DoorDash and the Northern District of California: Arbitration is a Two-Way Street ...

and What is Good for the Goose is Good for the Gander.

BY JEREMY M. GOODMAN

Consumer arbitration has always had its detractors. Among other things, they decry the unequal bargaining power between the companies who allegedly heartlessly hoist arbitration on unwilling or unwitting customers or employees. They bemoan the alleged unfairness of an arbitration system where companies are often "frequent flyers" and where arbitrators and arbitral institutions arguably have financial interests or other biases that ensure arbitration remains company friendly.

This author does not accept that consumer arbitration is always inherently unfair. In fact, the detractors often ignore or minimize the many legitimate and worthy benefits of arbitration for all parties to consumer arbitration, including a knowledgeable decision maker familiar with the subject matter of the dispute, confidentiality, efficiency of time and cost, etc. But, that does not mean that the detractors do not have legitimate arguments. They do.

The legitimacy of courts in the United States rests on the consent of the governed to accept courts' rulings, or at least the willingness of the executive to enforce courts' rulings. Similarly, the legitimacy of arbitration rests on the foundation of mutual party agreement or consent. It follows that where parties unfairly exercise unequal bargaining power in the formation of the arbitral contract, the existence of actual mutual party agreement or consent may be lacking, and the legitimacy of any resulting arbitration may be questioned.

Additionally, fairness is a critical cornerstone feature of arbitration, just like it is in any judicial forum. Substantive fairness, procedural fairness, even the perception of fairness. As my mother used to say, we should avoid even the appearance of evil. Where arbitrators or arbitral institutions have financial or other biases that might unfairly affect the outcome of the arbitration, whether disclosed or undisclosed, the concept of fairness is itself in question. Each party should have a fair shot in consumer arbitration.

The issue of fairness arose in the California.[1] In 2018, in the Superior Court of California, County of San Francisco, DoorDash faced a class action suit involving many thousands of its couriers (the "State Court Action"). The State Court Action involved allegations that DoorDash improperly classified many thousands of its couriers as independent contractors instead of employees, and thus deprived them of valuable rights while benefitting DoorDash.

DoorDash initially attempted to dismiss the State Court Action on the ground that the couriers' employment contract with DoorDash required the parties to arbitrate their disputes before the American Arbitration Association (the "AAA").[2] Law firm Keller Lenkner and a group of over five thousand couriers then did just that—filing over five thousand individual demands for arbitration with the AAA and paid over $1,200,000 worth of $300 consumer filing fees to the AAA. The AAA then

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sent DoorDash an invoice for almost $12,000,000 worth of $1,900 company filing fees. DoorDash balked, claiming among other things defects in the individual demands for arbitration.

Keller Lenkner and the couriers then commenced actions to compel arbitration which were consolidated before the United States District Court for the Northern District of California (the "Federal Court Action"). DoorDash sought to stay the motion to compel arbitration pending a decision on settlement in the State Court Action—the same one DoorDash initially sought to dismiss in favor of arbitration—that would have bound the couriers and obviated the need for arbitration unless the couriers opted out. This irony was not lost on the court in the Federal Court Action.

Ultimately, the court in the Federal Court Action compelled arbitration. In a blistering order, the court noted that:

> For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them too, thus taking away their ability to join collectively to vindicate common rights. The employer-side bar has succeeded in the United States Supreme Court to sustain such provisions. The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order.

The court could not have been clearer that DoorDash and other companies cannot contractually compel arbitration when it favors them, but then shield themselves from that decision when arbitration does not favor them.

That seems fair enough, but it is not the whole story. Media coverage of the court's order, and language above, was almost universally focused on the court's critical treatment of DoorDash. However, that was not the court's only "shot across the bow" in the order.

DoorDash made several allegations of unethical behavior by the couriers' law firm Keller Lenkner. DoorDash's concerns were extensive and cannot be fully detailed in such a short article. They went so far as to allege that Keller Lenkner did not even represent many of the couriers it claimed to represent. This contention was bolstered by the fact Keller Lenkner did not produce affidavits from over eight hundred of the couriers it claimed to represent and whom it claimed had valid arbitration agreements with DoorDash—despite the court's order that it do so.

The court, in its order, did not make any finding that Keller Lenkner did anything wrong. However, it went to great length to be clear that fundamental fairness for all parties, DoorDash included, was important to the court and that Keller Lenkner would suffer if the allegations raised by DoorDash were true. In three separate and detailed warnings, the court noted that:

> If it turns out that Keller Lenkner has overstated its authority, or for any procedural reason, petitioners have not perfected their right to arbitrate, this order imposes on Keller Lenkner a requirement to fully reimburse DoorDash for all arbitration fees and attorney's fees and expenses incurred by DoorDash in defending the arbitration, and the arbitrator shall so award them.
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> If it turns out that any petitioners attempt to double dip (get both class action relief and individual arbitration), then this order recommends the arbitrator impose on Keller Lenkner an order to fully reimburse DoorDash for all arbitration fees and attorney's fees and expenses incurred by DoorDash in defending the matter twice.
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> As to DoorDash's concern [about] the possibility that petitioners here may prefer the [State Court Action class] settlement, this order reminds Keller Lenkner that it would be a serious problem to assert that the firm has attorney-client privilege with a DoorDash courier who has not authorized Keller Lenkner to represent him or her, or to initiate arbitration on behalf of a petitioner without his or her informed consent.

Again, the court could not have been clearer: while DoorDash may not have won the day, the court also will not conscience gamesmanship by Keller Lenkner or the couriers.

As noted above, arbitration is about fairness and each party should have a fair shot in consumer arbitration. Put another way, arbitration is a two-way street … and what is good for the goose is good for the gander. The court in the Federal Court Action would, it seems, agree. ADR

ENDNOTES

1. *Terrell Abernath, et al. v. DoorDash, Inc.*, 3:19-cv-07545-WHA (N. D. Cal.). See, Docket 177.
2. In the interest of full disclosure, the author is a panelist on the American Arbitration Association National Rosters of Commercial and Consumer Mediators and Arbitrators, as well as other noted national and international panels. The author took no part in any of the cases discussed herein.