

# Acceptance and Termination of the Offer

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## A. Time and Form of Acceptance

Contract law uses the idea of an “acceptance” as the counterpart necessary to turn an offer into a contract. The Restatement (Second) of Contracts § 50 (1981) defines an acceptance as “the manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.” In assessing whether an offeree’s communication is an acceptance (or something else), it is important to keep these details in mind:

Finality of Acceptance. Contract law dictates that the contract is formed once the offer is accepted. If a purported offer gives the offeror one more bite at the apple—the right to “approve” the acceptance, for example—then the proposal is not an offer, but rather an invitation to make an offer on the terms proposed.

Method/Mode of Acceptance. The offer controls the way(s) in which the offer can be accepted. An offer can dictate, for example, that a valid acceptance can only be made by dressing up as the Flyers’ mascot Gritty and putting a “YES!” on posterboard. While the offer has that power, many times offers will not specify how the acceptance is to be delivered. Traditional common law doctrine required the acceptance to be made through the same means as the offer: if the offer was made by a mailed letter, then the acceptance must be sent through the mails; if the offer was made in person, then the offeree must accept in person. However, thanks in part to the UCC’s approach (discussed in a later module), Restatement (Second) § 30 creates a default rule that “an offer invites acceptance in any manner and by any medium reasonable in the circumstances.” (See also UCC § 2-206(1)(a).)

Acceptance by Promise or Performance. A critical question regarding the “how” of acceptance is whether the offeree must make a promise agreeing to the contract or instead must actually perform the actions requested by the offer, whether that be labor, the payment of money, or the delivery of property. Contracts formed through an acceptance by promise are called bilateral contracts, while contracts formed through acceptance by performance are called unilateral contracts. Because this terminology is somewhat misleading—no contract is “unilateral” in formation—the Restatement (Second) favors the specification of acceptance by promise versus acceptance by performance. We will discuss unilateral contracts further in these materials.

The Mirror Image Rule. The traditional common law approach to acceptance is that they must completely agree with the offer’s proposed terms. The contract is only formed where there is

unity of purpose, and any deviation from the offer's terms means that the alleged acceptance is not a real acceptance. The common law has loosened up a bit in allowing an acceptance to propose slight changes as long as the offeree makes such suggestions unconditionally. An acceptance that "purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance." Restatement (Second) of Contracts § 59. As discussed more below, a response to an offer that proposes changes to the terms is generally considered a counteroffer that terminates the power to accept the original offer.

Notice of Acceptance. If the offeree accepts the offer in a forest, and no one hears it, is it an acceptance? The general answer is no. Communication of the acceptance is a critical aspect of the process. Restatement (Second) of Contracts § 56 states that "it is essential to an acceptance by promise either that the offeree exercise reasonable diligence to notify the offeror of acceptance or that the offeror receive the acceptance seasonably." Comment b to § 56 clarifies: "It is sometimes said that the acceptance must be communicated to the offeror, and when the parties deal face to face communication is ordinarily required. The rule is more accurately stated as one requiring reasonable diligence on the part of the offeree . . . ." As discussed later in this Module, the so-called "mailbox rule" renders an acceptance binding as soon as it is dropped in the mailbox, rather than when it is actually received. But keep in mind that the offer has ultimate control over the required acceptance, including notice, and can specify when the contract will actually be formed.

The cases below further develop these concepts: *Hendricks v. Behee* concerns the issue of notice, and *Ardente v. Horan* the mirror-image rule.

### **Hendricks v. Behee**

786 S.W.2d 610 (Missouri Court of Appeals 1990)

FLANIGAN, Presiding Judge.

Plaintiff Steve L. Hendricks, d/b/a Hendricks Abstract & Title Co., instituted this interpleader action against defendants Eugene Behee, Artice Smith, and Pearl Smith. Plaintiff was the escrowee of \$5,000 which had been paid by defendant Behee as a deposit accompanying Behee's offer to purchase real estate owned by defendants Artice Smith and Pearl Smith, husband and wife, in Stockton, Missouri. A dispute between Behee and the Smiths as to whether their dealings resulted in a binding contract prompted the interpleader action. Behee filed a crossclaim against the Smiths.

After a nonjury trial, the trial court awarded plaintiff \$997.50 to be paid out of the \$5,000 deposit. None of the parties challenges that award. The trial court awarded the balance of \$4,002.50 to defendant Behee. Defendants Smith appeal.

In essence the Smiths contend that the dealings between them and Behee ripened into a contract and entitled the Smiths to the balance of \$4,002.50, and that the trial court erred in ruling otherwise.

After Behee, as prospective buyer, and the Smiths, as prospective sellers, had engaged in unproductive negotiations, Behee, on March 2, 1987, made a written offer of \$42,500 for the real estate and \$250 for a dinner bell and flower pots. On March 3 that offer was mailed to the Smiths, who lived in Mississippi, by their real estate agent. There were two real estate agents involved. The trial court found that both were the agents of the Smiths, and that finding has not been disputed by the Smiths in this appeal. For simplicity, the two agents will be considered in this opinion as one agent who acted on behalf of the Smiths.

On March 4 the Smiths signed the proposed agreement in Mississippi. Before Behee was notified that the Smiths had accepted the offer, Behee withdrew the offer by notifying the real estate agent of the withdrawal. That paramount fact is conceded by this statement in the Smiths' brief: "On either March 5, 6 or 7, 1987, Behee contacted [the Smiths' real estate agent] and advised her that he desired to withdraw his offer to purchase the real estate. Prior to this communication, Behee had received no notice that his offer had been accepted by the Smiths."

There is no contract until acceptance of an offer is communicated to the offeror. \*\*\* An uncommunicated intention to accept an offer is not an acceptance. \*\*\* When an offer calls for a promise, as distinguished from an act, on the part of the offeree, notice of acceptance is always essential. \*\*\* A mere private act of the offeree does not constitute an acceptance. \*\*\* Communication of acceptance of a contract to an agent of the offeree is not sufficient and does not bind the offeror. \*\*\*

Unless the offer is supported by consideration, an offeror may withdraw his offer at any time "before acceptance and communication of that fact to him." \*\*\* To be effective, revocation of an offer must be communicated to the offeree before he has accepted. \*\*\*

Notice to the agent, within the scope of the agent's authority, is notice to the principal, and the agent's knowledge is binding on the principal. \*\*\*

Before Behee was notified that the Smiths had accepted his offer, Behee notified the agent of the Smiths that Behee was withdrawing the offer. The notice to the agent, being within the scope of her authority, was binding upon the Smiths. Behee's offer was not supported by consideration and his withdrawal of it was proper. Cases involving facts similar to those at bar include *National Advertising Co. v. Herold*, *supra*, and *Sokol v. Hill*, *supra*.

The judgment is affirmed.

### Notes and Questions

1. Who is Steve L. Hendricks, and what is his role in this case?
2. Why was communication with one of the real estate agents considered sufficient to revoke the offer as to the Smiths?
3. What notice should be required when acceptance is accomplished by performance? This thorny issue is discussed later in these materials.

### **Ardente v. Horan**

366 A.2d 162 (Rhode Island Supreme Court 1976)

DORIS, Justice.

...In August 1975, certain residential property in the city of Newport was offered for sale by defendants. The plaintiff made a bid of \$250,000 for the property which was communicated to defendants by their attorney. After defendants' attorney advised plaintiff that the bid was acceptable to defendants, he prepared a purchase and sale agreement at the direction of defendants and forwarded it to plaintiff's attorney for plaintiff's signature. After investigating certain title conditions, plaintiff executed the agreement. Thereafter plaintiff's attorney returned the document to defendants along with a check in the amount of \$20,000 and a letter dated September 8, 1975, which read in relevant part as follows:

'My clients are concerned that the following items remain with the real estate:  
a) dining room set and tapestry wall covering in dining room; b) fireplace fixtures throughout; c) the sun parlor furniture. I would appreciate your confirming that these items are a part of the transaction, as they would be difficult to replace.'

The defendants refused to agree to sell the enumerated items and did not sign the purchase and sale agreement. They directed their attorney to return the agreement and the deposit check to plaintiff and subsequently refused to sell the property to plaintiff. This action for specific performance followed.

In Superior Court, defendants moved for summary judgment on the ground that the facts were not in dispute and no contract had been formed as a matter of law. The trial justice ruled that the letter quoted above constituted a conditional acceptance of defendants' offer to sell the property and consequently must be construed as a counteroffer. Since defendants never accepted the counteroffer, it followed that no contract was formed, and summary judgment was granted.

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The plaintiff assigns several grounds for appeal in his brief...

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[Plaintiff contends] that the trial justice incorrectly applied the principles of contract law in deciding that the facts did not disclose a valid acceptance of defendants' offer. Again we cannot agree.

The trial justice proceeded on the theory that the delivery of the purchase and sale agreement to plaintiff constituted an offer by defendants to sell the property. Because we must view the evidence in the light most favorable to the party against whom summary judgment was entered, in this case plaintiff, we assume as the trial justice did that the delivery of the agreement was in fact an offer.<sup>3</sup>

The question we must answer next is whether there was an acceptance of that offer. The general rule is that where, as here, there is an offer to form a bilateral contract, the offeree must communicate his acceptance to the offeror before any contractual obligation can come into being. A mere mental intent to accept the offer, no matter how carefully formed, is not sufficient. The acceptance must be transmitted to the offeror in some overt manner. \*\*\* A

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<sup>3</sup> The conclusion that the delivery of the agreement was an offer is not unassailable in view of the fact that defendants did not sign the agreement before sending it to plaintiff, and the fact that plaintiff told defendants' attorney after the agreement was received that he would have to investigate certain conditions of title before signing the agreement. If it was not an offer, plaintiff's execution of the agreement could itself be no more than an offer, which defendants never accepted.

review of the record shows that the only expression of acceptance which was communicated to defendants was the delivery of the executed purchase and sale agreement accompanied by the letter of September 8. Therefore it is solely on the basis of the language used in these two documents that we must determine whether there was a valid acceptance. Whatever plaintiff's unexpressed intention may have been in sending the documents is irrelevant. We must be concerned only with the language actually used, not the language plaintiff thought he was using or intended to use.

There is no doubt that the execution and delivery of the purchase and sale agreement by plaintiff, without more, would have operated as an acceptance. The terms of the accompanying letter, however, apparently conditioned the acceptance upon the inclusion of various items of personalty. In assessing the effect of the terms of that letter we must keep in mind certain generally accepted rules. To be effective, an acceptance must be definite and unequivocal. 'An offeror is entitled to know in clear terms whether the offeree accepts his proposal. It is not enough that the words of a reply justify a probable inference of assent.' 1 Restatement Contracts § 58, comment a (1932). The acceptance may not impose additional conditions on the offer, nor may it add limitations. 'An acceptance which is equivocal or upon condition or with a limitation is a counteroffer and requires acceptance by the original offeror before a contractual relationship can exist.' *John Hancock Mut. Life Ins. Co. v. Dietlin*, 97 R.I. 515, 518, 199 A.2d 311, 313 (1964). *Accord, Cavanaugh v. Conway*, 36 R.I. 571, 587, 90 A. 1080, 1086 (1914).

However, an acceptance may be valid despite conditional language if the acceptance is clearly independent of the condition. Many cases have so held. Williston states the rule as follows:

'Frequently an offeree, while making a positive acceptance of the offer, also makes a request or suggestion that some addition or modification be made. So long as it is clear that the meaning of the acceptance is positively and unequivocally to accept the offer whether such request is granted or not, a contract is formed.' 1 Williston, Contracts s 79 at 261-62 (3d ed. 1957).

Corbin is in agreement with the above view. 1 Corbin, *supra*, § 84 at 363-65. Thus our task is to decide whether plaintiff's letter is more reasonably interpreted as a qualified acceptance or as an absolute acceptance together with a mere inquiry concerning a collateral matter.

In making our decision we recognize that, as one text states, "The question whether a communication by an offeree is a conditional acceptance or counter-offer is not always easy to answer. It must be determined by the same common-sense process of interpretation that

must be applied in so many other cases.’ 1 Corbin, *supra* § 82 at 353. In our opinion the language used in plaintiff’s letter of September 8 is not consistent with an absolute acceptance accompanied by a request for a gratuitous benefit. We interpret the letter to impose a condition on plaintiff’s acceptance of defendants’ offer. The letter does not unequivocally state that even without the enumerated items plaintiff is willing to complete the contract. In fact, the letter seeks ‘confirmation’ that the listed items ‘are a part of the transaction’. Thus, far from being an independent, collateral request, the sale of the items in question is explicitly referred to as a part of the real estate transaction. Moreover, the letter goes on to stress the difficulty of finding replacements for these items. This is a further indication that plaintiff did not view the inclusion of the listed items as merely collateral or incidental to the real estate transaction.

A review of the relevant case law discloses that those cases in which an acceptance was found valid despite an accompanying conditional term generally involved a more definite expression of acceptance than the one in the case at bar....

Accordingly, we hold that since the plaintiff’s letter of acceptance dated September 8 was conditional, it operated as a rejection of the defendants’ offer and no contractual obligation was created.

The plaintiff’s appeal is denied and dismissed, the judgment appealed from is affirmed and the case is remanded to the Superior Court.

### Notes and Questions

1. Why *should* a counteroffer reject an offer? Imagine, for instance, an offer that an offeree might reasonably want ten days to consider. On day two, the offeree tells the offeror they are unwilling to accept the offer. At that point, the offeror might rightly move on to another potential offeree. This might seem to be true even if the offeror has given the offeree a ten-day irrevocable option to accept; however, counter-offers generally do not terminate option contracts. *See* the module on *Option Contracts*. The offeree is technically empowered to accept the deal even after rejection until the option expires, *see* Restatement (Second) of Contracts § 37, but one might reasonably expect the offeror to move along in such a case as well.
2. Professor Melvin Eisenberg critiques the deviant acceptance rule (the mirror image rule), which he calls a qualified acceptance rule. First, an offeree who responds with deviant acceptance might reasonably think the offer is still on the table. Second, the

deviant acceptance rule is softened by the fact that acceptance accompanied by an inquiry is not a counteroffer, and courts often appear to strain to find acceptance. Given the inconsistency of the rule and its potential incongruity with reasonable expectations, Eisenberg concludes the rule should be dropped. Melvin Aron Eisenberg, *Expression Rules in Contract Law and Problems of Offer and Acceptance*, 82 Cal. L. Rev. 1127, 1161-63 (1994). Do you agree?

3. The deviant acceptance rule has been moderated both under the UCC § 2-207, and under the Unidroit Principles of International Commercial Contracts Art 2.11.1 (2010). Under subsection 1 of the former, an acceptance with deviant terms is still acceptance, unless the acceptance is expressly made conditional on the additional or different terms. Under the latter, additional terms that do not materially alter the terms of the offer constitute acceptance unless the offeror objects to the discrepancy without undue delay. UCC § 2-207 will be discussed another module on offer and acceptance under the UCC.

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## B. Terminating the Offer

When an offeror makes an offer, there is the possibility of contract formation at any moment that the offer is still viable. There are several ways, however, in which the power to accept the offer can be terminated—in which, in other words, the offer itself terminates.

- Counteroffer. As discussed in *Ardente v. Horan*, a counteroffer terminates the former offer and takes its place as the new offer than can be accepted. Technically, this approach is a default rule: Restatement (Second) of Contracts § 39 states that “[a]n offeree's power of acceptance is terminated by his making of a counter-offer, unless the offeror has manifested a contrary intention or unless the counter-offer manifests a contrary intention of the offeree.” However, most courts find as a matter of course that a counteroffer is intended to some extent as a rejection of the offer.
- Rejection by Offeree. A clear rejection of the offer by the offeree also terminates the offer and the power to accept it. Restatement (Second) of Contracts § 38. This rule is also a default rule, and the offeree can signal an intent to take the offer under further advisement.

- Revocation by Offeror. An offeror can revoke the offer at any time, unless the offer is considered an irrevocable offer a.k.a. an option or firm offer. Once revoked, the offer cannot be accepted. As discussed in *Dickinson v. Dodds*, below, an offer can be revoked directly by the offeror in a communication to offerees, or the offer can be indirectly revoked by the offeror's actions. Restatement (Second) of Contracts § 43 sets up the following requirements: "An offeree's power of acceptance is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect." Both the action and the reliable information regarding the action are necessary for indirect revocation.
- Death. An offer is terminated by the death or legal incapacity of either the offeror or the offeree. *See* Restatement (Second) of Contracts § 48.
- Lapse of Time. Offers can also expire because of the lapse of a certain period of time. This expiration seems obvious when an offer expressly states a specific date and/or time, but offers also expire after a reasonable period of time if no specific time period is listed. Restatement (Second) of Contracts § 41 provides further specifics.

As noted in the discussion of options, these rules do not apply with respect to options or firm offers: a rejection or counteroffer does not take the irrevocable offer off the table, nor does death of either the offeror or the offeree, and of course by its own terms the offeror cannot revoke the offer before the end of the irrevocability period. Why did the court find Dodds' offer in the case below to be revocable?

### **Dickinson v. Dodds**

2 Ch. D. (L.R.) (United Kingdom, Court of Appeal, Queen's Bench, 1876)

On Wednesday, the 10th of June, 1874, the Defendant John Dodds signed and delivered to the Plaintiff, George Dickinson, a memorandum, of which the material part was as follows:—

I hereby agree to sell to Mr. George Dickinson the whole of the dwelling-houses, garden ground, stabling, and outbuildings thereto belonging, situate at Croft, belonging to me, for the sum of £800. As witness my hand this tenth day of June, 1874.

£800. (Signed) John Dodds.

P.S.—This offer to be left over until Friday, 9 o'clock, A.M. J. D. (the twelfth), 12th June, 1874.

(Signed) J. Dodds.

The bill alleged that Dodds understood and intended that the Plaintiff should have until Friday 9 A.M. within which to determine whether he would or would not purchase, and that he should absolutely have until that time the refusal of the property at the price of £800, and that the Plaintiff in fact determined to accept the offer on the morning of Thursday, the 11th of June, but did not at once signify his acceptance to Dodds, believing that he had the power to accept it until 9 A.M. on the Friday.

In the afternoon of the Thursday the Plaintiff was informed by a Mr. Berry that Dodds had been offering or agreeing to sell the property to Thomas Allan, the other Defendant. Thereupon the Plaintiff, at about half-past seven in the evening, went to the house of Mrs. Burgess, the mother-in-law of Dodds, where he was then staying, and left with her a formal acceptance in writing of the offer to sell the property. According to the evidence of Mrs. Burgess this document never in fact reached Dodds, she having forgotten to give it to him.

On the following (Friday) morning, at about seven o'clock, Berry, who was acting as agent for Dickinson, found Dodds at the Darlington railway station, and handed to him a duplicate of the acceptance by Dickinson, and explained to Dodds its purport. He replied that it was too late, as he had sold the property. A few minutes later Dickinson himself found Dodds entering a railway carriage, and handed him another duplicate of the notice of acceptance, but Dodds declined to receive it, saying, "You are too late. I have sold the property."

It appeared that on the day before, Thursday, the 11th of June, Dodds had signed a formal contract for the sale of the property to the Defendant Allan for £800, and had received from him a deposit of £40.

The bill in this suit prayed that "the Defendant Dodds might be decreed specifically to perform the contract of the 10th of June, 1874; that he might be restrained from conveying the property to Allan; that Allan might be restrained from taking any such conveyance; that, if any such conveyance had been or should be made, Allan might be declared a trustee of the property for, and might be directed to convey the property to, the Plaintiff; and for damages."

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[Trial Court Decision:]

BACON, V.C., after remarking that the case involved no question of unfairness or inequality, and after stating the terms of the document of the 10th of June, 1874, and the statement of the Defendant's case as given in his answer, continued:—

I consider that to be one agreement, and I think the terms of the agreement put an end to any question of *nudum pactum*. I think the inducement for the Plaintiff to enter into the contract was the Defendant's compliance with the Plaintiff's request that there should be some time allowed to him to determine whether he would accept it or not. But whether the letter is read with or without the postscript, it is, in my judgment, as plain and clear a contract for sale as can be expressed in words, one of the terms of that contract being that the Plaintiff shall not be called upon, to accept, or to testify his acceptance, until 9 o'clock on the morning of the 12th of June. I see, therefore, no reason why the Court should not enforce the specific performance of the contract, if it finds that all the conditions have been complied with.

Then what are the facts? It is clear that a plain, explicit acceptance of the contract was, on Thursday, the 11th of June, delivered by the Plaintiff at the place of abode of the Defendant, and ought to have come to his hands. Whether it came to his hands or not, the fact remains that, within the time limited, the Plaintiff did accept and testify his acceptance. From that moment the Plaintiff was bound, and the Defendant could at any time, notwithstanding Allan, have filed a bill against the Plaintiff for the specific performance of the contract which he had entered into, and which the Defendant had accepted.

I am at a loss to guess upon what ground it can be said that it is not a contract which the Court will enforce. It cannot be on the ground that the Defendant had entered into a contract with Allan, because, giving to the Defendant all the latitude which can be desired, admitting that he had the same time to change his mind as he, by the agreement, gave to the Plaintiff—the law, I take it, is clear on the authorities, that if a contract, unilateral in its shape, is completed by the acceptance of the party on the other side, it becomes a perfectly valid and binding contract. It may be withdrawn from by one of the parties in the meantime, but, in order to be withdrawn from, information of that fact must be conveyed to the mind of the person who is to be affected by it. It will not do for the Defendant to say, "I made up my mind that I would withdraw, but I did not tell the Plaintiff; I did not say anything to the Plaintiff until after he had told me by a written notice and with a loud voice that he accepted the option which had been left to him by the agreement." In my opinion, after that hour on Friday, earlier than nine o'clock, when the Plaintiff and Defendant met, if not before, the contract was completed, and neither party could retire from it.

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[Appellate court decision:]

JAMES, L.J. after referring to the document of the 10th of June, 1874, continued:—

The document, though beginning "I hereby agree to sell," was nothing but an offer, and was only intended to be an offer, for the Plaintiff himself tells us that he required time to consider whether he would enter into an agreement or not. Unless both parties had then agreed there was no concluded agreement then made; it was in effect and substance only an offer to sell. The Plaintiff, being minded not to complete the bargain at that time, added this memorandum—"This offer to be left over until Friday, 9 o'clock A.M., 12th June, 1874." That shews it was only an offer. There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until 9 o'clock on Friday morning; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that promise, and could not in any way withdraw from it, or retract it, until 9 o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear settled law, on one of the clearest principles of law, that this promise, being a mere *nudum pactum*, was not binding, and that at any moment before a complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. Well, that being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, "Now I withdraw my offer." It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retraction. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case, beyond all question, the Plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, "I withdraw the offer." This is evident from the Plaintiff's own statements in the bill.

The Plaintiff says in effect that, having heard and knowing that Dodds was no longer minded to sell to him, and that he was selling or had sold to some one else, thinking that he could not in point of law withdraw his offer, meaning to fix him to it, and endeavouring to bind him, "I went to the house where he was lodging, and saw his mother-in-law, and left with her an

acceptance of the [473] offer, knowing all the while that he had entirely changed his mind. I got an agent to watch for him at 7 o'clock the next morning, and I went to the train just before 9 o'clock, in order that I might catch him and give him my notice of acceptance just before 9 o'clock, and when that occurred he told my agent, and he told me, you are too late, and he then threw back the paper." It is to my mind quite clear that before there was any attempt at acceptance by the Plaintiff, he was perfectly well aware that Dodds had changed his mind, and that he had in fact agreed to sell the property to Allan. It is impossible, therefore, to say there was ever that existence of the same mind between the two parties which is essential in point of law to the making of an agreement. I am of opinion, therefore, that the Plaintiff has failed to prove that there was any binding contract between Dodds and himself.

MELLISH, L.J.:—

I am of the same opinion. The first question is, whether this document of the 10th of June, 1874, which was signed by Dodds, was an agreement to sell, or only an offer to sell, the property therein mentioned to Dickinson; and I am clearly of opinion that it was only an offer, although it is in the first part of it, independently of the postscript, worded as an agreement. \*\*\* But it is hardly necessary to resort to that doctrine in the present case, because the postscript calls it an offer, and says, "This offer to be left over until Friday, 9 o'clock A.M." Well, then, this being only an offer, the law says—and it is a perfectly clear rule of law—that, although it is said that the offer is to be left open until Friday morning at 9 o'clock, that did not bind Dodds. He was not in point of law bound to hold the offer over (end of replaced text) until 9 o'clock on Friday morning. He was not so bound either in law or in equity. Well, that being so, when on the next day he made an agreement with Allan to sell the property to him, I am not aware of any ground on which it can be said that that contract with Allan was not as good and binding a contract as ever was made. Assuming Allan to have known (there is some dispute about it, and Allan does not admit that he knew of it, but I will assume that he did) that Dodds had made the offer to Dickinson, and had given him till Friday morning at 9 o'clock to accept it, still in point of law that could not prevent Allan from making a more favourable offer than Dickinson, and entering at once into a binding agreement with Dodds.

Then Dickinson is informed by Berry that the property has been sold by Dodds to Allan. Berry does not tell us from whom he heard it, but he says that he did hear it, that he knew it, and that he informed Dickinson of it. Now, stopping there, the question which arises is this—If an offer has been made for the sale of property, and before that offer is accepted, the person who has made the offer enters into a binding agreement to sell the property to somebody else, and the person to whom the offer was first made receives notice in some way that the property

has been sold to another person, can he after that make a binding contract by the acceptance of the offer? I am of opinion that he cannot. The law may be right or wrong in saying that a person who has given to another a certain time within which to accept an offer is not bound by his promise to give that time; but, if he is not bound by that promise, and may still sell the property to some one else, and if it be the law that, in order to make a contract, the two minds must be in agreement at some one time, that is, at the time of the acceptance, how is it possible that when the person to whom the offer has been made knows that the person who has made the offer has sold the property to someone else, and that, in fact, he has not remained in the same mind to sell it to him, he can be at liberty to accept the offer and thereby make a binding contract? It seems to me that would be simply absurd. \*\*\* I am clearly of opinion that, just as when a man who has made an offer dies before it is accepted it is impossible that it can then be accepted, so when once the person to whom the offer was made knows that the property has been sold to some one else, it is too late for him to accept the offer, and on that ground I am clearly of opinion that there was no binding contract for the sale of this property by Dodds to Dickinson, and even if (end of replaced text) there had been, it seems to me that the sale of the property to Allan was first in point of time. However, it is not necessary to consider, if there had been two binding contracts, which of them would be entitled to priority in equity, because there is no binding contract between Dodds and Dickinson.

Baggallay, J.A.:—

I entirely concur in the judgments which have been pronounced.

The bill will be dismissed with costs.

### Notes and Questions

1. What is the basis for disagreement between Vice Chancellor Bacon (on the trial court level) and the opinions of Lord Justices James and Mellish (on the appellate level)? Is it a difference of opinion as to the facts, the law, or the application of the facts to the law?
2. As discussed in the module on option contracts, the common law after *Dickinson v. Dodds* has created venues for such option contracts that did not exist at the time of this opinion. What, in your view, were the concerns that drove courts and legislatures to create new methods of making an offer irrevocable for a period of time?

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### C. The Mailbox Rule

When a negotiation between offeror and offeree occurs face to face, the question of whether the negotiators entered into a contract can be determined by evaluating their communication before the conversation ends. Indeed, the default rule is that an oral offer extended during a face-to-face conversation lapses at the end of the conversation. *See* Restatement (Second) of Contracts § 41, *cmt. d*. In other contexts, an offer lapses after a reasonable time. *Id.* at § 41.

The burden of reconstructing offer and acceptance increases when the parties are negotiating remotely using a technology like written communications carried over long distances by third parties. It may be unclear when parties might reasonably conclude an offer has been accepted. Acceptance is typically called into question when offeror or offeree changes their minds after some communication was handed to the third party but before it was received. The lack of certainty led to the development of the “mailbox rule,” at issue in *Morrison v. Thaelke*, below.

#### **Morrison v. Thaelke**

155 So.2d 889 (Florida District Court of Appeal 1963)

[The Thaelkes owned property in Florida. They were negotiating a potential sale to the Morrisons. The Morrisons executed a contract for sale on November 26, 1957, and mailed it to the Thaelkes. The next day, the Thaelkes signed and sent the contract back to the Morrisons. Before the contract arrived, the Thaelkes called the Morrisons’ attorney, attempting to cancel and repudiate the contract. Nonetheless, after it arrived, the Morrisons caused the contract to be recorded. The Thaelkes sued to quiet title in the property and the Morrisons counterclaimed for specific performance of the contract and conveyance of the property. The trial court held in favor of the Thaelkes, finding that because they cancelled and repudiated the contract before the Morrisons received the document, the offer was not accepted.]

ALLEN, Acting Chief Judge.

... Turning to the principal point raised in this appeal, we are confronted with a question apparently of first impression in this jurisdiction. The question is whether a contract is complete and binding when a letter of acceptance is mailed, thus barring repudiation prior to delivery to the offeror, or when the letter of acceptance is received, thus permitting repudiation prior to receipt. Appellants, of course, argue that posting the acceptance creates the contract; appellees contend that only receipt of the acceptance bars repudiation.

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The appellant, in arguing that the lower court erred in giving effect to the repudiation of the mailed acceptance, contends that this case is controlled by the general rule that insofar as the mail is an acceptable medium of communication, a contract is complete and binding upon posting of the letter of acceptance. \*\*\* Appellees, on the other hand, argue that the right to recall mail makes the Post Office Department the agent of the sender, and that such right coupled with communication of a renunciation prior to receipt of the acceptance voids the acceptance. In short, appellees argue that acceptance is complete only upon receipt of the mailed acceptance. \*\*\*

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The rule that a contract is complete upon deposit of the acceptance in the mails, hereinbefore referred to as 'deposited acceptance rule' and also known as the 'rule in *Adams v. Lindsell*,' had its origin, insofar as the common law is concerned, in *Adams v. Lindsell*, 1 Barn. & Ald. 681, 106 Eng.Rep. 250 (K.B. 1818). In that case, the defendants had sent an offer to plaintiffs on September 2nd, indicating that they expected an answer 'in course of post.' The offer was misdirected and was not received and accepted until the 5th, the acceptance being mailed that day and received by defendant-offerors on the 9th. However, the defendants, who had expected to receive the acceptance on or before the 7th, sold the goods offered on the 8th of September. It was conceded that the delay had been occasioned by the fault of the defendants in initially misdirecting the offer.

Defendants contended that no contract had been made until receipt of the offer on the 9th.

\* \* \* So here the defendants who have proposed by letter to sell this wool, are not to be held liable, even though it be now admitted that the answer did come back in due course of post. Till the plaintiffs' answer was actually received there could be no binding contract between the parties; and before then the defendants had retracted their offer by selling the wool to other persons.

'But the court said that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum. The defendants must be considered in law as making, during every instant of the time their letter was traveling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter. Then as to

the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them that the plaintiffs' answer was received in course of post.'

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The 'meeting of the minds' justification advanced in *Adams v. Lindsell* is repeated in the first of two leading American cases on point. In *Mactier's Adm'rs v. Frith*, New York, 1830, 6 Wendell 103, 21 Am.Dec. 262, the offeree died while an acceptance was in the post. Since, if a 'meeting of the minds' was essential to the contract, the contract could have been completed only during the offeree's lifetime, the court found it necessary to determine the effective date of acceptance. They deemed the posting of the assent sufficient and wrote:

'All the authorities state a contract or an agreement (which is the same thing) to be aggregatio mentium. Why should not this meeting of the minds, which makes the contract, also indicate the moment when it becomes obligatory? I might rather ask, is it not and must it not be the moment when it does become obligatory? If the party making the offer is not bound until he knows of this meeting of minds, for the same reason the party accepting the offer ought not to be bound when his acceptance is received, because he does not know of the meeting of the minds, for the offer may have been withdrawn before his acceptance was received. If more than a concurrence of minds upon a distinct proposition is required to make an obligatory contract, the definition of what constitutes a contract is not correct. Instead of being the meeting of the minds of the contracting parties, it should be a knowledge of this meeting....'

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Significantly, in the second leading American case, *Tayloe v. Merchants' Fire Insurance Co. of Baltimore*, 9 How. [50 U.S.] 390, 13 L.Ed. 187 (1850) the Supreme Court did not advert to the 'loss of control' but closely followed the reasoning of *Adams v. Lindsell*. Holding an insurance contract complete upon posting of an acceptance, the Court wrote:

'It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavor to enter into a contract by correspondence, in the absence of the knowledge of

one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties, to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated; instead of postponing its completion till notice of such acceptance has been received and assented to by the company.

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In support of the rule proponents urge its sanction in tradition and practice. They argue that in the average case the offeree receives an offer and, depositing an acceptance in the post, begins and should be allowed to begin reliance on the contract. They point out that the offeror has, after all, communicated his assent to the terms by extending the offer and has himself chosen the medium of communication. Depreciating the alleged risk to the offeror, proponents argue that having made an offer by post the offeror is seldom injured by a slight delay in knowing it was accepted, whereas the offeree, under any other rule, would have to await both the transmission of the acceptance and notification of its receipt before being able to rely on the contract he unequivocally accepted. Finally, proponents point out that the offeror can always expressly condition the contract on his receipt of an acceptance and, should he fail to do so, the law should not afford him this advantage.

Opponents of the rule argue as forcefully that all of the disadvantages of delay or loss in communication which would potentially harm the offeree are equally harmful to the offeror. Why, they ask, should the offeror be bound by an acceptance of which he has no knowledge? Arguing specific cases, opponents of the rule point to the inequity of forbidding the offeror to withdraw his offer after the acceptance was posted but before he had any knowledge that the offer was accepted; they argue that to forbid the offeree to withdraw his acceptance, as in the instant case, scant hours after it was posted but days before the offeror knew of it, is unjust and indefensible. Too, the opponents argue, the offeree can always prevent the revocation of an offer by providing consideration, by buying an option.

\*\*\* Weighing the arguments with reference not to specific cases but toward a rule of general application and recognizing the general and traditional acceptance of the rule as well as the modern changes in effective long-distance communication, it would seem that the balance tips, whether heavily or near imperceptibly, to continued adherence to the 'Rule in *Adams v. Lindsell*.' This rule, although not entirely compatible with ordered, consistent and sometime artificial principles of contract advanced by some theorists, is, in our view, in accord with the practical considerations and essential concepts of contract law. See Llewellyn, *Our Case Law of Contracts; Offer and Acceptance II*, 48 *Yale L.J.* 779, 795 (1939). Outmoded precedents

may, on occasion, be discarded and the function of justice should not be the perpetuation of error, but, by the same token, traditional rules and concepts should not be abandoned save on compelling ground.

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In the instant case, an unqualified offer was accepted and the acceptance made manifest. Later, the offerees sought to repudiate their initial assent. Had there been a delay in their determination to repudiate permitting the letter to be delivered to appellant, no question as to the invalidity of the repudiation would have been entertained. As it were, the repudiation antedated receipt of the letter. However, adopting the view that the acceptance was effective when the letter of acceptance was deposited in the mails, the repudiation was equally invalid and cannot alone, support the summary decree for appellees.

The summary decree is reversed and the cause remanded for further proceedings.

### Notes and Questions

1. The mailbox rule has traditionally applied only to communications that are out of the control of the sender. The rule does not apply when a party asks an agent to deliver the acceptance, or when the communication can be recalled by the sender. The concern is that the ability to recall the message will in effect give the sender an option; the sender can put the acceptance in transit and have a contract, but then recall the acceptance (without the offeror knowing) and avoid a contract if the sender changes their mind. Thus, only communications that cannot be recalled get the benefit of the mailbox rule.
2. The court in *Morrison v. Thielke* actually disagreed with this specific condition for the rule, as does the Restatement (Second) of Contracts. Restatement (Second) of Contracts § 63 cmt. a (1981) (“It is often said that an offeror who makes an offer by mail makes the post office his agent to receive the acceptance, or that the mailing of a letter of acceptance puts it irrevocably out of the offeree's control. Under United States postal regulations, however, the sender of a letter has long had the power to stop delivery and reclaim the letter.”). *Morrison v. Thielke* and the Restatement both assume that the mailed acceptance is binding upon dispatch, even if it can be recalled, and assume that any recall will become known to the offeror. (Perhaps a misguided assumption?) Practically speaking, however, the average person does not have the

ability to recall a first-class letter sent in the mail, and thus surreptitious recall will not be possible, despite the postal regulation.

3. Should the mailbox rule still govern in a world of nearly instantaneous communication via phone, text, and email (among other media)? How does the mailbox rule apply to these media?
4. Note that courts have not applied the mailbox rule to options (a.k.a. irrevocable offers). Restatement (Second) of Contracts § 63(b) (noting that an acceptance of an option contract is not effective until receipt).
5. Although Restatement (Second) of Contracts § 63 covers the core of the mailbox rule, there is an important caveat contained in Restatement § 40. That provision notes: “Rejection or counter-offer by mail or telegram does not terminate the power of acceptance until received by the offeror, but limits the power so that a letter or telegram of acceptance started after the sending of an otherwise effective rejection or counter-offer is only a counter-offer unless the acceptance is received by the offeror before he receives the rejection or counter-offer.” Why is this caveat/exception to the general rule necessary? What might happen if this exception did not exist?

**University Emergency Medicine Foundation v. Rapier Investments, Ltd.**

197 F.3d 18 (1st Cir. 1999)

LIPEZ, Circuit Judge.

The evidence Rapier Investments Ltd. (“Rapier”) and Medical Business Systems, Inc., (“MBS”) (collectively, the “appellants”) appeal from the summary judgment entered in favor of plaintiff-appellee, University Emergency Medicine Foundation (“Emergency Medicine”), declaring effective Emergency Medicine's notice to terminate a service contract with appellants. This case calls upon us to decide whether notice of termination is effective pursuant to the law of Rhode Island where: (1) the notice is mailed in advance of, but received after, the expiration of the contractual notice period; and (2) a separate contractual notice provision invites notice by mail to a certain address, but notice is sent to, and actually received by, the noticee at a different address. Because we agree with the trial court that such notice was effective, we affirm.

I.

As this is an appeal from an entry of summary judgment, we recount the pertinent facts in the light most favorable to the non-moving party, the appellants. Emergency Medicine is a non-profit Rhode Island corporation that provides physicians' services to emergency departments at several Rhode Island hospitals. Pursuant to a series of contracts spanning more than ten years, MBS, a subsidiary of Rapier, performed coding, billing, collection and accounts receivable services for Emergency Medicine.

On October 1, 1995, Emergency Medicine and Rapier executed a contract (the "Agreement") calling for MBS to service Emergency Medicine for one year, and further providing that

this Agreement shall be automatically extended for additional one (1) year period [sic] ("additional terms") unless and until either party elects to terminate this Agreement as of the end of the initial term or any additional term by giving at least four (4) months written notice that it elects to have this Agreement terminated, without cause.

A separate paragraph entitled "Notices," (the "notice paragraph"), prescribes a method by which notice may be "effectively given":

Any notices given pursuant to this Agreement shall be deemed to have been effectively given if sent by registered or certified mail to the party to whom the notice is directed at the address set forth for such party herein above or at such other address as such party may hereafter specify in a notice given in accordance with this paragraph.

The only addresses "set forth" in the Agreement are Rapier's principal office, 7 Wells Avenue, Newton, Massachusetts, and Emergency Medicine's principal place of business, 593 Eddy Street, Providence, Rhode Island.

During the contract's first year, neither party terminated, and it automatically renewed for an additional year, ending September 30, 1997. On Friday, May 30, 1997, Annamarie Monks of Emergency Medicine mailed two letters intended to notify Rapier that Emergency Medicine planned to terminate the Agreement before it renewed for a third year. She sent one letter certified mail to Alan Carr-Locke of Rapier at 1238 Chestnut Street, Newton, Massachusetts. Because the letter was incorrectly addressed, it was returned undelivered on June 10, at which point Emergency Medicine mailed the notice to 7 Wells Avenue, Newton, Massachusetts. On May 30 she sent the second letter certified mail to JoAnn Barato-Mills of MBS, the employee who had negotiated and signed the Agreement on behalf of Rapier, at her place of business,

20 Altieri Way, Warwick, Rhode Island. Ms. Barato–Mills received the letter the following Monday, June 2, 1997.<sup>2</sup>

In the months following Emergency Medicine's notice of non-renewal, MBS continued to perform services under the Agreement. Meanwhile, Emergency Medicine solicited bids for a new service contract and, although MBS submitted a bid, Emergency Medicine awarded the new contract to a different service provider. MBS then asserted that, because Emergency Medicine's termination notice had been invalid, the Agreement had already extended automatically for an additional year, ending September 30, 1998.

Emergency Medicine filed a complaint seeking, inter alia, a declaration that its notice had effectively terminated the Agreement. The parties filed cross-motions for summary judgment on the validity of the termination notice, and the trial court granted judgment in favor of Emergency Medicine. This appeal ensued.

## II.

The Agreement entered into by Emergency Medicine and Rapier expressly reserved to either party the power to terminate the contract before it automatically renewed. Termination provisions are standard fare in modern contracts, see 1A Corbin on Contracts, § 265, at 531, and such provisions often require that the terminating party fulfill certain conditions before termination is effective, see 6 Corbin, § 1266 at 55–56. Where “the power to terminate is a conditional power,” termination is not effective until the party seeking termination can show that the condition has been fulfilled. See *id.* at 56. According to Rapier, Emergency Medicine did not fulfill the condition required for termination under the Agreement because it failed to provide Rapier with at least four months written notice. We are asked therefore to evaluate the effectiveness of Emergency Medicine's termination notice pursuant to the contract.

### *A. The Mailbox Rule*

The Agreement expressly conditions a party's right to terminate on that party “giving at least four (4) months written notice” to the other party. Where, as here, such “a condition is required by the agreement of the parties ... a rule of strict compliance traditionally applies.”

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<sup>2</sup> According to Ms. Monks, she also telephoned Ms. Barato–Mills on June 2, 1997, and notified her of Emergency Medicine's intent to terminate the Agreement. However, because the Agreement demands “written notice,” and, in any case, the four-month notice period had expired by June 2, this telephone call was not relied upon by the trial court, and has no bearing on our decision.

Farnsworth, Contracts § 8.3, at 571 (1990) (emphasis added). “Strict compliance” means that “[t]he notice to terminate, to be effective, must be given at the stipulated time.” *Fred Mosher Grain, Inc. v. Kansas Co-op. Wheat Mktg. Ass'n*, 136 Kan. 269, 15 P.2d 421, 425 (1932); see also 6 Corbin § 1266, at 65–66 (where the contract expresses a time period for notice, it is presumed that “time is of the essence”). As one court cautioned more than seventy-five years ago, “[t]he difference of one day in the giving of notice is small, in one view, but it is the distance across a necessary boundary in relations under the contract, and must be taken as decisive, or there can be no boundary.” *Brown Method Co. v. Ginsberg*, 153 Md. 414, 138 A. 402, 403–04 (1927). Accordingly, we must strictly enforce the four-month notice period bargained for by Rapier and Emergency Medicine.

The Agreement, as extended by renewal for one additional year, was set to expire on September 30, 1997. Counting back exactly four months, the last day on which Emergency Medicine had the power to terminate was May 31, 1997.<sup>5</sup> Although Emergency Medicine mailed notice letters on May 30, these letters were not received until after the notice period had expired. Thus, the timeliness of Emergency Medicine's notice turns on whether notice of termination is effective upon mailing, or upon receipt.

At common law, the default rule—i.e., the rule that governs unless the parties contract for different terms—makes notice effective only upon receipt, not mailing. See 1A Corbin § 265, at 532 (“If the agreement merely provides that one party may terminate by giving notice, the notice will be effective only when received, and not when it is started by mail or otherwise.”). . . . However, the parties may override the default rule by contract. See 6 Corbin § 1266, at 65 (“The time and manner of exercising a power of termination may be specified in the contract....”). In particular, the parties may contract to permit notice by mail. If they do, notice becomes effective upon mailing pursuant to the time-honored “mailbox rule.”<sup>6</sup> \*\*\*

Here, the Agreement unquestionably authorizes notice by mail. The notice paragraph expressly invites notice “sent by registered or certified mail.” This paragraph therefore triggers the “mailbox rule,” making notice effective upon mailing. Accordingly, Emergency Medicine's notice letters, mailed on May 30, 1997, took effect on that date, and were timely under the

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<sup>5</sup> The appellants concede in their brief that the deadline for providing four months written notice did not expire until Saturday, May 31, putting to rest any question about whether four months from September 30 was May 30 or May 31.

<sup>6</sup> The “mailbox rule” derives from the famous case, *Adams v. Lindsell*, 106 Eng. Rep. 250 (K.B.1818), which held that an offer was binding, and hence could no longer be revoked, once the offeree placed an acceptance in the mail. See Farnsworth, Contracts § 3.22, at 180–81.

Agreement's four-month notice period, which did not expire until May 31, unless the use of an address other than the one specified in the contract deprived Emergency Medicine of the benefit of the mailbox rule.

*B. The Mailing Address*

[The court held that while the four-month notice provision was an express condition of the contract, the parties did not intend “the use of the mailing address specified in the contract to be a condition precedent to valid termination.” Instead, the court held that “the parties identified specific addresses for the mailing of notice merely as a convenient means of ensuring timely delivery.” Because Rapier received actual notice through one of the letters sent on May 30 to JoAnn Barato–Mills of MBS, a designated agent of Rapier, the four-month notification condition was satisfied. The court also noted: “To be sure, a party that fails to use the address identified in the contract for mailing notice risks losing the benefit of the mailbox rule. . . . [I]f Emergency Medicine chose to give timely notice of termination by registered or certified mail sent to the specified address, and the notice was undelivered because of a failure by the postal service, Emergency Medicine would have still given timely notice of termination despite the non-delivery. . . . If, however, Emergency Medicine directed its otherwise timely notice of termination to the wrong address and there were no delivery, Emergency Medicine would lose the benefit of the mailbox rule.”]

*Affirmed.*

### Notes and Questions

1. The *Rapier* decision notes a common-law presumption against the mailbox rule, noting, “At common law, the default rule—i.e., the rule that governs unless the parties contract for different terms—makes notice effective only upon receipt, not mailing.” Can this view of the law be squared with the traditional mailbox rule?
2. What does actual notice mean in the context of this case? What risk did Emergency Medicine run in not sending to the addresses listed in the contract? How would the result have been different if the specific addresses were a condition of the contract? We will discuss conditions in other modules.
3. Work through the following mailbox rule problems between Yael and Zed concerning the sale of an antique vase. At the end of these timelines, is there a contract between Yael and Zed?

Problem A

July 1: Yael mailed an Offer to Zed to buy the vase for \$400.

July 2: Yael mailed a Revocation of the Offer to Zed.

July 3: Zed received Yael's Offer in the mail and mailed back an Acceptance to her Offer.

July 4: Zed received Yael's Revocation.

July 5: Yael received Zed's Acceptance.

Problem B

July 1: Yael mailed an Offer to Zed to buy the vase for \$400.

July 2: Yael mailed a Revocation of the Offer to Zed.

July 3: Zed received Yael's Offer in the mail and mailed back an Acceptance to her Offer.

July 4: Zed received Yael's Revocation.

Yael never received Zed's Acceptance, as it was lost in the mail.

Problem C

July 1: Yael mailed an Offer to Zed to buy the vase for \$400.

July 2: Zed received Yael's Offer in the mail.

July 3: Zed mailed back a Counteroffer for \$350.

July 4: Zed called Yael and provided an Acceptance to her \$400 Offer over the phone.

July 5: Yael received Zed's Counteroffer.

Problem D

July 1: Yael mailed an Offer to Zed to buy the vase for \$400.

July 2: Zed received Yael's Offer in the mail.

July 3: Zed mailed back a Counteroffer for \$350.

July 4: Zed mailed back an Acceptance to Yael's \$400 Offer.

July 5: Yael received Zed's Counteroffer.

July 6: Yael received Zed's Acceptance.

Problem E

July 1: Yael mailed an Offer to Zed to buy the vase for \$400.

July 2: Zed received Yael's Offer in the mail.

July 3: Zed mailed back an Acceptance to her Offer.

July 4: Zed called Yael and made a Counteroffer for \$350 over the phone. Yael rejected the Counteroffer. Zed did not mention his Acceptance.

July 5: Yael sold the vase to Xavier.

July 6: Yael received Zed's Acceptance.

## D. Accepting Online Form Agreements

By now you mastered the core common law rules concerning offer and acceptance. But how those rules, who were developed over hundreds of years, apply in an online environment? Websites and other apps often ask their users do click "I Agree" on their terms and conditions? Those agreements are called "click-wrap," but are they binding contracts? Other websites and apps include terms and conditions that state that they are accepted by using the service. Are those agreements, called "browse-wrap," binding contracts? The next case tackles those questions.

### **Kauders v. Uber**

486 Mass. 557 (Supreme Judicial Court of Massachusetts 2021)

KAFKER, J.

Plaintiffs Christopher Kauders and Hannah Kauders commenced a lawsuit against defendants Uber Technologies... in the Superior Court, claiming, among other things, that three Uber drivers, in violation of G. L. c. 272, § 98A, refused to provide Christopher Kauders with rides because he was blind and accompanied by a guide dog. Each of the plaintiffs registered with Uber through its cellular telephone application (app). Citing a provision in its terms and conditions, Uber sought to compel arbitration. The plaintiffs opposed arbitration on various grounds, including that there was no enforceable arbitration agreement. The judge granted Uber's motion, and the parties arbitrated their dispute in early 2018. On June 4, 2018, the arbitrator issued findings and a decision, ruling in favor of Uber on all of the plaintiffs' claims.

We [] conclude that Uber's terms and conditions did not constitute a contract with the plaintiffs. The app's registration process did not provide users with reasonable notice of the terms and conditions and did not obtain a clear manifestation of assent to the terms, both of which could have been easily achieved. Indeed, a review of the case law reveals that Uber has no trouble providing such reasonable notice and requiring express affirmation from its own

drivers. Here, in remarkable contrast, both the notice and the assent are obscured in the registration process. As a result, Uber cannot enforce the terms and conditions against the plaintiffs, including the arbitration agreement at issue here.

1. Background. We recite the undisputed facts as alleged in the complaint and as alleged by the parties in their filings on Uber's motion to compel arbitration.

a. Uber's registration process. Uber describes itself as a technology company that allows its users to request transportation services from drivers in their geographic area through its app. Before they can request trips, users must register with Uber. Users can register by means of their cellular telephones by using the app.

Christopher Kauders's registration process via the app involved three steps, with each step involving a separate screen. The first screen was titled "CREATE AN ACCOUNT." This title appeared in a gray bar at the top of the screen. The rest of the screen was a dark color. In the middle of the screen, there was white text that stated, "We use your email and mobile number to send you ride confirmations and receipts." Below the text, a keypad appeared by which the user could enter the required information. On this screen, the user was required to enter an e-mail address, a mobile telephone number, and a password. Once the user entered this information, a button in the top right corner of the screen that stated "NEXT" was enabled. All of the information was provided on a single screen; there was no need for the user to scroll to review any information. The user was required to press (or "click") "NEXT" to move to the second screen.

The second screen was titled "CREATE A PROFILE." The title again appeared in a gray bar at the top of the screen. On this screen, which has a similar dark background, the user was required to enter a first and last name and had the option to add a photograph. In the middle of this screen, white text stated, "Your name and photo helps your driver identify you at pickup." As with the first screen, a keypad appeared with which the user could enter the requested information. Also like the first screen, a button in the top right corner that stated "NEXT" was enabled once the user entered the required information.

The third screen was titled "LINK PAYMENT." Like the first two screens, the third screen had a dark background with a gray bar across the top. Under the gray bar, there was a white, rectangular field in which the user was required to enter a credit card number. Under the box, white, boldface text stated "scan your card" and "enter promo code." In the middle of the

screen, below the word “OR” in white text, there was a large, dark button labeled “PayPal” that provided another mechanism for entering payment information.<sup>7</sup>

At the bottom of the screen, there was white text that stated, “By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy.” This text was oddly divided into two parts. The first part of the sentence, which informed the user, “By creating an Uber account, you agree to the,” was far less prominently displayed than the words “Terms & Conditions and Privacy Policy,” which followed. The second part of the sentence -- “Terms & Conditions and Privacy Policy” -- was in a rectangular box and in boldface font. According to Uber, this presentation was used to indicate that the box was a clickable hyperlink. If a user clicked this box, the user would be taken to a screen that contained other clickable buttons, labeled “Terms & Conditions” and “Privacy Policy.” Once at this linked screen, if the user clicked the “Terms & Conditions” button, the terms and conditions would appear on the screen.

If the user interacted with the rectangular field at the top of the third screen, a number keypad appeared in the bottom half of the screen. The user could use the number keypad to enter credit card information. Once this keypad appeared, the white text and the link from the bottom of the screen moved to the middle of the screen between the rectangular box and the keypad. After a user filled in the credit card information, a button labeled “DONE” became clickable in the top right corner. Once the user clicked “DONE,” the user completed the account creation process.

Using this process, Christopher Kauders registered with Uber through the app on June 27, 2014. He used a cellular telephone to do so. Hannah Kauders registered with Uber sometime around October 2015.<sup>8</sup>

b. Uber’s terms and conditions. Uber’s terms and conditions are extensive and far reaching, touching on a wide variety of topics. Uber can amend the terms and conditions whenever it wants and without notice to the users that have already agreed to them. In fact, under the terms and conditions, the burden is on the user to frequently check to see if any changes have

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<sup>7</sup> PayPal is an Internet payment service.

<sup>8</sup> There is nothing in the record indicating that Hannah Kauders’s registration process differed in any way from the process described above. We therefore assume that both plaintiffs registered with Uber through the same process.

been made.<sup>10</sup> Yet, even if a user somehow detects a change, there is no way for the user to object to or contest any of the changes, as the changes are automatically binding on the user.

The terms and conditions contain numerous provisions, many of which are extremely favorable to Uber. There is a broad limitation of liability provision. This provision purports to release Uber from all liability for

“ANY INDIRECT, PUNITIVE, SPECIAL, EXEMPLARY, INCIDENTAL, CONSEQUENTIAL OR OTHER DAMAGES OF ANY TYPE OR KIND (INCLUDING PERSONAL INJURY, LOSS OF DATA, REVENUE, PROFITS, USE OR OTHER ECONOMIC ADVANTAGE). [UBER] SHALL NOT BE LIABLE FOR ANY LOSS, DAMAGE OR INJURY WHICH MAY BE INCURRED BY YOU .... YOU EXPRESSLY WAIVE AND RELEASE [UBER] FROM ANY AND ALL ANY [sic] LIABILITY, CLAIMS OR DAMAGES ARISING FROM OR IN ANY WAY RELATED TO THE THIRD PARTY TRANSPORTATION PROVIDER.”

As the judge below recognized, this provision “totally extinguishes any possible remedy” against Uber.

The “Dispute Resolution” section appears near the end of the terms and conditions. It provides that “any dispute, claim or controversy arising out of or relating to this Agreement ... will be settled by binding arbitration.” The terms and conditions describe the procedures to be used in the arbitration. The terms and conditions also mandate that “[t]he arbitrator’s award damages must be consistent with the terms of the ‘Limitation of Liability’ section above as to the types and the amounts of damages for which a party may be held liable.” If Uber makes changes to the dispute resolution section, the user has thirty days in which to object to the changes.<sup>13</sup>

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<sup>10</sup> We note that the United States Court of Appeals for the Ninth Circuit has held that a provision in terms of use providing for unilateral changes without notice to the other parties is unenforceable. See *Douglas v. United States Dist. Court for the Cent. Dist. of Cal.*, 495 F.3d 1062, 1066 (9th Cir. 2007) (per curiam), cert. denied sub nom. *Talk America, Inc. v. Douglas*, 552 U.S. 1242, 128 S. Ct. 1472, 170 L. Ed. 2d 296 (2008) (“a party can’t unilaterally change the terms of a contract; it must obtain the other party’s consent before doing so.... Even if [a user’s] continued use of [a] service could be considered assent, such assent can only be inferred after he received proper notice of the proposed changes”).

<sup>13</sup> These terms and conditions are apparently not uncommon in similar online contracts. See, e.g., Benoliel & Becher, *The Duty to Read the Unreadable*, 60 B.C. L. Rev. 2255, 2265-2266 (2019) (identifying common provisions); Hartzog, *Website Design as Contract*, 60 Am. U. L. Rev. 1635, 1642 (2011) (same). This is true even though some of these provisions have been held to be unlawful or unenforceable. See, e.g., *Douglas*, 495 F.3d at 1066. See also Preston, “Please Note: You Have

c. Procedural history. . .Uber moved to compel arbitration in June 2017, relying in part on a Federal District Court decision in *Cullinane* that held that Uber’s terms and conditions, and specifically the arbitration provision, were enforceable. See *Cullinane vs. Uber Techs., Inc.*, U.S. Dist. Ct., No. 14-14750-DPW, 2016 WL 3751652 (D. Mass. July 11, 2016) (*Cullinane I*).<sup>14</sup> The plaintiffs opposed arbitration on various grounds, including that the terms and conditions were not enforceable against them because they neither received adequate notice of the existence of the terms and conditions nor assented to them. The Superior Court judge granted Uber’s motion to compel, omitting any discussion or analysis of the contract formation issue.

The case proceeded to arbitration in early 2018, and the arbitrator issued the decision on June 4, 2018. . . rul[ing] for Uber on all of the plaintiffs’ claims because the drivers were independent contractors, not employees, of Uber, and therefore, Uber was not liable for the drivers’ actions.

On June 25, 2018, the First Circuit reversed the District Court’s ruling in *Cullinane I* and held that the same registration process at issue here did not create an enforceable contract under Massachusetts law between Uber and its users as to the terms and conditions. See *Cullinane II*, 893 F.3d at 64. Specifically, the First Circuit held that Uber failed to provide users with adequate notice of the existence of the terms and the hyperlink to those terms.

On January 2, 2019, over six months after the arbitrator issued his award, the judge granted the plaintiffs’ motion and vacated the earlier order compelling arbitration on the ground that there was no enforceable agreement to arbitrate. The judge first observed that the original order failed to address the contract formation argument even though the plaintiffs had raised it in their opposition to the motion to compel. The judge then concluded that, in light of the Appeals Court’s decision in *Ajemian v. Yahoo!, Inc.*, 83 Mass. App. Ct. 565, 575-577, 987 N.E.2d 604 (2013), S.C., 478 Mass. 169, 84 N.E.3d 766 (2017) (cert. denied), and the First Circuit’s recent decision in *Cullinane II*, the original order compelling arbitration was error and that no enforceable contract existed. As a result, the judge allowed the plaintiffs’ motion for reconsideration, denied Uber’s motion to compel arbitration, and denied Uber’s motion to confirm the award.

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Waived Everything?: Can Notice Redeem Online Contracts?, 64 Am. U. L. Rev. 535, 555 (2015) (“Wrap contracts frequently include disclaimers that actually are unenforceable, and that the drafters know are unenforceable, but are included anyway”).

<sup>14</sup> As explained infra, this decision would later be reversed by the First Circuit.

2. Discussion. ... Uber argues that we should reverse the judge's order denying Uber's motion to compel because the terms and conditions were an enforceable contract between the parties. We [] conclude that Uber's terms and conditions did not constitute an enforceable contract.

c. Enforceability of the terms and conditions.

i. Legal standard for online contract formation.

We have not previously considered what standard a court should use when considering issues of contract formation for online contracts. That being said, the fundamentals of online contract formation should not be different from ordinary contract formation. See, e.g., *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1034 (7th Cir. 2016). The touchscreens of Internet contract law must reflect the touchstones of regular contract law. standard, focusing on whether the contract provisions at issue "were reasonably communicated and accepted."

In evaluating whether provisions in an online agreement were enforceable, the Appeals Court in *Ajemian* used a reasonableness standard, focusing on whether the contract provisions at issue "were reasonably communicated and accepted." *Ajemian*, 83 Mass. App. Ct. at 574, 987 N.E.2d 604. Under this standard, for there to be an enforceable contract, there must be both reasonable notice of the terms and a reasonable manifestation of assent to those terms. *See id.* at 574-575, 987 N.E.2d 604, quoting *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 35 (2d Cir. 2002); *Schnabel*, 697 F.3d at 120. See also Conroy & Shope, Look Before You Click: The Enforceability of Website and Smartphone App Terms and Conditions, 63 Boston Bar J. 23, 23 (Spring 2019) (Conroy & Shope) ("This two-part test is consistent with the approach taken by other courts around the country").

We conclude that this two-prong test, focusing on whether there is reasonable notice of the terms and a reasonable manifestation of assent to those terms, is the proper framework for analyzing issues of online contract formation. Setting out these general fundamental contract principles is not, however, the difficult part of analysis. "The trick here is to know how to apply these general principles to newer forms of contracting" over the Internet. *Sgouros*, 817 F.3d at 1034. We elaborate more on each prong *infra*. We also emphasize that the burden of proof on both prongs is on Uber, the party seeking to enforce the contract. See *Canney v. New England Tel. & Tel. Co.*, 353 Mass. 158, 164, 228 N.E.2d 723 (1967).

A. Reasonable notice. The first prong requires that the offeree receive reasonable notice of the terms of the online agreement. Where the offeree has actual notice of the terms, this prong is satisfied without further inquiry. *Miller*, 448 Mass. at 680, 863 N.E.2d 537 (party bound by

terms of contract regardless of whether party actually read terms). Actual notice will exist where the user has reviewed the terms. It will also generally be found where the user must somehow interact with the terms before agreeing to them.

Absent actual notice, the totality of the circumstances must be evaluated in determining whether reasonable notice has been given of the terms and conditions. See *Sgouros*, 817 F.3d at 1034-1035 (discussing reasonable notice, and relevant considerations, in context of contracting over Internet). This is “clearly a fact-intensive inquiry.” *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 76 (2d Cir. 2017). See *Sgouros*, supra. It includes consideration of the form of the contract. See, e.g., *Polonsky v. Union Fed. Sav. & Loan Ass’n*, 334 Mass. 697, 701, 138 N.E.2d 115 (1956) (terms may not be enforceable where document containing or presenting terms to offeree does not appear to be contract); *Sgouros*, supra at 1035 (discussing how contracting over Internet is different from paper transactions and how reasonable users of Internet may not understand that they are entering into contractual relationship). In determining whether the notice is reasonable, the court should also consider the nature, including the size, of the transaction, whether the notice conveys the full scope of the terms and conditions, and the interface by which the terms are being communicated. *Sgouros*, supra at 1034 (in case involving contracting for credit scores over Internet, “we might ask whether the web pages presented to the consumer adequately communicate all the terms and conditions of the agreement”). For Internet transactions, the specifics and subtleties of the “design and content of the relevant interface” are especially relevant in evaluating whether reasonable notice has been provided. *Meyer*, supra at 75. See *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233 (2d Cir. 2016).

In examining the interface, we evaluate the clarity and simplicity of the communication of the terms. Does the interface require the user to open the terms or make them readily available? How many steps must be taken to access the terms and conditions, and how clear and extensive is the process to access the terms? See *Cullinane II*, 893 F.3d at 62, quoting *Ajemian*, 83 Mass. App. Ct. at 575, 987 N.E.2d 604 (court should consider “the language that was used to notify users that the terms of their arrangement ... could be found by following the link, how prominently displayed the link was, and any other information that would bear on the reasonableness of communicating [the terms]”). Ultimately, the offeror must reasonably notify the user that there are terms to which the user will be bound and give the user the opportunity to review those terms.

B. Reasonable manifestation of assent. When considering whether the user assented to the terms of the online agreement, we consider the specific actions required to manifest assent. A user may be required to expressly and affirmatively manifest assent to an online agreement by

clicking or checking a box that states that the user agrees to the terms and conditions. See, e.g., *Emmanuel v. Handy Techs., Inc.*, 442 F. Supp. 3d 385, 389 (D. Mass. 2020) (user required to affirmatively indicate assent by clicking “Accept” button); *Covino v. Spirit Airlines, Inc.*, 406 F. Supp. 3d 147, 152-153 (D. Mass. 2019) (enforcing agreement where user checked box acknowledging agreement with terms and conditions set forth in offeror’s contract of carriage); *Wickeberg v. Lyft, Inc.*, 356 F. Supp. 3d 179, 181 (D. Mass. 2018) (screen required user to click box indicating that he “agree[d] to Lyft’s terms of services” before he could continue with registration process). These are often referred to as “clickwrap” agreements, and they are regularly enforced. See Conroy & Shope, *supra* at 23. See also *Ajemian*, 83 Mass. App. Ct. at 576, 987 N.E.2d 604; *Wickeberg*, *supra* at 184; Note, The Electronic “Sign-in-Wrap” Contract: Issues of Notice and Assent, the Average Internet User Standard, and Unconscionability, 50 U.C. Davis L. Rev. 535, 539 (2016) (“Clickwrap contracts require Internet users to affirmatively click ‘I agree’ when assenting to the terms and conditions on a website or making online purchases”). As one court has observed, “[w]hile clickwrap agreements ... are not necessarily required ..., they are certainly the easiest method of ensuring that terms are agreed to.” *Nicosia*, 834 F.3d at 237-238. These are the clearest manifestations of assent.

Requiring a user to expressly and affirmatively assent to the terms, such as by indicating “I Agree” or its equivalent, serves several important purposes. It puts the user on notice that the user is entering into a contractual arrangement. This is particularly important regarding online services, where services may be provided without requiring compensation or contractual agreements, and the users may not be sophisticated commercial actors. Without an action comparable to the solemnity of physically signing a written contract, for example, we are concerned that such users may not be aware of the implications of their actions where agreement to terms is not expressly required. See *Sgouros*, 817 F.3d at 1035 (“a person using the Internet may not realize that she is agreeing to a contract at all, whereas a reasonable person signing a physical contract will rarely be unaware of that fact”); Moringiello, Signals, Assent and Internet Contracting, 57 Rutgers L. Rev. 1307, 1316 (2005) (“In contract law, a written signature provides the traditional evidence of assent because when we are asked to sign something, we are conditioned to think that we are doing something important”). Requiring an expressly affirmative act, therefore, such as clicking a button that states “I Agree,” can help alert users to the significance of their actions. Where they so act, they have reasonably manifested their assent.

Where no such express agreement is required by the offeror, we must turn to other less obvious manifestations of assent to the terms. This makes the task of the court more difficult. See *Cullinane II*, 893 F.3d at 62 (“We note at the outset that Uber chose not to use a common

method of conspicuously informing users of the existence and location of terms and conditions: requiring users to click a box stating that they agree to a set of terms, often provided by hyperlink, before continuing to the next screen”). In these cases, courts must again carefully consider the totality of the circumstances, and assent may be inferred from other actions the users have taken. Where the connection between the action taken and the terms is unclear, or where the action taken does not clearly signify assent, it will be difficult for the offeror to carry its burden to show that the user assented to the terms.

ii. Application. Turning first to whether the plaintiffs had reasonable notice of the terms and conditions, we begin with the form and nature of the transaction. Users are registering through an app that will connect drivers and riders for future short-term, small-money transactions. The registration process expressly explained: “We use your email and mobile number to send you ride confirmations and receipts”; and “Your name and photo helps your driver identify you at pickup.” Reasonable users may not understand that, by simply signing up for future ride services over the Internet, they have entered into a contractual relationship. See, e.g., *Sgouros*, 817 F.3d at 1035 (signing up for credit-score information over Internet not obviously contractual). It is qualitatively different from a large business deal where sophisticated parties hire legal counsel to review the fine print. It is also not comparable to the purchase or lease of an apartment or a car, where the size of the personal transaction provides some notice of the contractual nature of the transaction even to unsophisticated contracting parties.

It is also by no means obvious that signing up via an app for ride services would be accompanied by the type of extensive terms and conditions present here. Among those terms are those that indemnify Uber from all injuries that riders experience in the vehicle, subject riders’ data to use by Uber for purposes besides transportation pick-up, establish conduct standards for riders and other users, and require arbitration. Indeed, certain of the terms and conditions may literally require an individual user to sign his or her life away, as Uber may not be liable if something happened to the user during one of the rides.

In these circumstances, we must carefully consider the interface and whether it reasonably focused the user on the terms and conditions. That notice was essentially as follows. At the bottom of one screen in Uber’s registration process, the following language appeared: “By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy.” This text was divided into two parts, with the first part -- describing the consequences of creating an account -- being less prominently displayed than the link to the terms and conditions and the privacy policy. The app also contained a button that led to a link to the terms and conditions.

The question then becomes whether this type of notice was reasonable, particularly given the nature of the online transaction and the scope of the terms and conditions.

The notice of the terms was not reasonable for several reasons. Importantly, the interface did not require the user to scroll through the conditions or even select them. The user could fully register for the service and click “done” without ever clicking the link to the terms and conditions. The connection between the creation of the account and the terms and conditions was also somewhat oddly displayed in the two-part format, with the significant information (i.e., that by creating the account, the user expresses his or her agreement) being displayed less prominently than other information.

This is in striking contrast to the interface of the app provided to drivers by Uber, as demonstrated by the case law. Our review of numerous cases demonstrates that Uber required its drivers, before signing up, to review the terms and conditions by clicking a hyperlink. For example, in one case involving the driver registration process in June 2014, the Uber app there carefully required drivers to consider the terms and conditions. See *Singh v. Uber Techs., Inc.*, 235 F. Supp. 3d 656, 661 (D.N.J. 2017), vacated on other grounds, 939 F.3d 210 (3d Cir. 2019). “When [the driver] logged on to the Uber App with his unique user name and password, he was given the opportunity to review the [agreement] by clicking a hyperlink to the [agreement] within the Uber App.” *Id.* “To advance past the screen with the hyperlink and actively use the Uber App, [the driver] had to confirm that he had first reviewed and accepted the [agreement] by clicking ‘YES, I AGREE.’ After clicking ‘YES, I AGREE,’ he was prompted to confirm that he reviewed and accepted the [agreement] for a second time.” *Id.* The app was also designed to allow the drivers ample time to review the terms and conditions. *Id.* (driver accepted terms three months after terms first made available for review). See *Capriole vs. Uber Techs., Inc.*, U.S. Dist. Ct., No. 1:19-cv-11941-IT, 2020 WL 1536648 (D. Mass. Mar. 31, 2020) (registration required clicking “YES I AGREE” at least twice and informed registrant that “[b]y clicking below, you represent that you have reviewed all the documents above and that you agree to all the contracts above”); *Okereke vs. Uber Techs., Inc.*, U.S. Dist. Ct., No. 16-12487-PBS, 2017 WL 6336080 (D. Mass. June 13, 2017) (same).

The contrast between the notice provided to drivers and that provided to users is telling. As Uber is undoubtedly aware, most of those registering via mobile applications do not read the terms of use or terms of service included with the applications. See, e.g., Conroy & Shope, *supra* at 23 (“Most users will not have read the terms and, in some instances, may not have even seen the terms or any reference to them”). See also Ayres & Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 *Stan. L. Rev.* 545, 547-548 (2014) (describing

empirical evidence showing number of Internet users who read terms is “miniscule”); Tentative Draft Restatement of the Law of Consumer Contracts, Reporters’ Introduction (Apr. 18, 2019) (“The proliferation of lengthy standard-term contracts, mostly in digital form, makes it practically impossible for consumers to scrutinize the terms and evaluate them prior to manifesting assent”). Yet the design of the interface for the app here enables, if not encourages, users to ignore the terms and conditions. See *Sgouros*, 817 F.3d at 1035 (interface misleading user about existence of contractual terms weighed against enforcing terms).

We also consider the specific placement in the app of the link to the terms and conditions. On all three screens that a user was required to fill out, the top of the screen was where the user was required to focus and fill in information. It was not until the third screen that any reference to the terms and conditions appeared. The hyperlink to the terms and conditions was also at the very bottom of this “LINK PAYMENT” screen. The purpose of the screen, as indicated by the title at the top, was for the user to enter payment information. The place to enter that information – a white field set apart against a dark background -- was at the top of the screen. Under that field, there were two separate pieces of text in boldface, white font that related to the payment purpose of the screen. There was also a large button in the middle of the screen that provided another mechanism through which a user could link a payment. Nothing about this third screen, therefore, conveyed to a user that he or she should open a link that would reveal an extensive set of terms and conditions at the bottom of the screen to which the user was agreeing. As discussed previously, the statement explaining the connection between creating the account and agreeing to the terms, which would encourage opening and reviewing the terms, was displayed less prominently than the other information on the screen.

Similarly, the title of the screen, as well as much of the information on the screen, focused on payment information, not the terms and conditions. Other words on the screen also appeared as prominently as the link, if not more so. For example, the phrases “scan your card” and “enter promo code” appeared to be in boldface as well as the same size as the link. Further, the PayPal button appeared in the middle of the screen in a different color and in what appeared to be a larger box than the terms and conditions link. Put succinctly, “the presence of other terms on the same screen with a similar or larger size, typeface, and with more noticeable attributes diminished the hyperlink’s capability to grab the user’s attention.” *Cullinane II*, 893 F.3d at 64.

We also observe that a user could complete the “LINK PAYMENT” screen and the account creation process without ever focusing on the link or the notice on the screen. Uber relies on the fact that the notice of and the link for the terms and conditions “fall[ ] directly in the

middle of the screen, where any reasonable user's eyes would naturally be drawn.” This assertion is contradicted by Uber's own evidence, however, which shows that the notice and link only appear in the middle of the screen if the user interacts with the field where the user can enter credit card information and the number keypad appears. The limited record before us indicates that, unless this happens, the notice and link for the terms and conditions remain at the very bottom of the screen, while the white credit card field remains at the top and the PayPal button remains in the middle of the screen, where (as Uber puts it) “any reasonable user's eyes would naturally be drawn.”

Moreover, while the record does not explain what happens if the user clicks “scan your card” or the PayPal button in the middle of the screen, it seems likely that, in either situation, the terms and conditions notice and link either remain at the bottom of the screen or disappear from view altogether. So, if a user uses either of these features rather than clicking the white box to enter a credit card number, the user may never even see the notice and the link at the bottom of the screen.<sup>26</sup> The user's attention is simply never directed to the notice and the link; it is instead directed at the white rectangular box or the number keypad.

In sum, we do not consider the notice provided by this interface reasonable. In such a transaction, a user may reasonably believe he or she is simply signing up for a service without understanding that he or she is entering into a significant contractual relationship governed by wide-ranging terms of use. Instead of requiring its users to review those terms and conditions as it appears to do with its drivers, Uber has designed an interface that allows the registration to be completed without reviewing or even acknowledging the terms and conditions. In these circumstances, Uber has failed to show that it provided the plaintiffs with reasonable notice of the terms and conditions.

As we conclude that there was not reasonable notice of the terms, a contract cannot have been formed here. We nonetheless observe that the interface here also obscured the manifestation of assent to those terms. The interface did state in one sentence broken into two parts, one

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<sup>26</sup> For this reason, so-called “browsewrap” agreements have been held to be unenforceable. See, e.g., *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1179 (9th Cir. 2014). A “browsewrap” agreement is an agreement where “website terms and conditions of use are posted on the website typically as a hyperlink at the bottom of the screen.” *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009), *aff'd*, 380 Fed. Appx. 22 (2d Cir. 2010). These agreements are often unenforceable because there is no assurance that the user was ever put on notice of the existence of the terms or the link to those terms. See, e.g., *Nguyen*, *supra* at 1178-1179 (“where a website ... provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on -- without more -- is insufficient to give rise to constructive notice.... [T]he onus must be on website owners to put users on notice of the terms to which they wish to bind consumers”).

more prominent than the other, “By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy.” The words “Terms & Conditions and Privacy Policy” were more prominently displayed than what it meant to create the account. Uber claims this highlights the terms and conditions. A reasonable alternative interpretation is that it downplays the legal significance of creating the account.

What is clear is that a user could create an account without ever affirmatively stating that he or she agreed to the terms and conditions, or even opening those terms and conditions. Instead, the final step in the process was to input payment information and click “DONE.” “DONE” is also different from, and less clear than, other affirmative language such as “I agree.” Furthermore, there was nothing stating that “DONE” itself signified either creation of an account or acceptance of the terms. See *Nicosia*, 834 F.3d at 236-237 (“Nothing about the ‘Place your order’ button alone suggests that additional terms apply, and the presentation of terms is not directly adjacent to the ‘Place your order’ button so as to indicate that a user should construe clicking as acceptance”). The connection between the action and the terms was thus not direct or unambiguous. Uncertainty and confusion in this regard could have simply been avoided by requiring the terms and conditions to be reviewed and a user to agree. By obscuring this process, the app invited questions about whether the interface was designed to enable a user to sign up for services without requiring him or her to understand that he or she was contractually bound. See *Wilson v. Hunnige, Inc.*, 351 F. Supp. 3d 1308, 1317 (W.D. Wash. 2018), *aff’d*, 944 F.3d 1212 (9th Cir. 2019) (“The fact is, [the offeror] chose to make its Terms non-invasive so that users could charge ahead to play their game. Now, they must live with the consequences of that decision”).

Again, Uber’s own registration process for its drivers stands in striking contrast. As demonstrated by the case law, after clicking “‘YES, I AGREE,’ [the driver] was prompted to confirm acceptance a second time. On the second screen, the App state[d]: ‘PLEASE CONFIRM THAT YOU HAVE REVIEWED [sic] ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS’ ” (citations omitted). Okereke, *supra*. Additionally, in that case “Uber received an electronic receipt following [the driver’s] acceptance” and “[t]he receipt only could have been generated by someone using [the driver’s] unique username and password and hitting ‘YES, I AGREE’ twice when prompted by the Uber App.” *Id.* Other cases involving the driver registration process for Uber describe similar registration processes. See, e.g., *Capriole, supra* (registration required clicking “YES I AGREE” at least twice and informed registrant that “[b]y clicking below, you represent that you have reviewed all the documents above and that you agree to all the contracts above”); *Singh*, 235

F. Supp. 3d at 661 (same). Clearly, Uber knows how to obtain clear assent to its terms. We therefore conclude that there was no reasonable manifestation of assent here.

3. Conclusion. For the foregoing reasons, we conclude that there was no enforceable agreement between Uber and the plaintiffs, and therefore the dispute was not arbitrable. The case is remanded for further proceedings consistent with this opinion.

### Notes and Questions

1. Firms will often accompany the sales of goods or services with boilerplate language that purports to limit liability, require the buyer to indemnify the seller, or require the parties to arbitrate any disputes. When those contracts are formed online, courts must determine whether and when to treat consumers as on notice of and assenting to those boilerplate terms.
2. A new draft Restatement of Consumer Contracts notes that “courts routinely enforce clickwraps .... Out of a total of 92 cases, courts have enforced clickwraps in every case, absent fraud, unconscionability, or other intervening factors, such as insufficient notice,” cited by Stephen L. Sepinuck, *Designing a User Interface for Customer Assent*, 11 *Transactional Law*. 1, 2 (2021). Other modules will consider questions of fraud and unconscionability more directly.
3. How does the court in *Kauders* analyze whether Uber’s customers were on notice of and assented to Uber’s arbitration clause?
4. Is it clear to you why, as the court in *Kauders* notes in footnote 26, “browsewrap” agreements have been held to be unenforceable? Should those agreements be held unenforceable? Why or why not?