Uber, DirecTV and Beyond

By Jeffrey Grubman, Esq.
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Much of corporate America is determined to require consumers and employees to arbitrate disputes, including waiving their right to participate in class action lawsuits.

Two recent court decisions are instructive. The first is *DirecTV, Inc. v. Imburgia* (2015), decided by the U.S. Supreme Court on December 14, 2015. In *DirecTV*, Justice Breyer, writing on behalf of a divided Court, clarified and arguably expanded the Court's earlier decision in *AT&T Mobility LLC v. Concepcion* (2011), holding that customers of DirecTV were bound by a binding arbitration clause and class action waiver in their service agreements with the company.

In her dissent, Justice Ginsberg wrote: "It has become routine, in a large part due to this Court's decisions, for powerful economic enterprises to write into their form contracts with consumers and employees, no-class-action arbitration clauses. . . . Today's decision steps beyond Concepcion . . . Congress in 1925 (when the Federal Arbitration Act was enacted) could not have anticipated that the Court would apply the FAA to render consumer adhesion contracts invulnerable to attack by parties who never meaningfully agreed to arbitration in the first place."

The U.S. Supreme Court has not yet decided any cases applying the logic of *Concepcion* and *DirecTV* to class-action waivers in the employment context. Nevertheless, while the National Labor Relations Board has ruled that class-action waivers violate the National Labor Relations Act, the trend among the lower courts had been to uphold class-action waivers. See, e.g., *Jasso v. Money Mart Express Inc.; Morvant v. P.F. Chang's China Bistro, Inc.* However, a recent decision by Judge Chen in the Northern District of California involving the ongoing class litigation between ride-sharing service Uber and its drivers involving whether the drivers are employees or independent contractors, went in the opposite direction.

In a 32-page decision issued on December 9, 2015, the court expanded the scope of its previously certified class to include drivers who did not opt out of the contract's arbitration agreement: "the Court will certify a subclass of drivers who signed

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Uber's more recent agreements even if they did not timely opt out." Trial is scheduled for June 2016. Judge Chen denied Uber's motion to stay the ruling pending its appeal. However, he agreed to stay execution of any judgment until the appropriate appellate court reviews his decision.

Not surprisingly, employers' use of binding arbitration clauses and class action waivers is on the rise. In fact, the percentage of companies using arbitration clauses to preclude class action claims soared to 43 percent in 2014 from 16 percent in 2012, according to a survey of nearly 350 companies conducted by management-side law firm Carlton Fields Jorden Burt LLP. That same survey found that the percentage of class action lawsuits that address employment issues slipped to 23 percent in 2014 from 28 percent in 2011 and that class action suits from workers cost employers $462.8 million in 2014, down from $598.9 million in 2011.

Regardless of whether the U.S. Supreme Court decides the issue of the enforceability of class action waivers in the employment context in one of the pending Uber cases, the Court has shown an interest in the subject and will likely address the issue in the near future. The Court is likely to enforce binding arbitration clauses and class action waivers in the employment arena given its recent ruling in *DirecTV*. Consequently, employment litigators should hone their arbitration skills. This includes understanding that there are important and distinct differences in trying a case before a jury and trying a case to an arbitrator. Because the arbitrator acts as judge and jury, counsel should provide the arbitrator with a well written and concise pre-hearing brief setting forth the key legal and factual issues. Also, nothing frustrates an experienced arbitrator more than hearing and seeing cumulative evidence. The best way to keep an arbitrator interested and engaged is to utilize effective demonstrative evidence. If attorneys who try cases before arbitrators were forced to sit as arbitrators themselves, they would realize that it is extremely difficult to sit passively for hours and stay alert and interested.

Finally, many employment, consumer and commercial disputes are settled in mediation on a class basis before a class has been certified. The parties then file a joint motion to certify the class as part of the settlement process. Large companies with enforceable class action waivers could still attempt to settle on a class basis with plaintiffs' attorneys who file multiple individual arbitrations. To do so, the parties would engage in a private mediation and agree as part of the mediated settlement to file a lawsuit for the purpose of certifying a class and effecting the settlement. Undoubtedly, one of the many benefits of mediation is the flexibility it provides. ●

Jeffrey Grubman is a mediator and arbitrator with ***JAMS****. He is based out of the Miami office but mediates cases nationally. His practice focuses on employment, intellectual property, securities/ financial services and commercial/ business matters.* *The author would like to thank Jonathan Ben-Asher of the law firm Ritz Clark & Ben-Asher LLP for his excellent article, "Developments in Whistleblower Cases under Sarbanes-Oxley and Dodd-Frank." The information contained in this article does not constitute legal advice and are his opinions and not the opinions of* ***JAMS****.*

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