MASSACHUSETTS Lawyers Weekly

# SJC to decide if Uber rider formed contract

*Case attracts national amici on both sides*

By: Kris Olson September 3, 2020


One way to look at what the Supreme Judicial Court is being asked to decide in Kauders, et al. v. Uber Technologies Inc., to be argued on Sept. 10, is whether our e-commerce learning curve has reached the point at which courts can ratchet back their concern over whether consumers know they are agreeing to a contract when they click "done" on a smartphone app.

The plaintiffs in Kauders argue that, under traditional contract formation principles, particularly murky terms of service can still be invalidated, especially when one of the things being waived is the user's Seventh Amendment jury trial right.

The SJC has yet to speak on the issue, but the Appeals Court delved into it at length in its 2013 decision in Ajemian, et al. v. Yahoo!, Inc.

The 1st U.S. Circuit Court of Appeals then relied on Ajemian in reaching its decision in the 2018 case Cullinane, et al. v. Uber Technologies Inc.

The Cullinane decision, in turn, gave Superior Court Judge Douglas H. Wilkins a reason to reverse — finally — his order compelling arbitration of plaintiff Christopher P. Kauders' disability discrimination, Chapter 93A and intentional tort claims.

Kauders had challenged Wilkins' order three times, twice before arbitration and again after Uber moved to confirm the arbitrator's finding that Uber lacked a sufficient connection to be held liable for its drivers' denial of service to Kauders, who is blind and uses a guide dog.

Ultimately, the SJC will have to decide whether, when Kauders clicked "done" after inputting his credit card information — the last step in the creation of an Uber account — he also realized he was agreeing to a contract, one in which he was consenting to arbitrate any claims against Uber.

The case has attracted four amicus briefs, two on each side of the case. Supporting Kauders are the Massachusetts Academy of Trial Attorneys and, jointly, the national public interest law firm Public Justice, P.C. and the National Consumer Law Center.

On the other side are the New England Law Foundation and the Chamber of Commerce of the United States.

However, the amici share the hope that the SJC will get to the heart of the matter and make a meaningful statement about how time-honored Massachusetts contract law principles apply to new technology, rather than deciding the case on procedural issues the parties have also briefed.

**Frontal attack on 'Cullinane'**

In Ajemian, the Appeals Court said that "if electronic bargaining is to have integrity and credibility," two criteria are essential: "reasonably conspicuous notice of the existence of contract terms" and "unambiguous manifestation of assent to those terms by consumers."

Uber argues that the 1st Circuit simply got it wrong when it applied the Ajemian criteria to the facts in Cullinane.

According to Uber, the 1st Circuit's reasoning in Cullinane "departs from a long line of cases holding that the only requirement to form a binding agreement, online or otherwise, is reasonable notice — not some heightened notice standard that requires a specific type of font, text color, font size, or other font attribute."

Instead of following that jurisprudence, Uber says the 1st Circuit made unjustifiable, "hairsplitting distinctions" based on the appearance of the screens that greeted app users like Cullinane and Kauders.

But Uber is mischaracterizing Cullinane in suggesting that the 1st Circuit did anything other than apply the criteria laid out in Ajemian and determine that the information on the screen was not reasonably communicated, said Public Justice's Karla Gilbride.

While Uber might wish the situation were otherwise, words and visual cues matter when assessing the validity of a contract purportedly created by a smartphone app, said New York City attorney Rhea Ghosh, who co-authored the NCLC and Public Justice brief.

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Nonetheless, Uber said that the lower court's decision in Kauders has serious implications.

"If allowed to stand, the superior court's decision would invite courts in Massachusetts to strike down online agreements of all varieties using an inappropriately rigid standard, creating legal uncertainty where none previously existed," Uber argues in its brief. "Such a result injects unnecessary ambiguity and arbitrary consequences into millions of interactions on countless websites and mobile applications."

New England Legal Foundation's Ben S. Robbins shares those concerns. He said he hopes the SJC will help dissipate lingering skepticism or resistance to accepting that such rapid-fire contract formation is a fact of modern life.

That one might simultaneously create an account with a smartphone app and agree to terms of service "shouldn't be so mystifying, startling or controversial," he said.

Nor should the fact that those terms contain an arbitration clause or class action waiver, he added.

NELF is hoping that the SJC recognizes the validity of the type of contract formation at issue in Kauders so that such transactions, which most of us engage in multiple times a day — and with even greater frequency during the pandemic — are not disrupted by similar litigation in the future, Robbins said.

While it may have been appropriate for a "judicial eyebrow" to be raised by such agreements a quarter-century ago, consumers by now should be on "inquiry notice" about what they may be agreeing to when they click smartphone buttons, he said.

Uber notes that courts elsewhere in the country have had far less trouble finding that contracts can be formed by smartphones.

Those courts include the 2nd U.S. Circuit Court of Appeals, which in the case Meyer v. Uber Technologies, Inc. looked at essentially the same set of facts but reached the opposite conclusion of the 1st Circuit in Cullinane.

"While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract," Judge Denny Chin wrote for the court.

In reaching its decision, the 2nd Circuit considered the perspective of the "reasonably prudent smartphone user" confronted with a prompt, which included a hyperlink to the terms of service.

**Deed is 'done'**

But the plaintiffs in Kauders argue that Uber could have — and under Massachusetts law, needed to — do better. One way to have done so would be by using "clickwrap" and displaying the terms of service on the screen itself, rather than requiring the user to follow a hyperlink.

The plaintiffs essentially argue that Uber only has itself to blame for opening the door to the 1st Circuit delving into those "hairsplitting distinctions," when it could have more clearly communicated the arbitration clause and the rest of the terms of service and also done more to ensure that the plaintiffs were actually manifesting assent to the arbitration clause when they clicked "done."

> **"We hope a court ruling in our favor sends a strong message that companies need to be transparent and not try to hide the ball."**
>
> **— Rhea Ghosh, co-author of NCLC and Public Justice amicus brief**


In their brief, Public Justice and NCLC argue that agreeing to the arbitration clause and other terms of service was not even the "primary purpose" of clicking the "done" button.

"The 'Done' button serves a far more obvious function than agreeing to the Terms — submitting a payment method to gain access to the Uber service," they write. "This makes the user's action of clicking on the button, at best, inherently ambiguous from the perspective of a reasonable user."

In Ghosh's view, Uber made a "deliberate choice," hoping to reduce the chance that potential users would realize they were waiving their right to sue.

"We hope a court ruling in our favor sends a strong message that companies need to be transparent and not try to hide the ball," she said.

While it is just the arbitration clause at issue in Kauders, Gilbride noted that users of Uber and other smartphone apps are also agreeing to other disadvantageous provisions, like forum selection clauses and class action waivers, when they sign up for such services. They also may be handing over their rights to how the data the app collects may be used unwittingly.

"The least a corporation can do is be honest with people," she said.

**Hostility to arbitration?**

Robbins said that the "subtext" of Cullinane and the lower court's decision in Kauders seems to be a dislike or mistrust of arbitration as an alternative to litigation. He wondered aloud whether either court would have ruled similarly had the issue involved some provision of the terms of service other than the arbitration clause.

The whole purpose of the Federal Arbitration Act was to eliminate such judicial hostility to arbitration and recognize arbitration as a valid alternate forum to resolve disputes. Recent Supreme Court jurisprudence has only reinforced that concept, Robbins said.

NELF's brief makes the argument that Wilkins imported more onerous rules of contract formation, which are unique to forum selection and limitations clauses, to the arbitration clause, and applied a heightened "conspicuousness" standard that is altogether foreign to Massachusetts contract law.

"In so doing, the court did precisely what the FAA forbids and singled out Uber's agreement for unequal treatment," NELF argues.

But if there is judicial hostility to arbitration, it may be well placed in the consumer context, said Thomas R. Murphy, who chairs MATA's Amicus Committee.

MATA's brief rattles off a litany of statistics revealing that the main effect of arbitration clauses in the consumer context is that potentially valid claims against large corporations are never brought at all.

Despite arbitration provisions conservatively numbering more than 800 million, there is an average of just 6,000 consumer-versus-corporation arbitrations a year, MATA's brief notes.

For example, Amazon, with 101 million Prime subscribers, faced only 15 arbitrations brought by consumers over five years; General Motors sold approximately 40 million vehicles over five years and faced only five arbitrations during that time; and Walmart, which serves 275 million customers a week, faced just two consumer arbitrations in five years, according to MATA's brief.

When consumers buck the trend and invoke the arbitration process, they rarely win, and even when they do win, they do not win big, MATA adds. Over a five-year period, just 6.3 percent of consumers, or about 382 consumers a year, prevailed in arbitration, which is fewer than the number of people annually struck by lightning in the United States, MATA's brief notes.

And in many cases, those victories were Pyrrhic. According to MATA's brief, consumers claimed an average of $170,000 per case but won an average of only $1,400, and were forced to pay an average of $27,000 in arbitration fees and payments to the defendant and its attorneys.

"It's a scam," Murphy said.

But Kauders' attorney, W. Paul Needham of Boston, said the courts' concern might not be about arbitration per se.

"I don't think it's hostility to arbitration so much as it's hostility to waivers of the Seventh Amendment right to a jury trial," he said.

Boston attorney Felicia H. Ellsworth**,** who will argue Kauders on Uber's behalf, said she was not able to discuss the case in advance of oral argument.

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Full-text Opinions

Kauders, et al. v. Uber Technologies, Inc., et al. (Lawyers Weekly No. 10-001-21)

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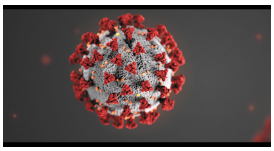

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