Cue Lee Corso: Reprieve From Heightened Standard To Enforce Online Arbitration May Be Short Lived

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(by **Casey Alan Coyle** and **Ryan McCann**)

Lee Corso was a fixture in college football for over 60 years, first as a coach and then as an analyst on ESPN's *College GameDay* program. Coach Corso is known to many casual sports fans for his headgear segment, where he would put on the head of the mascot of the team he picked to win the signature game of the week—a feat he accomplished 431 times throughout his illustrious broadcasting career. But for diehard *College GameDay* fans, Coach Corso is synonymous with his catchphrase "Not so fast, my friend!," which he often employed (with glee) when disagreeing with a pick from another analyst. While the college football season does not kick off for another six months, Coach Corso's catchphrase is apropos because the reprieve from the heightened standard to enforce online arbitration agreements in Pennsylvania may be short lived.

Chilutti v. Uber

The story begins in 2016, when a woman registered for an Uber rider account. As part of the registration process, the woman agreed to Uber's hyperlinked terms and conditions, which, in turn, contained an arbitration agreement. Such agreements are commonly referred to as "browsewrap" agreements. In contrast, "clickwrap" agreements are where a website presents users with specified contractual terms on a pop-up screen and users must check a box explicitly stating "I agree" in order to proceed. Three years later, the woman was injured while riding in an Uber. She and her husband subsequently filed a negligence suit against the company and its subsidiaries. The defendants filed a petition to compel arbitration, arguing that the terms and conditions of Uber's app required the couple to arbitrate their claims. The trial court granted the petition and stayed the matter pending arbitration, and the couple appealed to the Superior Court.

A Superior Court panel reversed, holding for the first time that an order compelling arbitration constitutes a collateral order, and thus, is immediately appealable. *See Chilutti v. Uber Technologies*, No. 1023 EDA 2021, 2022 WL 6886984, at *5 (Pa. Super. Ct. Oct. 12, 2022) *withdrawn* (Pa. Super. Ct. Dec. 27, 2022). Turning to the merits, the panel adopted a new, "strict[]" standard "to demonstrate a party's unambiguous manifestation of assent to arbitration," under which an online arbitration agreement is only valid if: (1) "explicitly stating on the registration websites and application screens that a consumer is waiving a right to a jury trial when they agree to the company's 'terms and conditions,' and the registration process cannot be completed until the consumer is fully informed of that waiver;" and (2) "when the agreements are available for viewing after a user has clicked on the hyperlink, the waiver should not be hidden in the 'terms and conditions' provision but should appear at the top of the first page in bold, capitalized text." *Chilutti,* No. 1023 EDA 2021, *slip op.* at 30. In doing so, however, the panel never addressed the Federal Arbitration Act ("FAA") beyond a passing reference to the statute. The FAA "places arbitration agreements on equal footing with other contracts." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). Therefore, per the FAA, arbitration agreements may only be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Id.* at 68. In other words, the FAA prohibits courts from creating special rules to enforce arbitration agreements.

The Superior Court subsequently granted reargument and withdrew the panel's opinion. By a vote of 6-3, the *en banc* Superior Court vacated the trial court's order, with the majority effectively adopting the panel's withdrawn opinion as its own. *Chilutti v. Uber Techs., Inc*., 300 A.3d 430, 439 (Pa. Super. Ct. 2023) ("*Chilutti I*"), *rev'd*, ___ A.3d ___, 2026 WL 156181 (Pa. 2026) ("*Chilutti II*"). Uber sought further review from the Pennsylvania Supreme Court, and on August 27, 2024, the Supreme Court granted Uber's Petition for Allowance of Appeal.

Cobb v. Tesla

Approximately a month later, on September 26, 2024, the Philadelphia County Court of Common Pleas issued its Order and Opinion in *Cobb v. Tesla, Inc.*, Case ID 231202254. There, an employee filed a class action against Tesla following a data breach at the company where the personal identifying information of the employee and others were stolen. Tesla responded by filing a petition to compel arbitration based on an arbitration provision contained in an employment agreement that the employee signed digitally before starting at the company. The trial court denied the petition, and in the process, extended the novel *Chilutti I* standard beyond the browsewrap agreement context. Relying on *Chilutti I*, the trial court held that the arbitration provision failed to provide "reasonably conspicuous notice" of the terms that would bind the employee, and therefore, was unenforceable, because the provision "is in small font, is not underlined, capitalized or bolded, and is not set off with a heading or in a different font color," among other reasons. *Cobb*, *slip op.* at 4. The trial court further held, albeit in a conclusory manner, that the "FAA does not preempt" the elevated standard established by *Chilutti I*. *Id.* at 6. However, at least two federal district courts reached the opposite conclusion in separate thorough and well-reasoned decisions. *Dieffenbach v. Upgrade, Inc.*, No. 4:23-CV-1427, 2025 WL 1239238, at *8 (M.D. Pa. Apr. 29, 2025) (per Munley, J.) (*Chilutti I* "is . . . in conflict with the language of the FAA"); *Happy v. Marlette Funding, LLC*, 744 F.Supp.3d 403, 412 (W.D. Pa. 2024) (per Paradise Baxter, J.) (finding the precedential effect of the Superior Court's decision in *Chilutti I* "questionable for a number of reasons," including that "the FAA preempts state laws that condition [] the enforceability of an arbitration clause upon a specific notice requirement" (internal citation and quotation marks omitted)).

Tesla appealed the decision to the Superior Court, which, unlike the plaintiff in *Chilutti I*, it had the ability to do as of right. The case was argued before a three-judge panel on October 21, 2025. While that decision was pending, the Pennsylvania Supreme Court issued its long awaited opinion in *Chilutti II* on January 21, 2026, reversing the *en banc* Superior Court and holding that the trial court's order granting Uber's petition to compel arbitration and staying court proceedings does not qualify as a collateral order. 2026 WL 156181, at *7. Because the Supreme Court ruled that the Superior Court lacked jurisdiction over the appeal, it did not address the substantive issues raised in *Chilutti I*, namely, whether the "strict[]" standard adopted by the Superior Court to enforce online arbitration agreements violated the FAA.

Then, on February 18, 2026, the Superior Court issued its non-precedential opinion in *Cobb*, holding that the trial court erred in denying Tesla's petition to compel arbitration. No. 2879 EDA 2024, 2026 WL 458470, at *4 (Pa. Super. Ct. Feb. 18, 2026). The panel began by acknowledging that, while the trial court was influenced by its reading of *Chilutti I*, "*Chilutti I* is no longer controlling law." *Id.* at *3 n.5. The panel therefore applied what it termed as the "well-established test" for determining whether a valid agreement to arbitrate exists—namely, that "courts apply state law principles of contract law." *Id.* at *4. When applying those principles, the panel held that there was a valid agreement. However, the trial court did not address whether the parties' dispute falls within the scope of the arbitration agreement—which is the second part of the two-part test to determine whether to compel arbitration—and according to the panel, neither party offered "substantive advocacy on the issue or provided "any pertinent legal authority." *Id.* at *5. The panel thus remanded the matter to the trial court for consideration of that issue.

But the most significant passage of the panel's opinion was reserved to a footnote. In footnote 6, the panel wrote: "Assuming *arguendo* that the general principles articulated by this Court in *Chilutti I* represent the current state of the law, notwithstanding the fact that the case has been overturned, we do not find that the particularized requirements for conspicuity of arbitration agreements outlined in that case apply here" because *Chilutti I* "arose from, and pertained to, a specific context, namely, a browsewrap agreements." *Id.* at *4 n.6. As such, "even if the legal analysis underlying *Chilutti I* is sound as to the enforceability of browsewrap agreements, it simply has no bearing outside that peculiar context." *Id.* At least one other Pennsylvania court similarly interpreted the now vacated decision in *Chilutti I* as applying to browsewrap agreements only. *Eichlin v. GHK Co.*, 746 F. Supp. 3d 247, 255 (E.D. Pa. 2024) ("The Court finds that *Chilutti* has no import on the instant case because the decision in *Chilutti* is framed in the context of lengthy and hidden browsewrap agreements, not two-page written buyer's orders like the one at bar.").

What's Next

Many in the defense bar gave a "sigh of relief" after the Supreme Court's ruling in *Chilutti II*. Riley Brennan, "Arbitration Law in Pa. Sees 'Reset' Following High Court's Uber Decision, Lawyers Say," The Legal Intelligencer (Jan. 27, 2026). But that excitement may soon be short lived because the Superior Court's panel in *Cobb* provides a pathway to revive the now defunct standard in *Chilutti I*. Therefore, and with the possibility of further appellate review in *Cobb* (the respective deadlines for reargument and allocatur have yet to expire), the reprieve afforded by *Chulitti II* may prove temporary. Cue Lee Corso.

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