - during the nearly two-year pendency of her motion as
13 to these terms, and by the way, forget what we already said
14 about checking a box, if you keep using our taxis, that
15 will be another way you can manifest assent to these terms.
16 She had every right to believe, while the validity of those
17 terms was being litigated, that whatever preexisting terms
18 they had in - - -

19 JUDGE TROUTMAN: But why - - -

20 MR. KELNER: - - - there in relationship
21 controlled without assent.

22 JUDGE TROUTMAN: Why isn't she not expected to
23 talk to her attorney about the fact that she's litigating
24 against a party?

25 MR. KELNER: Well, the no contact rule - - -



1 putting aside expectations, no - - -

2 JUDGE TROUTMAN: And - - - and what - - -

3 MR. KELNER: Yeah.

4 JUDGE TROUTMAN: - - - should she do? What
5 should she do with respect to future use?

6 MR. KELNER: Well, with regard to - - - to the no
7 contact rule, the no contact rule contemplates that there
8 will be ongoing, potentially, neutral contacts between
9 litigants. So she was allowed to reach out to Uber and try
10 to get a taxi, and they while - - -

11 JUDGE TROUTMAN: And so their non-lawyers could
12 send notices: if you using our services, here are the
13 rules.

14 MR. KELNER: Well, the no - - - the no contact
15 rule also contemplates that. And a lawyer can't outsource
16 their ethical obligations to support staff. I can't tell
17 my paralegal I want to make contact with a represented
18 party, how do you sent out this letter?

19 JUDGE TROUTMAN: But how do we know a lawyer was
20 involved with respect to the update of the agreement?

21 MR. KELNER: Well, if there's any ambiguity about
22 this, we had asked for a hearing and there should be one.
23 But all we have is them hiding behind the affidavit of a
24 paralegal who lives halfway across the country from where
25 the terms were drafted.

1 JUDGE TROUTMAN: Well, where is the evidence that
2 an actual lawyer reached out to her?

3 MR. KELNER: Well, the evidence about - - - all
4 we have to do is look at the terms. They never denied that
5 a lawyer drafted the terms. And no lawyer - - - no one
6 other than a lawyer could write a legal document as
7 detailed and intricate and conceptually complex as these
8 terms - - -

9 JUDGE TROUTMAN: So if a lawyer writes it, then a
10 lawyer is presumed to have sent it, or even if someone else
11 sends it on behalf of the company itself, it's deemed to be
12 an act of a lawyer. Is that what you're saying?

13 MR. KELNER: Well, that's what the no contact
14 rule says. It says that a lawyer can counsel a client
15 about how to make contact with represented parties, but
16 they have to give notice to opposing counsel.

17 JUDGE CANNATARO: Counsel, is this the - - -

18 JUDGE SINGAS: Let's suppose that there was an
19 ethical violation here. Isn't what you're asking for - - -
20 it's basically case ending. The sanctions would just end
21 this case. And isn't that a bit draconian and move much
22 further away from what we usually do in these
23 circumstances?

24 MR. KELNER: Well, what we say in our brief is we
25 are more than accepting of the concept that an appropriate

1 sanction would be that they shouldn't be allowed to enforce
2 the arbitration clause. But it's clear that there
3 shouldn't have been contact with a represented party here.
4 It concerned the representation. They knew that she was
5 represented. They knew they were reaching out
6 systematically to represented parties. And at a minimum,
7 they shouldn't be able to enforce the - - -

8 JUDGE CANNATARO: So if you - - -

9 MR. KELNER: - - - proper benefit of that
10 bargain.

11 JUDGE CANNATARO: If you're willing to accept the
12 possibility that they shouldn't be allowed to enforce the
13 arbitration clause, doesn't that really just go back to the
14 unconscionability issue? And shouldn't that - - - and
15 because you do have a delegation clause in this agreement,
16 which is not the subject of a dispute as I understand it,
17 you've agreed to give that question to an arbitrator.

18 MR. KELNER: I don't think so, Your Honor.
19 First, no contact is separate from unconscionability. No
20 contact is a boundary that's part of the adversarial
21 process and says you cannot reach out to a represented
22 party who is represented by counsel to try to get something
23 of value - - -

24 JUDGE CANNATARO: Yes, Counsel. But we're
25 talking about the remedy you asked for. And originally, as

1 we heard, the remedy that you asked for was striking of the
2 answer and - - - and sanctions - - - monetary sanctions.
3 But you - - - you very graciously conceded that you would
4 also take non-enforcement of the arbitration provision.
5 That's the part, to me, that seems can only go to the
6 unconscionable way in which the arbitration agreement was
7 secured.

8 MR. KELNER: Well, we - - -

9 JUDGE CANNATARO: And that's for the arbitrator.

10 MR. KELNER: Well, we cite a number of cases in
11 our brief about inherent authority of courts. Public
12 Justice as amicus cites a case, Billingsley, that also
13 talks about other cases where courts exercised inherent
14 authority not to enforce arbitration clauses. And on the
15 delegation issue, we did validly challenge the delegation
16 clause. Our language in our brief is almost identical to
17 what the Supreme Court found valid in Coinbase in footnote
18 2, literally almost word-for-word verbatim identical. And
19 Uber also didn't even contend in the court below that we
20 had failed to raise some sort of delegation issue. They
21 just said that we hadn't shown that either of them were
22 unconscionable, and that itself should be a waiver of the
23 argument.

24 JUDGE GARCIA: Quick factual question. Is this
25 the same account she used to order the car that was

1 involved in the accident?

2 MR. KELNER: Which account, Your Honor?

3 JUDGE GARCIA: Uber account. Is it the same Uber
4 account?

5 MR. KELNER: Yeah. She didn't open a second
6 account, Your Honor.

7 JUDGE GARCIA: Thank you.

8 CHIEF JUDGE WILSON: Thank you.

9 MR. KELNER: I see my red light is on. Thank
10 you.

11 MR. HUSTON: May it please the court. I'm
12 Michael Huston, of Perkins Coie, on behalf of the
13 respondents. Courts in this state and around the country
14 from California to Massachusetts have repeatedly recognized
15 that Uber's 2021 clickwrap agreement forms an enforceable
16 contract under basic principles of contract law. That's
17 because the clickwrap ensures that a user gives an
18 unambiguous manifestation of assent to the contract terms
19 and a clear and simple interface to - - -

20 JUDGE RIVERA: Have they considered its
21 application to someone who has a pending lawsuit?

22 MR. HUSTON: So I don't think that specific
23 question has come up in any - - -

24 JUDGE RIVERA: So isn't that really what it turns
25 on?



1 MR. HUSTON: Yes. I - - - I think so, Your
2 Honor. But that just gets to the fundamental point.

3 JUDGE RIVERA: Okay.

4 MR. HUSTON: The - - -

5 JUDGE RIVERA: Where - - - make believe for one
6 moment. I'm not a judge. I'm not a lawyer. I haven't had
7 all that legal training. I just need this cab to get
8 somewhere. And - - - and I open it up. Let's say I click
9 all the way through, and I - - - and I spend the time to
10 read section 2. What - - - what would alert me that that
11 case I filed months ago is now not going to be resolved in
12 a court of law but must be sent to mandatory arbitration?

13 MR. HUSTON: Sure. So I - - - I think two points
14 about that, Your Honor.

15 JUDGE RIVERA: Yes.

16 MR. HUSTON: The first is that - - - of course,
17 you already knew in the hypothetical that you had agreed,
18 long before the accident, long before this clickwrap to
19 another contract with the exact - - -

20 JUDGE RIVERA: Yeah. But that's not what you
21 relied on. So let's just stick with 2021.

22 MR. HUSTON: Sure. So I would direct the court
23 to page 118 - - -

24 JUDGE RIVERA: Okay.

25 MR. HUSTON: - - - of the record. This is the

1 contract terms.

2 JUDGE RIVERA: Yeah.

3 MR. HUSTON: We're in - - - you know, the very
4 first page of the - - - of the term says, be aware, this is
5 - - - you're - - - you're forming a contract. Take the
6 time to read this. It creates an important decision.

7 JUDGE RIVERA: Right.

8 MR. HUSTON: So I think right away, we're
9 alerting the user, this is a serious thing that should be
10 taken seriously. If you want to know about the arbitration
11 provision, how disputes can be brought between you and - -
12 - you and Uber, go to section 2.

13 JUDGE RIVERA: Okay.

14 MR. HUSTON: Right there in section 2, it's going
15 to say, you and Uber agree that any dispute, claim, or
16 controversy in any way arising from your use of the
17 services - - -

18 JUDGE RIVERA: Yes.

19 MR. HUSTON: - - - whether it arose before or
20 after you - - -

21 JUDGE RIVERA: Right.

22 MR. HUSTON: - - - accepted these terms - - -

23 JUDGE RIVERA: Right.

24 MR. HUSTON: - - - must go - - - be decided by an
25 arbitrator - - -

1 JUDGE RIVERA: Again, how would that tell a
2 layperson, having already incurred the kind of event that
3 created an injury that they then are filing a personal
4 injury lawsuit on and they have actually made their choice,
5 that now they are going to have to take - - - I mean,
6 they're going to have to take some action and proceed in a
7 different manner from the choice that they made, which is,
8 I made a choice to go to court, and if I - - - if I check
9 this little box, I'm going to have to forfeit that?

10 MR. HUSTON: Sure. So the answer, Your Honor, is
11 that regular people understand what the phrase before or
12 after means. This isn't written in - - -

13 JUDGE RIVERA: Well, no, that - - - one would
14 read that, I think, without legal training, to mean
15 occurrences of the past, occurrences for the future, but
16 not necessarily an occurrence that now I've already chosen
17 to file a lawsuit on and I have done that.

18 MR. HUSTON: So respectfully, Your Honor, I think
19 I just disagree about what a reasonable person - - -

20 JUDGE RIVERA: You may. I don't know who gets a
21 better end of that, but yeah.

22 MR. HUSTON: Sure. So I - - - I - - - I guess
23 what I - - - what I - - - I would urge the court to take a
24 look at the language on page 118 because I think what
25 you'll see is we're talking about any - - - first of all,

1 we're using the broad phrase - - - phrase any. Any means
2 any, as the Supreme Court of the United States has
3 repeatedly instructed. But what I think you're looking at
4 here is any - - -

5 JUDGE RIVERA: If we disagreed with you, doesn't
6 this mean you just add one little sentence?

7 MR. HUSTON: So - - -

8 JUDGE RIVERA: This includes pending litigation.

9 MR. HUSTON: Your Honor - - -

10 JUDGE RIVERA: That's all it would mean.

11 MR. HUSTON: So your - - -

12 JUDGE RIVERA: Correct?

13 MR. HUSTON: No. I - - - I - - - I mean, Your
14 Honor, if - - -

15 JUDGE RIVERA: You wouldn't do that if we
16 disagreed with you?

17 MR. HUSTON: Uber strives to have valid, you
18 know, agreements. We would respond to the court's
19 decisions, obviously.

20 JUDGE RIVERA: Good idea.

21 MR. HUSTON: I think the key point, though, is
22 you can always demand one more sentence. Every plaintiff
23 will come to court - - - no matter what you say in this
24 case about, well, we needed just one more sentence, the
25 plaintiffs in the next case will say, well, we needed just

1 one more sentence for our lawsuit.

2 JUDGE RIVERA: No. But we're talking about this
3 lawsuit, and we're talking about the fact that it was a
4 pending lawsuit. I - - - I just - - - I'm struck. I've
5 never come across - - - and it just may be that I've never
6 come across it, maybe others have, of a situation where you
7 have someone who's filed a lawsuit, they have record
8 representation by a lawyer, and now another lawyer wants
9 them to - - - to proceed outside of that lawsuit to go into
10 binding arbitration by the fact that they signed some other
11 contract without the benefit of counsel that never refers
12 to that particular lawsuit. Usually, if you want, this
13 would be - - - wouldn't this be something you come in and
14 negotiate and say, look, would your client consider the
15 following? Let's resolve this in - - - in - - - in
16 arbitration. It'll be better for your client and mine.

17 MR. HUSTON: So Your Honor, I think I have to
18 take issue with the premise of the question because, as
19 we've already discussed earlier this afternoon, it is
20 simply not the case that this term was added to this
21 agreement for purposes of Ms. Wu's lawsuit, for purposes -
22 - -

23 JUDGE RIVERA: No.

24 MR. HUSTON: - - - of this agreement.

25 JUDGE RIVERA: That - - - I wasn't asking



1 anything like that. I actually understand your argument.
2 I think it's a very compelling one, that if we just carve
3 out pending lawsuits, this gives quite robust notice. I
4 think it's a very compelling argument. The issue is about
5 someone who is in litigation and having a lawyer depending
6 on this, you know - - -

7 CHIEF JUDGE WILSON: How - - - how hard - - -

8 JUDGE RIVERA: - - - the clickwrap in that case.

9 CHIEF JUDGE WILSON: How hard practically would
10 it have been for Uber to identify the set of people who had
11 pending lawsuits and treat them differently?

12 MR. HUSTON: Sure, Your Honor. So I think with -
13 - - with regard to this case specifically, it's important
14 to understand that the - - -

15 CHIEF JUDGE WILSON: No. I'm asking not about
16 this case specifically. You can get to that in a second,
17 but generally, there's - - - I - - - I assume people have
18 sued Uber, and there's some number of pending lawsuits.
19 And you have a legal department, and they have - - - keep
20 track of that?

21 MR. HUSTON: Sure. So there's thousands of
22 lawsuits that get filed - - - that touch Uber in some way.

23 JUDGE HALLIGAN: Do you have a process in place
24 for identifying those individuals, though, and shielding
25 them from communications like this, which send out updated

1 terms of service?

2 MR. HUSTON: I - - - I don't think the - - - the
3 record doesn't reflect that, Judge Halligan, but I think
4 it's - - - I - - - I do think it's important to understand
5 that this term and specifically the before and after clause
6 that gives rise to - - - in the 2021 terms that makes the
7 contract enforceable as to Ms. Wu even though she'd already
8 filed her lawsuit that wasn't added in 2021.

9 JUDGE HALLIGAN: I understand, but - - - but - -
10 -

11 MR. HUSTON: It was added in 2016.

12 JUDGE HALLIGAN: But you - - - it sounds to me,
13 just so I'm clear, that you can't tell us whether your
14 client has in place any mechanism for identifying
15 individuals who are plaintiffs in a pending lawsuit and
16 taking their name off of whatever list there is that goes
17 out with respect to updated terms of service, or even
18 perhaps telling them that they can't procure services or
19 something like that. So you - - - you don't - - - you
20 don't know whether you have that mechanism?

21 MR. HUSTON: The record does not reflect anything
22 about that in the - - -

23 JUDGE CANNATARO: Well, Counsel, you have done
24 that for class action litigants. Uber is able to screen
25 for class action litigants, right? They've been directed



1 to do that.

2 MR. HUSTON: So litigators at Uber who are
3 responsible for the handling of those cases do have a
4 process, obviously, to comply with Federal Rule of Civil
5 Procedure 23(d), which affects our ability to contact them
6 when they are absent class members. That's, of course, for
7 the purpose that if you're an absent class member, you may
8 not know that you - - -

9 JUDGE CANNATARO: But - - -

10 MR. HUSTON: - - - have a lawsuit that - - -

11 JUDGE CANNATARO: - - - my only point is it
12 doesn't seem like it would be that far leap to identify
13 those other people who have their own individual, say,
14 personal injury lawsuit and they're represented.

15 MR. HUSTON: So - - -

16 JUDGE CANNATARO: I mean, I get that the record
17 doesn't reflect whether the technological capability is
18 there, but it seems like something very much like it exists
19 in other contexts.

20 MR. HUSTON: So Your Honor, I - - - I think what
21 we're - - - what we're striving to do in this line of
22 inquiry is come up with a process to mitigate the apparent
23 unfairness of a situation where somebody files a lawsuit
24 and then, for the first time, agrees to an arbitration
25 clause that takes that case out of this court. That's not



1 what happened in this case for two reasons.

2 JUDGE CANNATARO: But - - - yeah. I - - - we all
3 understand that there's a - - - there's an issue involving
4 how notice was served in this case that you could make an
5 argument that you weren't aware. But there are other
6 litigants who - - - who, as Judge - - - as Chief Judge
7 Wilson said, there are other litigants, surely, who had
8 active suits against Uber who could theoretically have been
9 screened out of this update.

10 MR. HUSTON: So respectfully, Your Honor, I'm not
11 sure that that's actually correct. I mean, this provision,
12 the before or after clause, was added to Uber's terms of
13 use in 2016, four years before - - -

14 JUDGE TROUTMAN: However, in our modern society,
15 people have to use the services, whether - - - if they
16 become a part of their everyday life, whether it's Disney
17 Channel or others that have these arbitration agreements,
18 Uber, if you live in New York City as opposed to upstate
19 New York, you may be more dependent upon. What my
20 colleagues are asking you is you have this great power
21 here. And arguably, some might think it's unfair to the
22 consumer this broad sweeping, that even though I filed a
23 lawsuit, it applies to everybody. And there's a concern.
24 I - - - it's - - - it's not a defense. She didn't read it,
25 but it's packed with all of this information in it. Why is

1 it unfair to Uber to - - - to excise out people with
2 pending lawsuits in - - - due to the fact - - - we have
3 software that can search all kinds of things.

4 MR. HUSTON: So I completely understand the
5 question, Your Honor. I think what you're - - - what
6 you're asking is, why is this particular term fair as - - -
7 you know, and enforceable in Ms. Wu's case specifically.
8 The first and most important answer that I have to give is
9 that that question has expressly been delegated to the
10 arbitrator for resolution. You can see this at page 119 of
11 the record.

12 JUDGE TROUTMAN: So your argument is these
13 agreements are fine. And as to her, if there is an issue
14 as it being overreaching, unfair, it is something - - -
15 because of the delegation clause, she's - - - she gets to
16 have it answered, but she gets to have it answered there,
17 just not in a court?

18 MR. HUSTON: That's exactly right, Your Honor.
19 That's critically important. The Federal Arbitration Act,
20 as interpreted by the Supreme Court of the United States in
21 cases like Rent-A-Center - - -

22 JUDGE RIVERA: Why - - - why didn't you raise
23 that issue previously?

24 MR. HUSTON: I'm sorry, Your Honor. Could - - -

25 JUDGE RIVERA: Why didn't you raise that issue

1 previously?

2 MR. HUSTON: We - - - we absolutely did, Your
3 Honor, respectfully. I mean, I - - - I think this is - - -
4 it's all - - -

5 JUDGE RIVERA: Where would I find that in the
6 record?

7 MR. HUSTON: Sure. It's all over our opposition
8 to the - - - the plaintiff moved to stay the arbitration.
9 In response, we cross-moved to compel arbitration and
10 oppose that. The very first, you know, paragraph, I think
11 - - - first page of our brief. And I think it's at record
12 191 if I'm not mistaken. I'll have it for you exactly in a
13 moment. But we certainly argued at length that this
14 question - - - any question about the enforceability of the
15 terms, the unconscionability of the term in plaintiff's
16 case specifically, have been delegated to the arbitrator
17 for resolution.

18 JUDGE CANNATARO: Counsel - - -

19 JUDGE GARCIA: Counsel - - -

20 JUDGE CANNATARO: - - - even if we agree with
21 that proposition, this body, as - - - as the stewards of
22 the ethical standards of our profession, I would think, has
23 an interest in saying we don't want attorneys to obtain
24 arbitration clause. Whether they're - - - you know,
25 whether they're delegable to the arbitrator or resolvable



1 in the court is another issue under the contract. But we
2 don't want attorneys obtaining these kinds of favorable
3 terms through unethical conduct. And the - - - the
4 question that I was trying to ask previously is it seems to
5 me it would have been pretty easy to avoid this allegedly
6 unethical conduct by screening out those people. So - - -
7 so why wouldn't you do that?

8 JUDGE GARCIA: Counsel, on that case - - - let me
9 ask you something on a follow-up on the screening. If I'm
10 riding in an Uber, I wasn't the one that ordered it. I'm
11 with the person that ordered it. I get in an accident. I
12 sue Uber. Am I bound by the arbitration agreement that the
13 person who ordered the Uber signed?

14 MR. HUSTON: Multiple courts have found that you
15 - - - you probably are if - - - you know, because you're a
16 third - - - intended third-party beneficiary of that
17 contract. And the - - - the contract specifically covers
18 third-party beneficiaries. Of course, it's not - - - you
19 know, not presented for this case for decision. If I could
20 return to Your Honor's question just about - - -

21 JUDGE GARCIA: But just to go to screening, that
22 would mean that - - - as I understand it, that Uber lawyers
23 then would have to determine passengers and what accounts
24 they had so that they didn't violate this no contact rule.

25 MR. HUSTON: So I agree with that, Your Honor. I

1 think that's yet one more problem with the suggestion
2 about, well, it actually - - - it would have been so easy
3 to carve that out. Again, even if we could carve that out,
4 even if we could identify exactly what is the status of
5 every person's assent at any given time and track that
6 against whatever litigation filings they may have, and
7 we're talking about thousands of cases going on at any
8 given time all across the country, even if we had the
9 technological capability to do it, it's not going to do - -
10 -

11 CHIEF JUDGE WILSON: So let me - - -

12 MR. HUSTON: - - - anything to help Ms. Wu - - -

13 CHIEF JUDGE WILSON: Let me - - -

14 MR. HUSTON: - - - because she agreed to
15 arbitration - - -

16 CHIEF JUDGE WILSON: Let me just - - -

17 MR. HUSTON: - - - four years before that.

18 CHIEF JUDGE WILSON: Let me just understand - - -
19 we've - - - we've gotten the four-year point several times
20 now. I think we get that one. Let me ask you something
21 about Judge Garcia's question. So suppose the passenger in
22 his hypothetical had an Uber account, gets a click - - -
23 clickwrap and rejects the new terms, right?

24 MR. HUSTON: Yes, sir.

25 CHIEF JUDGE WILSON: Still bound?



1 MR. HUSTON: No, Your Honor. I mean, at that
2 point they won't - - - well - - -

3 CHIEF JUDGE WILSON: No. If they're a passenger,
4 they're still bound to the third-party beneficiary of the
5 person they're riding with.

6 MR. HUSTON: Oh, I'm sorry. So maybe, but it
7 would depend on, you know, what is the status of that
8 person's account and are they a third - - - is there
9 another method - - -

10 CHIEF JUDGE WILSON: Okay. So if they have no
11 Uber account, they're bound. If they have an Uber account
12 but they reject the clickwrap and they no longer have an
13 account because they rejected the clickwrap, then they're
14 not bound?

15 MR. HUSTON: So, you know, I'm appreciating that
16 it's - - - it's not the question before the court. Like,
17 if there were an instance - - -

18 CHIEF JUDGE WILSON: Well, it's a hypothetical.

19 MR. HUSTON: Sure. Sure. If there were an
20 instance where a person rejected the clickwrap, they're not
21 going - - - you know, those - - - they - - - they haven't
22 manifested their assent unless they use - - -

23 CHIEF JUDGE WILSON: But they are - - -

24 MR. HUSTON: - - - the services.

25 CHIEF JUDGE WILSON: But they are a passenger.



1 MR. HUSTON: Sure. So in that instance, they're
2 an intended third-party beneficiary of another person's
3 contract.

4 CHIEF JUDGE WILSON: So even though they
5 themselves rejected the - - - the idea that they're going
6 to be forced into arbitration - - - they're going to be
7 forced into arbitration?

8 MR. HUSTON: So that's - - - but, Your Honor,
9 that happens all the time, you - - - you know. You can - -
10 - you can form a contract. You can be a third-party
11 beneficiary of somebody else's contract.

12 JUDGE GARCIA: Would the flip also happen? Let's
13 say the passenger has an Uber account and they've accepted
14 the terms, but the person who ordered the car rejected
15 them. Then would the person in the car be bound by their
16 own acceptance of the arbitration agreement?

17 MR. HUSTON: Respectfully, I don't think the - -
18 - I don't think the situation would arise because if you
19 don't accept the terms, you won't have the means to access
20 Uber services. That's actually, I think, a virtue of this,
21 right? It calls the user's attention specifically that,
22 look, if you want to - - -

23 JUDGE HALLIGAN: Yeah.

24 MR. HUSTON: - - - enter - - - use our services,
25 you have got to agree to these terms.

1 JUDGE HALLIGAN: Can I ask you about the 2016
2 agreement? Is it indistinguishable from the agreement at
3 issue in Kauders?

4 MR. HUSTON: No. Yeah. No, it is not
5 indistinguishable. It is distinguishable, Judge - - -

6 JUDGE HALLIGAN: In what respect?

7 MR. HUSTON: Sure, Judge Halligan. So I would
8 urge the court to take a look at the record on page - - -
9 this is the - - - the interface is in the record at 289.
10 So in Kauders and in the other cases that my friend refers
11 to that he says invalidated the 2016 agreement, that was a
12 different user interface. What was - - - what the courts
13 found problematic about that interface in Kauders was that
14 you were - - - the terms of use hyperlink was on a screen
15 where you were also asked to provide payment information.
16 So they said - - -

17 JUDGE HALLIGAN: So I'm looking at 289.

18 MR. HUSTON: Sure.

19 JUDGE HALLIGAN: How is it different - - -

20 MR. HUSTON: Sure.

21 JUDGE HALLIGAN: - - - exactly?

22 MR. HUSTON: Because in Kauders, this - - - what
23 you see on 289 is not what you would have seen in Kauders.

24 JUDGE HALLIGAN: Yes.

25 MR. HUSTON: In Kauders, there was a screen that

1 was about, enter your credit card information, and that's
2 the feature that the court in Kauders said made it
3 problematic. Because you're - - - they said the user is
4 focused on entering her credit card, she doesn't know that
5 she's being asked to agree to terms and conditions. Well,
6 in - - - you know, we - - - the interface here is very
7 different from 2016 because, of course, it says, I confirm
8 that I have read and agreed to the terms and conditions and
9 the privacy policy. And you have to hit that arrow to
10 confirm that agreement, so - - -

11 JUDGE HALLIGAN: So it is distinguishable, though
12 - - -

13 MR. HUSTON: Yes.

14 JUDGE HALLIGAN: - - - that you're not - - -
15 sorry, from the 2021 agreement in that you're not clicking
16 the specific box?

17 MR. HUSTON: So that's also true. 2021 is a
18 little bit of a different agreement. The Massachusetts
19 Supreme Judicial Court's decision - - -

20 JUDGE HALLIGAN: Clearer, one would say; is that
21 fair? I understand you said 2016 is also clear enough.

22 MR. HUSTON: Yes. I - - - I agree - - - I agree
23 with that, that the 2021 is clear in - - - in some
24 respects, the key ones being that you have to give your
25 assent twice. You have to both put a check box - - - click

1 box next to - - - I mean, check a box that says, I have
2 read and agree to the terms of use. Then you have to hit a
3 separate confirm button.

4 JUDGE HALLIGAN: Yes.

5 MR. HUSTON: So I agree that the 2021 is even
6 more clear. We went above and beyond. I still think that
7 the agreement in 2020 - - - in 2016 is fully enforceable
8 because this key language here, by continuing, I confirm
9 that I have read and agree, that was the word - - -

10 JUDGE RIVERA: So why didn't you rely on it?

11 MR. HUSTON: I'm sorry?

12 JUDGE RIVERA: Why didn't you rely on it?

13 MR. HUSTON: We did, Your Honor. Respectfully, I
14 - - - I mean, I - - - I just don't think that this is - - -
15 I'm not sure why my friend says we didn't. Again, if Your
16 Honor looks at our response in opposition to the motion to
17 stay the arbitration in the Supreme Court, we again
18 referred to the 2016 interface by which the user confirmed
19 her agreement and the fact that the terms of use are
20 exactly the same including the before and after clause,
21 which I think, again, just reinforces that was not a
22 provision that was somehow added only in 2021, and like,
23 Ms. Wu became bound by that for the very first time in
24 2021.

25 JUDGE RIVERA: Is that the first time it was



1 raised?

2 MR. HUSTON: No.

3 JUDGE RIVERA: It's not raised in your initial
4 papers - - -

5 MR. HUSTON: The - - - the 2016 - - -

6 JUDGE RIVERA: - - - just to be clear, the 2016.
7 Your reliance is on the 2016.

8 MR. HUSTON: We invoked the 2016 terms.

9 JUDGE RIVERA: Right. And you said, in response?

10 MR. HUSTON: In response to the plaintiff's
11 motion to stay the arbitration - - -

12 JUDGE RIVERA: Right. Right.

13 MR. HUSTON: Sure.

14 JUDGE RIVERA: In your initial papers seeking the
15 stay for mandatory - - -

16 MR. HUSTON: So Your Honor - - -

17 JUDGE RIVERA: - - - arbitration, did you refer
18 to the 2016?

19 MR. HUSTON: The - - - the plaintiff filed - - -
20 made the first motion. The plaintiff - - -

21 JUDGE RIVERA: Okay.

22 MR. HUSTON: - - - filed in the Supreme Court, a
23 motion to stay the arbitration. We responded and said, we
24 think the 2021 clickwrap is enforceable, but also, by the
25 way, you - - - you signed up for arbitration in 2016.



1 JUDGE RIVERA: But - - - but - - - I'm sorry.
2 Their motion is filed in response to your only asserting
3 the 2021, or have I misunderstood - - -

4 MR. HUSTON: Okay.

5 JUDGE RIVERA: - - - what went on here?

6 MR. HUSTON: I understand, Your Honor. So it - -
7 - it is true that in our initial demand for arbitration - -
8 -

9 JUDGE RIVERA: Yes.

10 MR. HUSTON: - - - which was not a court filing,
11 we sent it to the plaintiff.

12 JUDGE RIVERA: Yes. Yes.

13 MR. HUSTON: We said, you are bound by the 2021
14 terms. Of course, it made sense to do that. That was the
15 operative contract. That was the most recent contract.
16 The Appellate Division's decision in Mejia addresses this
17 issue and cites multiple cases for the proposition that a
18 party's failure to mention every sequential contract that
19 might be in existence does not mean we're waiving our
20 reliance on those other ones. We cite the one that's, you
21 know, the most operative. That creates a binding contract.
22 We're not saying and nothing else does. Plaintiff
23 certainly had a fair opportunity to brief to the Supreme
24 Court the validity of the 2016 terms. And the last one - -
25 -

1 JUDGE RIVERA: But - - - but if the - - - let me
2 just say this. To - - - if - - - if the dispositive
3 deficiency, let me put it that way, of 2021 is the failure
4 to somehow refer specifically to pending actions, whatever
5 language might have been used for that, you would agree
6 that that would be the same problem in 2016.

7 MR. HUSTON: No.

8 JUDGE RIVERA: Right?

9 MR. HUSTON: Because it wouldn't - - -

10 JUDGE RIVERA: Neither one refers to pending
11 actions.

12 MR. HUSTON: That's - - -

13 JUDGE RIVERA: Correct?

14 MR. HUSTON: Yes. That is correct, Your Honor.

15 JUDGE RIVERA: Okay.

16 MR. HUSTON: No. No. I'm sorry. They both have
17 the same clause. They have the same before and after
18 clause - - -

19 JUDGE RIVERA: Yes.

20 MR. HUSTON: - - - in 2016 and 2021.

21 JUDGE RIVERA: Yes.

22 MR. HUSTON: So I guess, if Your Honor - - - but
23 of course, in 2016 there is no pending litigation, right?
24 I mean, that's the whole point. Is that when she signed up
25 for arbitration in 2016, that is years before the accident.

1 JUDGE RIVERA: Yes. I know it's applied to her,
2 but I'm talking about that - - -

3 MR. HUSTON: So - - -

4 JUDGE RIVERA: - - - that carve out.

5 MR. HUSTON: Yes. I - - -

6 JUDGE RIVERA: It's not found in either one. But
7 of course, you are correct in 2016, at the time, she was
8 not in litigation.

9 MR. HUSTON: And the last thing I want to say
10 about 2016 is just that this language, I confirm, I have
11 read and agree to the terms and conditions, I think that's
12 exactly the kind of solemn - - - what the Massachusetts
13 Supreme Judicial Court called solemn I agree language that
14 alerts the user that they are forming a contract. It's
15 what - - -

16 JUDGE HALLIGAN: Sorry. Can I just ask you
17 before your light - - - well, now it goes on, but to
18 briefly address the Coinbase Rent-A-Center point?

19 MR. HUSTON: Sure, Your Honor. Absolutely. So I
20 think any - - - I think your - - - I agree with Your
21 Honor's suggestion to my friend that the heart of this case
22 is really not about whether there was a valid contract
23 form. It's almost all but common ground that the 2021
24 clickwrap forms a contract. The question is whether one
25 provision of that contract, the arbitration agreement, is

1 enforceable because of Ms. Wu's specific circumstances.
2 That's an argument that the contract term is unenforceable
3 or maybe unconscionable. That - - - but that argument was
4 expressly delegated by the parties to an arbitrator and
5 that separate arbitration provision, Rent-A-Center tells
6 us, has to be enforced by this court. The only - - -

7 JUDGE HALLIGAN: And what about Coinbase footnote
8 2 which, I think, is what your adversary is relying on?

9 MR. HUSTON: So I think it's - - - it's - - - I
10 don't mean to be pedantic. I think it's the star footnote
11 in Coinbase - - -

12 JUDGE HALLIGAN: Sorry.

13 MR. HUSTON: - - - Your Honor, respectfully.

14 JUDGE HALLIGAN: Whichever footnote.

15 MR. HUSTON: But the - - - but the - - - the - -
16 - the relevant footnote in Coinbase says - - - and first of
17 all, I think it's dicta in Coinbase, but because that
18 wasn't the - - - what the court was talking about. But
19 what the Supreme Court is saying is, in response to - - -
20 to the delegation provision specifically, the plaintiff in
21 Coinbase said what that plaintiff thought was wrong with
22 the delegation provision. We don't have anything like that
23 here.

24 JUDGE HALLIGAN: So you're saying nothing that
25 specifically is targeted at the delegation provision as

1 opposed to the agreement as a whole?

2 MR. HUSTON: That's - - - that's exactly right,
3 Your Honor.

4 JUDGE HALLIGAN: Okay. Thank you.

5 MR. HUSTON: And that matters. That's critical
6 because that - - - you know, that word, a specific
7 challenge to the delegation provision, that's what the
8 Supreme Court of the United States said the Federal
9 Arbitration Act demands. And if there's any way that the
10 delegation provision won't be - - - won't be enforced. And
11 you will find nothing in my friend's papers in the Supreme
12 Court where he said, what is unconscionable or
13 unenforceable about allowing an arbitrator to resolve this
14 question. So for that reason, all of the questions in this
15 case that go to enforceability or alleged unconscionability
16 or alleged unfairness of the term - - - in this particular
17 case, Ms. Wu is going to have an opportunity to make those
18 arguments, but she has to make them to the arbitrator.

19 CHIEF JUDGE WILSON: Thank you.

20 MR. HUSTON: Thank you.

21 MR. KELNER: So if I might, I want to start on
22 the no contact rule and to get to Judge Garcia's
23 hypothetical.

24 JUDGE TROUTMAN: Why don't you instead pick up on
25 delegation?



1 MR. KELNER: Sure, Your Honor.

2 JUDGE TROUTMAN: And what - - - did she
3 specifically assert that which would allow her to the point
4 you're asking?

5 MR. KELNER: So the Coinbase - - - my apologies.
6 Star footnote says that using the objection to the word
7 arbitrability was sufficient to challenge the delegation
8 clause. Our paper is below. It's in the record at 361 and
9 362, also said, in response to Uber's argument about
10 arbitrability that no issue was properly delegated to the
11 arbitrator. So that is identical. Getting to no contact,
12 numerous courts have held across the country that you can't
13 use mass communications to affect contact with represented
14 parties.

15 Judge Garcia, you asked about the passenger.
16 There wouldn't be contact with the passenger there because
17 the contact would be with the person who hailed the cab.
18 So if so facto, there wouldn't be a breach of no contact -
19 - -

20 JUDGE TROUTMAN: Well, let me ask you - - -

21 JUDGE GARCIA: But let's say the passenger has
22 their own account, right?

23 MR. KELNER: Oh, but if the question is, what are
24 you allowed to do if you contacted represented party - - -

25 JUDGE GARCIA: Right.



1 MR. KELNER: - - - in your version there is
2 contact - - -

3 JUDGE GARCIA: The passenger sues - - -

4 MR. KELNER: - - - with represented party.

5 JUDGE GARCIA: Passenger is represented. I sue.
6 Let's say it's Joe Smith. Joe Smith sues. He goes with
7 Jones' account, though. He's a passenger in the car they
8 hail on the app. And now Mr. Smith orders an Uber on his
9 own account. That's my hypothetical.

10 MR. KELNER: I - - - I don't know if I'm exactly
11 following it, but if I understand it, it's person A has the
12 lawsuit and person B hails the cab?

13 JUDGE GARCIA: Yes.

14 MR. KELNER: Well, there's no contact there with
15 person A. So the attorney - - -

16 JUDGE GARCIA: Let's say they get - - - person A
17 has their own account - - -

18 MR. KELNER: Right.

19 JUDGE GARCIA: - - - and later the 2021 terms
20 come around, and person A clicks, sure. Why isn't that
21 contact with a represented party?

22 MR. KELNER: Well, if they're contacting the
23 person with the lawsuit for the purpose of affecting the
24 lawsuit, then that is contact.

25 JUDGE GARCIA: But they're contacting them

1 exactly the same way. Let's put the rhetoric aside.

2 MR. KELNER: Sure.

3 JUDGE GARCIA: They're contacting them exactly
4 the same way they contacted plaintiff here. New terms go
5 out to everyone. Passenger A has their own account, and
6 they click yes on the terms.

7 MR. KELNER: Well, what they're doing there, even
8 if there - - - it's the same email, there's a specific term
9 of the terms of use that is intended to affect represented
10 parties. The reason we are here is because they admit they
11 drafted a clause of their terms of use to try to take
12 pending cases out of the courts.

13 JUDGE GARCIA: But I - - - to go back to my
14 hypothetical, A is represented. They just didn't hail the
15 cab - - - the - - - the car in the original incident.
16 Would that also be contact for you? Since now they're
17 using their own account in the - - -

18 MR. KELNER: If they're trying to affect person
19 B's lawsuit, then it wouldn't concern the subject of the
20 representation.

21 JUDGE TROUTMAN: But in - - - in this - - -

22 MR. KELNER: I'm sorry.

23 JUDGE TROUTMAN: What about the fact that in - -
24 - does it make a difference if it's the person seeking a
25 ride that causes the click to come up as to, well, if you

1 want the ride, you have - - - now you have to review the
2 updated terms? Is that still a lawyer contacting a
3 represented party?

4 MR. KELNER: If the lawyer drafted the terms of
5 use with the intention of affecting the lawsuit, then 4.2
6 would say that.

7 JUDGE TROUTMAN: So even though the person sought
8 contact with Uber, that's still on Uber?

9 MR. KELNER: Yeah. 4.2 specifically contemplates
10 that. You're allowed to have neutral contacts with a
11 litigant. What you can't do is weaponize it to affect a
12 case. And the commentaries are pretty clear on that. The
13 other thing that I would say, we talked before about how -
14 - -

15 JUDGE CANNATARO: I'm sorry, Counsel.

16 MR. KELNER: Okay.

17 JUDGE CANNATARO: Before you get to that - - -

18 MR. KELNER: Yes, Judge.

19 JUDGE CANNATARO: - - - other thing, I want to
20 get back to the - - - the actual terms of use in the
21 agreement. Because there was a question to your adversary
22 about what a normal person would understand and a non-
23 lawyer would understand - - -

24 MR. KELNER: Yes.

25 JUDGE CANNATARO: - - - if they took the time to



1 really read the terms of use. Do you agree with your
2 adversary that, you know, if you really spent time reading
3 the terms that - - - that the effect of the - - - of that
4 language is to give up your right to a trial in an already
5 pending action?

6 MR. KELNER: I think every part of the process
7 was intended to be set up so a layperson could never get
8 there because they say it's an update - - -

9 JUDGE CANNATARO: Leaving aside - - -

10 MR. KELNER: Yeah.

11 JUDGE CANNATARO: - - - notice and inquiry
12 notice, just the language itself, if you read it, do you
13 come to the understanding, after a much thoughtful, you
14 know, analysis, that you're giving up your right to a
15 pending lawsuit?

16 MR. KELNER: Even with legal training, it's at
17 best ambiguous, and that's me with a law degree. We talked
18 about burdens of carving out represented parties. It would
19 have been extremely easy to do so.

20 JUDGE CANNATARO: Why is that - - - I'm - - - I'm
21 looking at - - -

22 MR. KELNER: Sure.

23 JUDGE CANNATARO: - - - the language. And, you
24 know, counsel spent a lot of time talking about before or
25 after and how that's - - -



1 MR. KELNER: Yeah.

2 JUDGE CANNATARO: - - - typical language. The -
3 - - the language that comes before that is whether the
4 dispute, claim, or controversy occurred or accrued before
5 or after the date you agreed to the terms. So to me,
6 that's a - - - it doesn't even mention the accident. It's
7 not like a person would say, this doesn't apply to
8 accidents that happened before the date of the agreement.
9 It actually says claims, controversies, and disputes. That
10 seems susceptible to only one interpretation if you think
11 about it.

12 MR. KELNER: Well, I think it's a well settled
13 principle of New York law that if something is beyond the
14 realm of expectations for the transaction, that the
15 contract isn't construed that way. It doesn't say
16 lawsuits.

17 JUDGE CANNATARO: Why is that beyond the realm of
18 expectation if that's what it says?

19 MR. KELNER: Well, because, again, you have a
20 represented party with a pending lawsuit, and it doesn't
21 specifically refer to lawsuits. It's an update. Just as
22 to carve outs, I guess, I've - - - I've tried to - - -

23 JUDGE CANNATARO: So - - - so claims,
24 controversies, and disputes, that's not good enough because
25 it doesn't say lawsuits?

1 MR. KELNER: In context of inquiry notice for a
2 layperson, certainly not. And for a lawyer, arguably not.
3 And as to carving out people who are represented and have
4 lawsuits, all they had to do was six words, this does not
5 affect pending lawsuits. And then no term they had here
6 would have infringed on any pending lawsuit. It was a
7 conscious choice by Uber that they wanted to go behind the
8 backs of lawyers for represented parties that clearly
9 violates the no contact rule. And by its holding here, the
10 court should affirm the integrity of the judicial process
11 and not allow corporations with impunity to poach pending
12 cases from the court without notice to counsel.

13 CHIEF JUDGE WILSON: Thank you.

14 MR. KELNER: Thank you.

15 (Court is adjourned)

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C E R T I F I C A T I O N

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Wu v. Uber Technologies, Inc., No. 90 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Brandon Deshawn

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