OPINION

UBER EATS ORDER LEADS TO COMPELLED ARBITRATION AFTER UBER CAR ACCIDENT*

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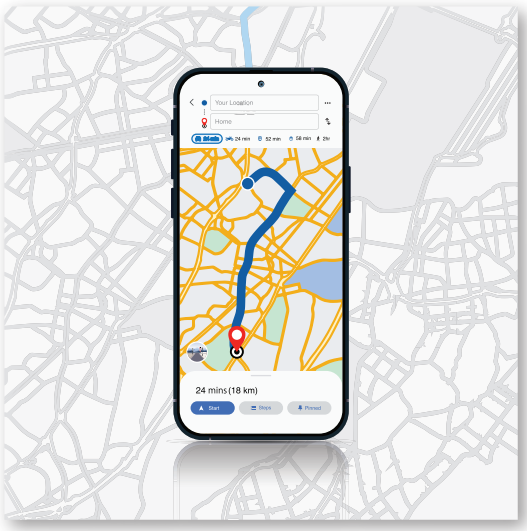

We have been commenting regularly lately on what I have called arbitration clause bootstrapping, and David Horton has alternatively called *Infinite Arbitration Clauses* and *Accidental Arbitration*. There was the report of the New York Post discussing Disney invoking arbitration with respect to an incident at a Disney-owned restaurant based on a family member's prior registration for a trial subscription to the Disney + streaming service. Disney eventually abandoned that argument after it generated a lot of negative attention. There also was Airbnb's attempt to compel arbitration in *Peterson v. Devita*, brought by a man injured in a fall at a party at a house that the party's host had rented on Airbnb. The injured man was a guest, not a party to the rental agreement, but he had once registered on Airbnb's site, although he never used the site. Airbnb's motion was denied, but there was a dissent.

Third time's the charm. In *McGinty v. Zheng*, a New Jersey appellate court granted Uber's motion to compel arbitration. The McGintys got in an Uber on March 31, 2022. Their driver ran a red light and hit another car. The McGintys suffered serious injuries. Georgia McGinty was unable to work for one year. John McGinty suffered broken bones, and still suffers from diminished use and sensation in his left wrist. They sued the driver and Uber. Uber filed a motion to compel arbitration.

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As Uber users know, when Uber updates its terms of use, you get a warning on the welcome screen. There is no way to use the app unless you agree to the updated terms, and the terms relevant to the McGinty's use of the app included a conspicuous arbitration clause. So an easy case.

But not so easy. It turns out, there is just one app for both Uber rides and Uber Eats, and the McGintys claimed that it was not them but their twelve-year-old daughter who manifested asset to Uber's terms when she ordered take-out on her mother's account with her mother's consent. In addition, the McGintys pointed out that Uber's updated terms made no mention of a waiver of the right to a jury trial.

As to the latter issue, New Jersey requires no "magic words" when assessing whether arbitration clause effects notice that one is waiving the right to a jury trial. Here Uber's emphatic language that disputes were to be settled in arbitration and not in a court of law sufficed. Cases like this cause me to muse on the cavalier ways in which courts allow for the shedding of some constitutional rights but not others in some contexts but not others. So, would a court be as blasé about the boilerplate click-through and, to borrow David Horton's language, infinite and accidental relinquishment of 1st or 2nd Amendment rights? And as we know from the *Jarkesy* case, the right to a civil jury matters when the alternative is proceedings before an administrative tribunal, but for some reason, not arbitration.

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