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Uber's bid to compel arbitration of drivers' class claims denied

By Brandi O. Brown, J.D.

Concluding that an order from a federal court in California did *not* render the arbitration provision in question in this lawsuit—and its opt-out provision, specifically—a nullity, a federal district court in Pennsylvania rejected Uber's motion to dismiss the federal and state wage claims of a putative class of drivers and to compel arbitration. The arbitration provision was valid, the court explained, and the plaintiffs here had properly taken advantage of their right to opt out of it ([Razak v. Uber Technologies, Inc.](http://hr.cch.com/ELD/RazakUber072116.pdf), <http://hr.cch.com/ELD/RazakUber072116.pdf>), July 21, 2016, Baylson, M.).

Drivers opted out. The named plaintiffs are certified limousine drivers who drive for the UberBLACK service in Philadelphia. They each completed the sign-up process used by Uber for the service in 2013 and 2014. In December 2015, Uber issued to its independent transportation providers a revised Technology Services Agreement containing a revised arbitration provision, as well as a Driver's Addendum. Section 15.3 of the agreement explicitly referenced and incorporated a provision from the Driver's Addendum and both documents stated the procedures for opting out of the agreement's arbitration provision. According to the plaintiffs, they exercised their right to opt out by way of a letter from their attorney, which was postmarked within 30 days, as required.

A few days later, they filed a complaint in state court against Uber and Gegen, its Philadelphia transportation company, which the defendants removed to federal court. Subsequently, the defendants moved to dismiss the action and compel arbitration. A few months later, they moved to stay the action.

No agreement to arbitrate arbitrability. In their motion, the defendants had attempted to “neuter” the drivers' opt-outs, the court explained, by contending that an order issued by Judge Chen in *O'Connor v. Uber Technologies* (and related cases) “nullified” the Arbitration Provision and therefore rendered immaterial and ineffective Plaintiffs' putative right to opt out.” They also argued that Chen's order enjoining enforcement rendered the provision void, “thereby raising a ‘threshold question of arbitrability’ which must first be decided by an arbitrator” and not the court under the provision's delegation clause.

However, the court explained, the defendants misconstrued Chen's order, which was issued under Rule 23(d) pursuant to the court's authority to govern communications in class actions. That order “did not, *ab initio*, render the Arbitration Provision a nullity.” In fact, Chen explicitly stated that he was not ruling on the enforceability of the terms of December 2015 agreement.

Plaintiffs complied with procedure. The only question the court was faced with, then, was whether the plaintiffs in this case complied with the opt-out procedure. While the provision contained a broad delegation clause which “unequivocally evinces an intention to arbitrate arbitrability[,]” it also contained a “conspicuous” opt-out provision allowing for resolution of disputes in a court of law. The undisputed facts presented here indicated “conclusively” that the drivers complied with the procedure outlined, the court said. In fact, the defendants did not dispute that compliance, but only whether the provision continued to be valid.

No merger, no stay. Arguing to no avail that Judge Chen's order nullified the December agreement, the defendants next contended that, accordingly, the arbitration provisions embodied in Uber's prior service agreements were in effect. As such, according to the

defendants, the survival clauses in its earlier arbitration provisions compelled the court to disregard the December agreement. And, the defendants reasoned, because the plaintiffs had *not* opted out of those prior agreements, the court had to compel arbitration.

But the court disagreed, having already rejected the initial premise, and noting too that the language of the provision itself “mandates *against* substitution of one arbitration clause with another.” The December arbitration provision contained a merger clause stating that it would not “substitute” a valid agreement with a superseded provision.

Finally, the court declined to stay the case at hand pending a ruling on appeal in the *O'Connor* case.

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