MASSACHUSETTS Lawyers Weekly

SJC should rule for consumers in smartphone case

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The Supreme Judicial Court is set to decide what businesses need to do to make consumers aware that they are agreeing to a contract when they conclude a transaction on a smartphone app.

The case before the court, Kauders, et al. v. Uber Technologies Inc., involves a blind man with a guide dog who sued Uber, claiming that its drivers' denial of service to him constituted disability discrimination.

Uber demanded that the plaintiff take his claims to arbitration, relying on the contract it says he agreed to.

A Superior Court judge initially ordered arbitration, which resulted in a finding that Uber lacked a sufficient connection to be held liable for its drivers' denial of service. But the judge later reversed his order, relying on a decision from the 1st U.S. Circuit Court of Appeals that in turn relied on a prior ruling from the Appeals Court.

In that decision, 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."

Now the SJC will need to decide whether the plaintiff in the present case, who clicked "done" after entering his credit card information, understood he was also agreeing to a contract and consenting to arbitrate any claims he might have against Uber.

Arbitration is generally favored. The whole purpose of the Federal Arbitration Act was to eliminate judicial hostility to arbitration and recognize it as a valid alternate forum to resolve disputes.

But in the consumer context, arbitration often isn't much of an alternative. One of the amici in the current case, the Massachusetts Academy of Trial Attorneys, provided some sobering statistics in its brief. According to MATA, despite arbitration provisions conservatively estimated as numbering more than 800 million, there are an average of just 6,000 consumer-versus-corporation arbitrations a year.

For example, Amazon has 101 million Prime subscribers but faced only 15 arbitrations brought by consumers over five years, while Walmart, which serves 275 million customers a week, faced just two consumer arbitrations in the same timeframe.

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And the consumers who do pursue arbitration generally either lose or recover very little. MATA's statistics show that only 6.3 percent of consumers prevail in arbitration, and the average award is only $1,400.

Given how ubiquitous smartphones are, it's entirely reasonable to argue that someone who creates an account via an app is also agreeing to some terms of service. But fairness requires that companies like Uber make crystal clear that such an agreement is being made and clearly communicate the presence of an arbitration clause and what that means, including the waiver of any right to a jury trial and the acceptance of a process that can't be appealed and often costs more than court filing fees.

Doing this needn't be complicated: As the amici in Kauders suggested, a business could display the terms of service on the screen itself, rather than requiring the user to follow a hyperlink.

The important thing is to be transparent and honest with consumers. The SJC should require it.

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