

Trial News

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Uber app's forced arbitration clause is unenforceable

By Kate Halloran | January 28, 2021

Uber Technologies, Inc. cannot bind plaintiffs bringing discrimination claims against it to a forced arbitration agreement in its online terms and conditions, the Massachusetts Supreme Judicial Court has ruled. Applying traditional principles of contract formation to the online contract contained in Uber's app, the court held that the plaintiffs did not have reasonable notice of the contract's terms nor had they assented to the terms. (*Kauders v. Uber Tech., Inc.*, 2021 WL 18927 (Mass. Jan. 4, 2021).)

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Christopher Kauders, who is blind and is accompanied by a guide dog, signed up for Uber's rideshare app on his smartphone. He followed a set of screens to register and enter his payment information, and at the end of the process, clicked on a button that said "Done." His daughter, Hannah, also signed up for the app through the same process. After several Uber drivers refused rides for Christopher because he was blind and had his guide dog with him, the Kauderses sued Uber in Massachusetts state court. Based on the terms and conditions contained in the app registration, the defendant moved to compel arbitration. The plaintiffs argued that they had never received notice of the arbitration agreement nor had they assented to it.

The trial court granted the motion, and the dispute proceeded to arbitration. In June 2018, the arbitrator ruled in favor of Uber on all of the plaintiffs' claims, finding that the company could not be liable for its drivers' actions because they were independent contractors, not employees. Later that month, the First Circuit found in *Cullinane v. Uber Technologies, Inc.* (893 F.3d 53) that the same registration process the Kauderses followed in the app did not create a valid contract because it lacked reasonable notice to the user of its terms and conditions, including the arbitration agreement. When Uber petitioned the trial court to confirm the arbitration decision in the Kauderses' case, the judge allowed the plaintiffs to move for reconsideration in light of *Cullinane*. The judge granted that motion and reversed his earlier ruling to compel arbitration on the grounds that the app's contract was not enforceable. AAJ filed a joint **amicus brief** with the Massachusetts Academy of Trial Attorneys in support of the plaintiffs.

On appeal to the Massachusetts high court, Uber argued that the plaintiffs had missed their window to appeal the arbitration decision, that the judge abused his discretion in hearing the motion for reconsideration, and that its contract was enforceable. The court ruled that under the Massachusetts Arbitration Act, the plaintiffs met the requirements to preserve the arbitrability question for appeal. But it agreed with the defendant that the judge abused his discretion to grant the motion for reconsideration because once an arbitration decision had been reached, the judge should have confirmed it and that would have allowed the plaintiffs to appeal. However, rather than remanding for the judge to confirm the arbitration decision just to have it appealed back to it, the court decided to move ahead with the merits of the contract challenge for judicial economy.

In an issue of first impression, the court considered what standard should apply for determining the validity of an online contract. Noting that the “touchscreens of Internet contract law must reflect the touchstones of regular contract law,” the court applied its fundamental two-prong test of whether a party had received reasonable notice of the terms and conditions and whether there was a “reasonable manifestation of assent” to the terms.

Actual notice of the online contract’s terms can be shown when the user must review or interact with those terms and expressly agree to them—for example, being required to click a hyperlink to the terms and then click on a button that says “I agree.” Without actual notice, the court analyzes the totality of the circumstances to determine whether the party had reasonable notice of the terms, which is “clearly a fact-intensive inquiry.”

For online contracts, the court explained that “the specifics and subtleties” of the user interface and how clearly and simply it communicates the contract’s terms are essential to this inquiry. To determine whether a party assented to the terms, the court looks at the specific actions required, such as an express requirement to click on or check a box stating that the user agrees to the terms. Without express evidence of assent, the court again considers the totality of the circumstances.

In the version of the app’s registration process at issue, users were presented with a screen that, at the bottom, displayed language that stated: “By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy.” The first part of the text that explains that the user is agreeing to something was less prominently displayed than the second part, the court noted. It also focused on other elements of how the terms were presented, including the title and location of the screen. And while the screen had a button to click on that led to the terms and conditions, nothing required a user to do so or to scroll through them before signing up for the service. A user could complete the registration process and click on the “Done” button (not an “I agree” button) and never click that link to the terms.

The court also highlighted how easily Uber could have provided actual notice of its contract terms by comparing the user app to the registration process for its drivers, which requires clicking on a link to terms and conditions, providing three months for drivers to review those terms, and requiring affirmative consent to them at least twice before completing the registration process. “Yet, the design of the interface for the app here enables, if not encourages, users to ignore the terms and conditions,” the court said.

Although the court did not need to proceed to the second prong of the test after concluding the

plaintiffs had not received reasonable notice, it still discussed the issue of assent. Focusing on the lack of affirmative agreement to the terms and the “Done” button, the court said that “the connection between the action and the terms was thus not direct or unambiguous.” Because the defendant had obscured the assent process in the app, it raised the question of whether users could be expected to understand that they were bound contractually simply because they signed up for the company’s rideshare service.

“This decision is huge: As the amicus brief pointed out, Uber had no trouble giving such notice and getting that assent from its drivers in their app,” said Salem, Mass., attorney Thomas Murphy, the amicus committee chair for the Massachusetts Academy of Trial Attorneys. “Because the notice and the assent are buried in the bowels of the phone’s app, the arbitration agreement was unenforceable. The takeaway is that technology does not trump the fundamental age-old principles of contract law.”

Cambridge, Mass., attorney Kristie LaSalle, a coauthor of the joint amicus brief, echoed that the decision is a great one “and a step in the right direction in terms of preserving consumers’ access to justice. It shows a willingness by the court to be thoughtful about how arbitration agreements are presented to consumers, to be skeptical of efforts to trick consumers into forfeiting their right to seek redress in court, and to ensure that arbitration agreements are enforceable only when both parties knowingly agreed to be bound by the agreement. . . . Hopefully [this decision] can provide a road map for consumers in other states and federal courts: Get in the weeds, and don’t be afraid to look at how the presentation of an arbitration clause is presented in analogous contexts.”

The issue of how contract formation plays out in the online context is especially important in today’s world of e-commerce, Boston attorney Michael McCann, another coauthor of the joint amicus brief, pointed out. “With so much business conducted online or by mobile applications, any court decision that examines the enforceability of an online contract is going to have a significant impact on how contract terms are presented to users in these online formats. . . . Simply placing a link to the terms on the screen is not sufficient notice. Plaintiff attorneys should thoroughly investigate the manner in which the terms of an online agreement were presented to the user to determine whether those terms will be binding.”

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