

Chicago Daily Law Bulletin®

VOLUME 166, NO. 133

LAW BULLETIN MEDIA

Postmates' challenge must be arbitrated; decision appealed

Postmates, the online delivery platform, hires thousands of people throughout the country to act as "couriers" to deliver fast food, drinks and other items. While Postmates classifies these couriers as independent contractors, more than 5,000 couriers in California and Illinois sought to challenge their employment classification through arbitration. These challenges, however, are now in procedural limbo over arbitrability issues, awaiting consideration by two federal appellate courts.

In *McClenon, et al. v. Postmates, Inc.*, 200 Postmates couriers in Illinois sought relief from the U.S. District Court for the Northern District of Illinois, requesting an order compelling Postmates to arbitrate their misclassification claims and to pay the corresponding administrative filing fees levied by the American Arbitration Association so that the demands could move forward. See 19-cv-06415, Dkt. 51, Slip Op. (July 20, 2020 N.D. Ill.) (Rowland, J.)

The Postmates' Fleet Agreement signed by the couriers contained a mandatory arbitration clause (the "Mutual Arbitration Provision"), which also set forth a mutual waiver of the right to bring a class or collective action (the "Class Action and Representative Action Waivers"). While Postmates agreed that the couriers' claims were subject to arbitration, it challenged the numerous arbitration demands, all filed at the same

time as a de facto class action, arguing that the demands violated the waivers in the Mutual Arbitration Provision. Accordingly, Postmates also moved to compel arbitration, but sought an order that each courier be forced to refile an individual demand for arbitration.

The *McClenon* court ordered the parties to arbitration but declined to decide whether the couriers' arbitration demands violated the Class Action and Representative Action Waivers, finding that the Mutual Arbitration Provision expressly dictated that this dispute was to be decided by an arbitrator. The court held that the Fleet Agreement's stated exception allowing court adjudication for challenges to the enforceability of the Class Action and Representative Action Waiver provisions was expressly and unambiguously limited to challenges to enforceability and could not be expanded. As to the payment of the AAA administrative fees, the court noted that the payment of fees "is a procedural condition precedent to be decided by the arbitrator" not the court. As such, the court denied both Postmates' request that the couriers refile their demands individually and the couriers' request that Postmates be ordered to pay filing fees to the AAA.

Judge Mary M. Rowland's decision was consistent with that of a prior opinion by the Northern District of California, confronting the same dispute between the



LAURA B. BACON of *Nixon Peabody LLP* focuses her practice on commercial litigation and labor and employment. She represents clients in both state and federal courts in addition to various administrative venues.

parties and interpreting nearly identical contract language. See *Adams v. Postmates, Inc.*, 414 F. Supp. 3d 1246 (N.D. Cal. 2019). The *Adams* court also compelled the parties to arbitration, but similarly denied Postmates' request that the couriers refile individual demands and denied the couriers' request forcing Postmates to pay the AAA fees.

The practical implications of the *Adams* and *McClenon* decisions leave the couriers' misclassification claims without a forum for resolution. The AAA previously declined to administer the couriers' demands (i.e., appoint an

arbitrator) unless Postmates made up front payment of the total administrative filing fees, which exceeded \$11 million. Postmates refused to pay, and the AAA closed the cases, triggering the couriers' pursuit of court intervention (now declined by both federal courts taking up the question). So the courts have decided that the primary dispute between the parties can only be decided by an arbitrator, which the AAA refuses to appoint until Postmates pays a fee that it refuses to pay and that a court will not order it to pay.

Alerted to this conundrum by Postmates, the *McClenon* court stated:

"While the Court is frustrated for the hundreds of couriers and for Postmates that they have been unable to have the merits of the claims heard and resolved while the lawyers have engaged in procedural gymnastics, the law on arbitration agreements and the language of the Fleet Agreement, drafted by Postmates, ties the Court's hands." At 14, n.5.

The parties will now await further guidance on appeal. Postmates appealed the *Adams* decision to the 9th U.S. Circuit Court of Appeals, which is scheduled to be heard for argument in September. See *Postmates v. Adams*, No. 19-17362 (9th Cir. 2020). Postmates also just recently appealed the *McClenon* decision to the 7th Circuit, with Postmates' opening brief due Sept. 29. See *Postmates v. McClenon*, No. 20-2577 (7th Cir. 2020).