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Arbitration Clause Issues in Sharing Economy Contracts

CARISSA LAUGHLIN*

I. INTRODUCTION

The “sharing economy” generates a new form of economic activity through digital platforms, allowing people to create and share goods and services with one another. Representative of a generational shift in consumer values and purchasing preferences, the sharing economy is diverse, and continues to grow every day with different types of online applications that provide goods, services, rides, vacation stays, money, clothes, and more to consumers in ways previously unimagined. Transformative in some respects, overhyped in others,¹ the sharing economy continues to grow in the absence of law needed to regulate it.² This primarily peer-to-peer industry has taken the world by storm, and industry growth does not appear to be slowing down.³ Beyond the stand out companies that offer ride-sharing and home-sharing services, consumers can also borrow a car on Turo,⁴ connect to someone else’s WiFi on Fon,⁵ and find a pet-sitter on DogVacay.⁶

In common with the prevalence of (and attendant access to litigation concerns raised by) arbitration clauses governing traditional consumer and employment agreements, as the sharing economy evolves, similar concerns are raised about the force of arbitration in this new arena. Many sharing economy companies contain an arbitration clause in their Terms of Use agreements. Consumers “agree that any dispute, claim or controversy arising out of or relating to [the] Terms . . . will be settled by binding arbitration,” and yet, consumers continue to file lawsuits against

* B.B.A. Southern Methodist University 2015, J.D., University of Missouri 2018. I would like to thank the editorial staff of the *Journal of Dispute Resolution* and my advisor Professor Randy Diamond for the time spent helping edit this Comment, and for the inspiration to write about the sharing economy. I would also like to thank my parents for their unwavering support in everything that I do, because if not for them, I would never have had the chance to write this Comment.

1. Reid Cramer, *How the Sharing Economy Is Hurting Millennials*, TIME (June 29, 2015), <http://time.com/3939850/sharing-economy-pitfalls/>.

2. Alberto Marchi and Ellora-Julie Parekh, *How the sharing economy can make its case*, MCKINSEY Q. (Dec. 2015), <http://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/how-the-sharing-economy-can-make-its-case>.

3. In a study conducted by the Pew Research Center for Internet, Science & Tech, it was found that 72% of American adults have used at least one of 11 different shared and on-demand services. Further, some incorporate a variety of these services into their daily lives. The study showed that around one-in-five Americans have used four or more of these services, and 7% have used six or more. Aaron Smith, *Shared, Collaborative and On Demand: The New Digital Economy*, PEW RES. CTR. (May 19, 2016), <http://www.pewinternet.org/2016/05/19/the-new-digital-economy/>.

4. People can either rent a car or list their own for someone else to borrow on Turo. *See How Turo Works*, TURO, <https://turo.com/how-turo-works> (last visited Mar. 10, 2017).

5. Fon is a global WiFi network with a unique crowdsourcing approach where members can share their WiFi access with consumers. Fon currently offers 20,365,961 hotspots around the world. *See Fon Network*, FON, <https://network.fon.com/> (last visited Mar. 10, 2017).

6. DogVacay matches users with pet-sitters. *See How DogVacay Works*, DOGVACAY, <https://dogvacay.com/how-it-works> (last visited Mar. 10, 2017).

companies like Uber. Over the years, consumers have challenged binding arbitration clauses within the traditional economy upon realizing the limitations concerning access to the courts.⁷ These concerns regarding access to the courts (arguably limited by binding arbitration) in the traditional economy are now carrying over into the sharing economy.⁸

No regulatory scheme exists that encompasses sharing economy issues regarding taxation, insurance, and employment to name a few.⁹ Consequently, the courts have been addressing some of these questions, while leaving others to arbitration. For example, Uber has successfully compelled arbitration in multiple instances, but many cases are remanded to California district courts for further consideration regarding the employment status of Uber drivers. In *O'Connor*, a group of current and former Uber drivers filed a class action suit alleging that drivers were employees rather than independent contractors.¹⁰ The case is currently under reconsideration regarding the enforceability of an arbitration clause within Uber's most recent Terms of Use.¹¹ If the court finds the arbitration clause enforceable, a vast majority of the *O'Connor* class will be forced to arbitrate. A result like this would not only jeopardize the viability this class, but the possibility of future class action suits against Uber.¹²

This Comment will explicate the successes and failures of sharing economy arbitration clauses, and discuss the future legal climate for companies like Airbnb and Uber. First, this Comment will give an overview of the sharing economy and its current legal implications, then it will provide an overview of arbitration clauses and their success in sharing economy contract agreements, and finally, it will evaluate the potential advantages and disadvantages of arbitration clauses in the future based on a current labor and employment suits pending against Uber.

7. This article highlights the prevalence of arbitration clauses within multiple traditional economy industries such as applying for a credit card, using a cell phone, getting cable or Internet service, or shopping online. Furthermore, the article discusses multiple lawsuits and previous attempts by consumers to find these arbitration clauses unconscionable against companies like AT&T. Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015) [hereinafter *Stacking the Deck of Justice*], <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>.

8. *Id.*

9. See generally Alexander Traum, *Sharing Risk in the Sharing Economy: Insurance Regulation in the Age of Uber*, 14 CARDOZO PUB. L. POL'Y & ETHICS J. 511 (2016) (describing the current landscape of the sharing economy, overviews insurance regulation in the United States, exposes coverage gaps in the sharing economy, highlights how the sharing economy sector took early steps to fill insurance coverage gaps, and surveys the ongoing insurance regulatory developments in the sharing economy); Stephen Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. ON LEGIS. 147 (2016) (examines existing regulatory responses to sharing economy); Molly Cohen & Corey Zehngelot, *What's Old Becomes New: Regulating the Sharing Economy*, 58 BOS. B.J. 6 (2014) (highlighting a number of legal issues raised by the sharing economy).

10. *O'Connor v. Uber Techs., Inc.*, 2016 WL 4398271, *1 (N.D. Cal. 2016) (order denying preliminary approval).

11. *Id.* at *19.

12. *Id.* at *9. Although Uber's Terms of Use includes a class arbitration waiver, there is also a "Changes" section that allows users to opt out of the arbitration agreement within thirty days of accepting the Terms of Use, thus allowing the possibility of a class action suit. See *Terms of Use*, UBER, <https://www.uber.com/legal/terms/us/> (last visited Mar. 10, 2017).

II. SHARING ECONOMY

A. What is the “sharing economy”?

There are multiple ways to define “sharing economy,” but for this Comment, the sharing economy is an “economic model where people are creating and sharing goods, services, space and money with each other.”¹³ It is difficult to measure how many sharing economy companies exist today, likely attributed to the fact that new companies frequently emerge. Crowd Companies, a self-proclaimed “brand council” that assists major companies in navigating and infiltrating the sharing economy, identified 460 startups in the sharing economy, and categorized them into 16 market sectors including provider support, learning, wellness and beauty, municipal, money, goods, health, space, food, utilities, mobility services, services, logistics, vehicle sharing, corporation and organizations, and analytics and reputation.¹⁴ Another source, The Mesh, which monitors the sharing economy’s growth, posits that there are approximately 9,731 sharing economy companies worldwide.¹⁵

Many sharing economy companies utilize either the Internet or other digital platforms to cultivate peer-to-peer business.¹⁶ For example, Airbnb, a digital marketplace for people to list and book accommodations around the world, operates via website and smartphone application.¹⁷ Operating in over 65,000 cities and 191 countries, Airbnb has managed to accommodate over 60 million guests since its founding in August of 2008.¹⁸ In addition to home-sharing, ride-sharing is another growing sector in the sharing economy.¹⁹ Uber, which started as a service where people could digitally hail a cab, now provides ride-sharing services to over 500 cities worldwide.²⁰ Beyond ride-sharing, Uber has expanded and become a company that delivers food for restaurants that register with UberEATS,²¹ and a delivery service for companies that register with UberRUSH.²² Not to mention, riders can now request premium cars with UberBLACK or UberLUX, and request rides that are accessible for wheelchairs or come equipped with car seats.²³

Airbnb and Uber are just two leading examples of success stories within the sharing economy. There are numerous types of companies infiltrating traditional

13. See *About Us*, CROWD COMPANIES, <http://crowdcompanies.com/about.html> (last visited Mar. 10, 2017). This definition of sharing economy is from Crowd Companies™, a “brand council” that assists major companies in navigating and infiltrating the sharing economy. *Id.*

14. Jeremiah Owyang, *Honeycomb 3.0: The Collaborative Economy Market Expansion*, WEB STRATEGIST (Mar. 10, 2016), <http://www.web-strategist.com/blog/2016/03/10/honeycomb-3-0-the-collaborative-economy-market-expansion-sxsw/>.

15. *Mesh: The Pulse of the Sharing Economy*, <http://meshing.it> (last visited Mar. 10, 2017). As of March 2017, the site lists 9,829 sharing economy companies. *Id.*

16. See *The rise of the sharing economy*, THE ECONOMIST (Mar. 9, 2013), <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy>.

17. See *About Us*, AIRBNB, <https://www.airbnb.com/about/about-us> (last visited Mar. 10, 2017).

18. *Id.*

19. Smith, *supra* note 3.

20. See *Our Story*, UBER, <https://www.uber.com/our-story/> (last visited Mar. 10, 2017).

21. See *UBEREATS*, <https://www.ubereats.com> (last visited Mar. 10, 2017).

22. See *Small Business*, UBERRUSH, <https://rush.uber.com/how-it-works/> (last visited Mar. 10, 2017).

23. See *Ride with Uber*, UBER, <https://www.uber.com/ride/> (last visited Mar. 10, 2017).

marketplaces. People can share places to park using Park Circa²⁴, sell used clothing on ThredUp²⁵, save time in the day using TaskRabbit²⁶ or Instacart²⁷, and even share capital on Prosper.²⁸ ThredUp is an example of online retail usurping the need for brick-and-mortar stores, and Prosper is overriding the need for traditional banks when consumers want to acquire a loan. As of February 2016, twenty-four sharing economy companies have been valued at one billion dollars.²⁹ Among those, eighteen unicorns exist, meaning private start-ups valued at over one billion dollars.³⁰

Although most of these sharing economy companies were founded less than a decade ago, many are competitive, if not superior in market value, to their traditional counterparts. For example, Airbnb has expanded to over 2,000,000 room listings in 191 countries, less than ten years after its founding.³¹ By the end of 2015, Airbnb raised over \$100 million in a round of funding, which valued the company at \$25.5 billion.³² As of August 2016, Airbnb is valued at \$30 billion, making it the second-most-valuable U.S. technology startup company after Uber, valued by investors at around \$68 billion.³³ By comparison, traditional hotel chains have had much lower valuations and fewer rooms available in competing years.³⁴ According to annual financial reports, by the end of 2015, Marriott had a market value of close to \$15 billion with only 759,330 rooms in 87 countries,³⁵ and Hilton had a market value of under \$15 billion with only 758,000 rooms in 100 countries.³⁶

Like Airbnb, Uber is giving its traditional counterpart (i.e. automakers) a run for its money.³⁷ As the number of car and ride-sharing companies increase, so does

24. Park Circa is a digital platform that connects people who need to find a parking space with people who list available parking spaces for a set time. See *How It Works*, PARK CIRCA, <http://www.park-circa.com/How-It-Works> (last visited Mar. 10, 2017).

25. ThredUp is a digital platform for buying and selling secondhand clothes. See *About Us*, THREDUP, <https://www.thredup.com/p/about> (last visited Mar. 10, 2017).

26. TaskRabbit is a help, or task-completing, service that operates on a digital platform. TaskRabbit allows users to select from a list of chores, submit a request, and get paired with a “Tasker” in the area for a same-day appointment or future time that suits the user’s schedule. See *How It Works*, TASKRABBIT, <https://www.taskrabbit.com/how-it-works> (last visited Mar. 10, 2017).

27. Instacart is a service where users can order fresh groceries online, schedule the delivery, and then have the order delivered. See *How Instacart Works*, INSTACART, <https://www.instacart.com> (last visited Mar. 10, 2017).

28. Prosper is a digital “marketplace lending platform, with over \$8 billion in funded loans.” See *About us*, PROSPER, <https://www.prosper.com/plp/about/> (last visited Mar. 10, 2017).

29. Jeremiah Owyang & Philippe Cases, *Sharing economy’s ‘billion-dollar club’ is going strong, but investor risk is high*, VENTURE BEAT (Feb. 7, 2016 10:00 AM), <http://venturebeat.com/2016/02/07/sharing-economys-billion-dollar-club-is-going-strong-but-investor-risk-is-high/>.

30. *Id.*

31. See AIRBNB, *supra* note 17.

32. Rolfe Winkler, *Airbnb Raises Over \$100 Million as It Touts Strong Growth*, WALL ST. J. (Nov. 20, 2015 6:47 PM), <https://www.wsj.com/articles/airbnb-raises-over-100-million-as-it-touts-strong-growth-1448049815>.

33. Matt Rosoff, *Airbnb is now worth \$30 billion*, BUS. INSIDER (Aug. 6, 2016 4:31 PM), <http://www.businessinsider.com/airbnb-raises-850-million-at-30-billion-valuation-2016-8>.

34. Michael A. Cusumano, *How Traditional Firms Must Compete in the Sharing Economy*, COMM. ACM, Jan. 2015, at 33.

35. MARRIOTT INTERNATIONAL, INC., 2015 ANNUAL REPORT 6, 15 (2015), http://files.shareholder.com/downloads/MAR/3820327988x0x884644/934434D3-0551-4E9D-94EF-687390A5AE6F/2015_AR.pdf.

36. HILTON WORLDWIDE, 2015 ANNUAL REPORT 2, 4 (2015), <http://ir.hilton.com/~media/Files/H/Hilton-Worldwide-IR-V3/annual-report/2015-annual-report1.pdf>.

37. See Eric Auchard, *Now roughly equal in value, Uber and Daimler trade gentle blows*, REUTERS (June 8, 2016 8:37 PM), <http://www.reuters.com/article/us-autos-uber-daimler-idUSKCN0YU2IN>.

the threat of reduced long-term demand for new cars from automakers.³⁸ Some automakers, like Daimler, have responded by investing in new car-sharing businesses.³⁹ In June 2016, Uber was valued at \$62.5 billion, worth more than the stock market capitalizations of automakers like BMW and GM.⁴⁰

B. Arising & Current Legal Questions

Although the sharing economy continues to grow, regulatory mechanisms have not kept pace.⁴¹ Sharing economy companies implicate many legal issues, such as ownership rights.⁴² People now have the ability to share things that they do not necessarily own, for example, a seat in Starbucks.⁴³ One company, Betrspot, advertises its service as a “get up,” “get out,” and “get paid” exchange where a “poster” can charge a “requester” to take the poster’s seat, table, couch, and even spot in line at a crowded location.⁴⁴ Betrspot does not imply an exchange of title (or a sale), but rather “selectively releasing a space” to a requester.⁴⁵ Similarly, MonkeyParking, a company founded in San Francisco that allows users to auction off parking spots, received a cease-and-desist letter informing MonkeyParking that it would face major fines, and the city would not allow businesses to hold hostage on-street public parking for private profit.⁴⁶ That letter was released in June of 2014, and instead of ceasing all business activities, MonkeyParking restructured its business model to focus on renting private property.⁴⁷ The new (and legally improved) MonkeyParking allows users to rent their driveway space, and is now working to partner with hotels in San Francisco to help monetize hotel parking vacancies.⁴⁸

In addition to ownership issues, there are also potential taxation issues. Some sharing economy participants are not required to pay certain specialty taxes.⁴⁹ For example, it remains unclear whether Airbnb hosts are required to pay the hotel occupancy tax in most municipalities.⁵⁰ The list of unsettled legal questions goes on, including insurance, liability, employment, zoning, licensing, and permitting issues.⁵¹

38. *Id.*

39. *Id.*

40. *Id.* BMW, or Bayerische Motoren Werke AG, had a market capitalization of \$60.4 billion as of May 2016. See *BMW Group on the Forbes Global 2000 List, The World’s Biggest Public Companies*, FORBES (May 2016), <http://www.forbes.com/companies/bmw-group/>. GM, or General Motors, had a market value of \$49.6 billion as of May 2016. See *General Motors on the Forbes Canada’s Best Employers List*, FORBES (May 2016), <http://www.forbes.com/companies/general-motors/>.

41. Cohen & Zehngbot, *supra* note 9, at 6.

42. *Id.* at 7.

43. *Id.*

44. See *FAQs*, BETRSPOT, <http://www.betrspot.com/faqs.html> (last visited Mar 10, 2017).

45. *Id.*

46. Laura Entis, *San Francisco Puts the Brakes on a Parking App Startup*, ENTREPRENEUR (June 26, 2014), <https://www.entrepreneur.com/article/235134>.

47. Joe Eskenazi, *MonkeyParking is back and ready to disrupt your driveway*, SFGATE (Mar. 25, 2015), <http://www.sfgate.com/business/article/MonkeyParking-is-back-and-ready-to-disrupt-your-6158479.php>.

48. See *Press*, MONEY PARKING, <http://www.monkeyparking.co/press> (last visited Mar. 10, 2017).

49. Cohen & Zehngbot, *supra* note 9, at 7.

50. *Id.*

51. *Id.*

One of the most apparent concerns is loss of tax revenue for state and local governments.⁵² For instance, hotels generate a special type of income tax for cities, which can be a major source of revenue.⁵³ Often referred to as the transient occupancy tax, this tax allows cities to collect taxes from non-residents at a rate that far exceeds typical sales taxes.⁵⁴ The short-term rental market is usurping the existing hotel market, which prevents cities from collecting the transient occupancy tax.⁵⁵

Although there are obvious issues with reporting accurate tax returns while operating sharing economy businesses, the Internal Revenue Service (IRS) has taken measures to help participants meet their tax reporting responsibilities.⁵⁶ Recently, the IRS launched a new web page, the Sharing Economy Resource Center, designed to help taxpayers involved with the sharing economy.⁵⁷ This page provides sharing economy participants with the resources necessary to meet tax obligations.⁵⁸ Because the sharing economy has changed how people commute, travel, rent homes, spend vacation time, and perform other activities, the IRS found it necessary to respond to this changing economic climate.⁵⁹ Ranging from filing requirements to making quarterly estimated tax payments, the IRS's Sharing Economy Resource Center offers tips and resources on a variety of topics.⁶⁰

Beyond taxation, as the sharing economy has developed, certain insurance coverage gaps have begun to draw the attention of the media and politicians.⁶¹ Some states have implemented statutes establishing insurance coverage requirements in response to accidents involving ride-sharing businesses.⁶² For example, California enacted coverage and disclosure requirements, requiring Transportation Network Companies (TNCs) to disclose, in writing, the insurance coverage that they will provide to drivers.⁶³ Further, the TNCs are required to advise a participating driver in writing that the driver's personal automobile insurance policy will not provide coverage.⁶⁴

Colorado's statute exempts TNCs from its definition of "common carrier."⁶⁵ The Colorado statute, like California's, regulates TNCs under a new section of the code rather than fitting it into a pre-existing common carrier statute.⁶⁶ The statute defines a "prearranged ride" as the time that a driver has accepted a ride until the

52. Miller, *supra* note 9, at 173.

53. *Id.*

54. See, e.g., Cory Biggs, *Who Runs San Diego: The Use and Abuse of the Transient Occupancy Tax*, SAN DIEGO FREE PRESS (Sept. 3, 2014), <http://sandiegofreepress.org/2014/09/who-runs-san-diego-the-use-and-abuse-of-the-transient-occupancy-tax/>.

55. *Id.*

56. *IRS Launches New Sharing Economy Resource Center on IRS.gov, Provides Tips for Emerging Business Area*, IRS (Aug. 22, 2016), <https://www.irs.gov/uac/irs-launches-new-sharing-economy-resource-center-on-irsgov>.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Traum, *supra* note 9, at 523.

62. *Id.*

63. CAL. PUB. UTIL. CODE § 5432(a) (West 2014). California defines a TNC as an organization that provides prearranged transportation services for compensation using an online-enabled application to connect passengers with drivers using a personal vehicle. CAL. PUB. UTIL. CODE § 5431(c). Examples of TNCs include Uber, Lyft, Wingz, Haxi, Summon, Fasten, and Ride Austin.

64. *Id.*

65. COLO. REV. STAT. ANN. §§ 40-10.1-601 to -608 (West 2015).

66. *Id.*

passenger is dropped off at the arranged destination.⁶⁷ During the prearranged ride, either the TNC or driver must maintain primary insurance coverage.⁶⁸ Further, the driver or TNC (on the driver's behalf) must maintain insurance that expressly covers TNC services.⁶⁹

Only California and Colorado had passed legislation specifically governing TNCs at the close of 2014.⁷⁰ Since then, twenty-five more states and the District of Columbia have passed similar legislation.⁷¹ As the sharing economy continues to grow, other states will likely develop new statutory language to cover ride-sharing businesses and to close insurance coverage gaps.

In addition to tax and insurance issues, sharing-economy businesses have blurred the distinction between employee and independent contractor. Employment issues have become especially pertinent in the ride-sharing industry. Different courts have utilized a variety of tests to distinguish between employees and independent contractors; however, the application of different tests has led to courts reaching inconsistent classifications for ride-sharing drivers.⁷² Even different courts within the same jurisdiction that apply the same test might weigh factors differently in similar cases.⁷³ For example, because Uber drivers have the ability to create their own work schedules, this factor gives pro-independent contractor courts some ammunition to declare that ride-sharing workers are independent contractors.⁷⁴ On the other hand, Uber drivers are limited in ways to improve income levels (apart from driving more often), and Uber could not operate its business without the drivers, leaning towards employee status.⁷⁵

Without a clear test, courts will likely continue to disagree on the employment status of ride-sharing drivers. Different tests include the right-to-control test, the necessary control test, the entrepreneurial opportunities test, and the economic realities test. The right-to-control test defines an employee as one who is "employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."⁷⁶

The necessary control test states that an employment relationship exists if an employer maintains meaningful control over the business.⁷⁷ For example, the Supreme Court of California found that although workers who harvested vegetables did not require persistent control because of the simplicity of the work, the employment relationship existed because the employer maintained meaningful control.⁷⁸

67. *Id.*

68. *Id.*

69. *Id.*

70. Traum, *supra* note 9, at 535.

71. *Id.* at 535-36.

72. Grant E. Brown, Note, *An Uberdilemma: Employees and Independent Contractors in the Sharing Economy*, 75 MD. L. REV. ENDNOTES 15, 17 (2016).

73. *Id.* at 30.

74. *Id.* at 42.

75. *Id.* at 43.

76. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989) (quoting RESTATEMENT (SECOND) OF AGENCY § 220(1) (AM. LAW INST. 1958)).

77. S.G. Borello & Sons v. Dep't of Indus. Relations, 769 P.2d 399, 408 (Cal. 1989).

78. *Id.*

The employer held pervasive control over the operation as a whole making decisions about what crops to plant, supplying materials, transporting and selling the goods, and handing out employee checks.⁷⁹

The entrepreneurial opportunities test focuses on a person's ability to engage in entrepreneurial activity in the work place.⁸⁰ The D.C. Circuit applied the entrepreneurial opportunities test to FedEx drivers and found that they were independent contractors because the drivers could meaningfully effect their entrepreneurial ability by selling routes for profit, substituting drivers without FedEx's involvement, negotiating higher rates, and even incorporating.⁸¹

The economic realities test determines whether a worker should be classified as an employee or an independent contractor by determining how much an individual depends upon the business to which they render service.⁸² Courts rely on six different factors to make this determination, none of which are dispositive: 1) degree of alleged employer's right to control the manner in which work is performed; 2) alleged employee's opportunity for profit or loss depending on managerial skills; 3) alleged employee's investment in equipment, materials, and helpers required for the task; 4) whether the service requires a special skill; 5) degree of permanence in working relationship; and 6) whether the service rendered is integral to the alleged employer's business.⁸³

The employee versus independent contractor question is prevalent in all areas of the economy.⁸⁴ In determining which status applies to Uber drivers during a lawsuit, plaintiffs must first provide evidence that the drivers provided services to the company.⁸⁵ Once this is established, California law presumes that the drivers are employees.⁸⁶ Next, the burden shifts to Uber to rebut the employee presumption using *Borello* (or the necessary control test) to show that the drivers are not in fact employees, but rather, independent contractors.⁸⁷ In *O'Connor*, the court recommended that it might be time for a higher court to revise the *Borello* test in light of the sharing economy, and perhaps even more specifically to the ride-sharing economy.⁸⁸ It seems necessary that either legislators create a new test, or the courts issue a uniform ruling.⁸⁹ If not, California will continue to apply an outdated test to a modernized sector of the economy.⁹⁰

79. *Id.*

80. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 517 (D.C. Cir. 2009). The court stated that although the drivers have a contractual right to sell their routes for profit, FedEx tightly constrains the drivers' ability to exercise this right. *Id.* at 304. Drivers may sell only to buyers approved by FedEx. *Id.* Further, FedEx can reconfigure a route "in its sole discretion" and at any time, further constraining the discretion of drivers to change or sell routes. *Id.* (referencing FedEx Operating Agreement).

81. *Id.* at 503.

82. *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981).

83. *Id.* (citing *Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748, 754 (9th Cir. 1979)).

84. Silver-Greenberg & Gebeloff, *supra* note 7.

85. Brian Shapiro, *YEAR-IN-REVIEW: O'Connor v. Uber Techs., Inc.*, 82 *F. Supp. 3d* 1133 (2015), 43 *W. ST. L. REV.* 325, 326 (2016).

86. *Id.*

87. *Id.*

88. *Id.* at 328.

89. *Id.*

90. *Id.*

III. ARBITRATION

A. Arbitration Agreements in Sharing-Economy Contracts

The Federal Arbitration Act (FAA) governs any arbitration agreement that is “a contract evidencing a transaction involving commerce.”⁹¹ Congress, court holdings, and the language of the FAA indicate a preference towards arbitration.⁹² In authorizing the FAA, “Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims that the contracting parties agreed to resolve by arbitration.”⁹³ The Supreme Court has interpreted “involving commerce” as the entire permissible exercise of Congress’s Commerce Clause power, establishing the FAA’s broad reach.⁹⁴ Further, the Supreme Court has stated that Congress’s Commerce Clause power may be exercised in individual cases if the economic activity in question would represent any practice subject to federal control, no matter if any specific effect upon interstate commerce exists.⁹⁵

There is a strong presumption that the FAA, not state arbitration law, provides the rules for arbitration when an agreement falls within the FAA’s coverage.⁹⁶ Nevertheless, parties are free to conduct their arbitration under state arbitration laws, so long as the agreement demonstrates a clear intent to do so.⁹⁷ The FAA’s default arbitration provisions will apply if a contract includes a general choice of law provision.⁹⁸ The parties must agree to conduct their arbitration according to the arbitration law of a particular state; this manifests sufficient intent to arbitrate under a specific state’s arbitration laws.⁹⁹ The reference to application of a state’s arbitration laws must be unambiguous.¹⁰⁰

For example, because Airbnb’s Terms of Service have a California choice-of-law clause, California law will govern during arbitration with Airbnb.¹⁰¹ When parties mutually manifest their assent to a contract, including an arbitration provision, the provisions stated therein bind those parties.¹⁰² Although sharing economy companies, like Airbnb, operate primarily on the Internet or smartphone applica-

91. 9 U.S.C. § 2 (1947).

92. Bruce E. Meyerson, *The Revised Uniform Arbitration Act: 15 Years Later*, 71 DISP. RESOL. J. 1, 3 (2016). As further evidence of the strong presumption in favor of arbitration, the Supreme Court has stated that “as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Wolff v. Westwood Mgmt., LLC*, 558 F.3d 517, 520 (D.C. Cir. 2009) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

93. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

94. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273 (1995).

95. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57 (2003).

96. *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1269 (9th Cir. 2002).

97. *Fid. Fed. Bank v. Durga Ma Corp.*, 386 F.3d 1306, 1311 (9th Cir. 2004).

98. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995).

99. *Johnson v. Gruma Corp.*, 614 F.3d 1062, 1066-67 (9th Cir. 2010).

100. *Id.*

101. *See Terms of Service* § 33, AIRBNB, <https://www.airbnb.com/terms> (last visited Mar. 10, 2017); *Aliron Intern., Inc. v. Cherokee Nation Indus., Inc.*, 531 F.3d 863, 865-866 (dispute as to whether parties agreed to arbitrate because the contract contained an Oklahoma choice-of-law clause; applied Oklahoma state law to arbitration).

102. *Shatteen v. Omni Hotels Mgmt. Corp.*, 113 F. Supp. 3d 176, 179 (D.D.C. 2015).

tion, “new commerce on the Internet . . . has not fundamentally changed the principles of contract.”¹⁰³ Mutual manifestation of assent is fundamental to contract formation; mutual assent is determined by an objective standard, which is applied to outward expressions of parties (i.e. the reasonable meanings of their words and acts, not their unexpressed intentions or understandings).¹⁰⁴

When signing up to use Airbnb, consumers are presented with a “clickwrap” agreement, meaning the user agrees to be contractually bound by the Terms of Service by clicking on a box or button.¹⁰⁵ By affirmatively clicking on a button saying, “I accept,” or some other equivalent, the user has been put on notice regarding the agreement to the Terms of Service, and manifests his or her agreement to those terms (i.e. assents to the terms).¹⁰⁶

Airbnb’s sign-up page is similar to Facebook’s sign-up page; the page has a “Sign Up” button that states “[b]y clicking Sign Up, you are indicating that you have read and agree to the Terms of Service,” and there is a hyperlink from that text to the Terms of Service themselves.¹⁰⁷ In two different instances, federal district courts have held that by clicking the sign up button, and because the user had notice of the Terms of Service, the user agreed to, and was bound by, Facebook’s Terms of Service.¹⁰⁸ Both the Northern District of California and the Southern District of New York found that the user was bound to the terms because of the click action.¹⁰⁹ Consequently, when consumers sign up to use Airbnb, they mutually assent to the Terms of Service, which include an arbitration clause.¹¹⁰

B. The Motion to Compel: Sharing Economy Companies’ Successes and Failures

During 2016, there has been a significant increase in the number of lawsuits against Uber, including significant litigation regarding the employment status of Uber drivers.¹¹¹ The answer is still unclear as to whether Uber drivers are considered employees or independent contractors. Many Uber drivers have been unable to get an answer from the courts, because courts often find this issue arbitrable under

103. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014) (quoting *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004)).

104. *HM DG, Inc. v. Amini*, 162 Cal. Rpts. 3d 412, 418 (Cal. Ct. App. 2013).

105. *Nguyen*, 763 F.3d at 1175-76; *Mohamed v. Uber Techs., Inc.*, 109 F. Supp. 3d 1185, 1197 (N.D. Cal. 2015).

106. *Nguyen*, 763 F.3d at 1176-77. There is mutual assent to terms in a clickwrap agreement when “the user is required to affirmatively acknowledge the agreement before proceeding with use” of the service. *Id.*

107. *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 835 (S.D.N.Y. 2012); see also *In re Facebook Biometric Info. Privacy Litig.*, 185 F. Supp. 3d 1155, 1166 (N.D. Cal. 2016).

108. *Fteja*, 841 F. Supp. 2d at 841; see also *Facebook Biometric*, 185 F. Supp. 3d at 1166.

109. *Facebook Biometric*, 185 F. Supp. 3d at 1166; see also *Fteja*, 841 F. Supp. 2d at 838 (agreement by clicking “Sign Up” button was valid because “the user must do something else – click ‘Sign up’ – to assent to the hyperlinked terms”).

110. See *Terms of Service*, *supra* note 101.

111. Marisa Kendall, *Uber battling more than 70 lawsuits in federal courts*, THE MERCURY NEWS (Aug. 11, 2016 10:53 PM), <http://www.mercurynews.com/2016/07/04/uber-battling-more-than-70-lawsuits-in-federal-courts/>. In 2016, Uber battled more than seventy federal lawsuits. *Id.* Uber was sued forty-six times in federal court alone in 2016. *Id.* Other sharing economy companies gained lawsuits in 2016 including Airbnb (six lawsuits) and Lyft (seven lawsuits). *Id.*

Uber's Terms and Conditions. Below are many examples of courts granting motions to compel in favor of Uber in labor and employment disputes. As a result, the question regarding Uber drivers' legal employment status is left unanswered.

In Arizona, David Sena, an Uber driver, filed a seven-count class action complaint against Uber challenging the classification of Uber drivers as independent contractors.¹¹² Uber moved to dismiss the action, compel arbitration of Sena's claims, and strike the class allegations in the complaint.¹¹³ Uber succeeded on all three counts.¹¹⁴ Sena filed a motion for reconsideration of the order granting Uber's motion to compel arbitration.¹¹⁵ Sena's motion for reconsideration was denied.¹¹⁶

Another U.S. District Court followed the reasoning in *Sena* and decided to dismiss class claims against Uber, and grant Uber's motion to compel arbitration.¹¹⁷ In Maryland, Elizabeth Varon filed a complaint against Uber for various claims including a violation of labor laws in Maryland by treating drivers as employees, but not paying them accordingly.¹¹⁸ The district court granted Uber's motions to dismiss, to compel arbitration, and to strike class allegations.¹¹⁹ Among other things, Varon argued that the arbitration clause containing a fee-splitting provision (requiring drivers to share the arbitration costs and pay half the arbitrator's fee) rendered Uber's arbitration agreement per se unenforceable.¹²⁰ The district court disagreed, and followed *Sena*'s reasoning that the facts were not adequate to support a contention that the fees would be prohibitively expensive for her.¹²¹ Varon filed a motion for reconsideration, which was subsequently denied.¹²²

Similar to both *Sena* and *Varon*, Landon Bruster brought Ohio wage and labor claims against Uber.¹²³ Bruster accepted the June 2014 Technology Services Agreement which included a class action waiver, arbitration, and delegation provisions.¹²⁴ Bruster had the ability to opt out of the June 2014 Agreement's arbitration provision within thirty days of acceptance, but never opted out.¹²⁵ Uber deactivated Bruster's account (meaning Uber deactivated Bruster's ability to use the application to pick up riders¹²⁶) in November 2015 because of repeated unsatisfactory customer experiences.¹²⁷ Nonetheless, on December 11, 2015, Bruster "accepted" Uber's new Technology Services Agreement.¹²⁸ Five days later, Bruster sent a purported

112. *Sena v. Uber Techs., Inc.*, No. CV-15-02418-PHX-DLR, 2016 WL 1376445, *4 (D. Ariz. Apr. 7, 2016).

113. *Id.* at *5.

114. *Id.* at *23.

115. *Id.* at *1.

116. *Id.* at *3.

117. *Varon v. Uber Techs., Inc.*, No. MJG-15-3650, 2016 WL 1752835, *1 (D. Md. May 3, 2016).

118. *Id.* at *1-2.

119. *Id.* at *6.

120. *Id.* at *5.

121. *Id.* Because litigation would be the alternative forum to arbitration, courts must focus upon claimant's expected or actual arbitration costs (and the claimant's ability to pay those costs), and compare that fee to the baseline of a claimant's expected costs for litigation (and the claimant's ability to pay those costs). *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 n.5 (4th Cir. 2001).

122. *Varon*, 2016 WL 1752835, at *2.

123. *Bruster v. Uber Techs., Inc.*, 188 F. Supp. 3d 658, 661 (N.D. Ohio 2016).

124. *Id.* at 660.

125. *Id.* at 660-61.

126. Complaint & Jury Demand at ¶ 35, *Bruster v. Uber Techs., Inc.*, 188 F. Supp. 3d 658 (N.D. Ohio 2016) (No. 15-CV-2653).

127. *Bruster*, 188 F. Supp. 3d at 661.

128. *Id.* at 662.

opt-out notice to Uber, and five days after opting out, filed a lawsuit against Uber.¹²⁹ Uber argues that the June 2014 Agreement requires Bruster's claims to be arbitrated; Bruster argues that he opted out of the June 2014 Agreement after accepting the December 11, 2015 Agreement and sending an opt-out notice to Uber.¹³⁰

The district court stated that Uber withdrew from an ongoing contractual relation with Bruster, as a driver, when Uber deactivated Bruster's account.¹³¹ Therefore, Bruster's acceptance of the December 2015 Agreement was not sufficient to replace the June 2014 Agreement, and the arbitration and delegation provisions of the June 2014 Agreement were binding on Bruster's claim as a driver.¹³² The district court granted Uber's motions to dismiss and compel arbitration, and further ordered that if the arbitrator found the claims to be arbitrable, then the parties had to submit their claims to arbitration under the June 2014 Agreement.¹³³ Bruster filed a motion for reconsideration, which was subsequently denied.¹³⁴

Horace Lee filed suit against Uber for violation of numerous Illinois labor laws.¹³⁵ This case is another example of a United States District Court granting Uber's motion to compel arbitration against drivers bringing claims for violation of state labor laws.¹³⁶ Here, the district court agrees with the courts that have found Uber's delegation clause "clear and unmistakable in delegating the question of arbitrability to an arbitrator."¹³⁷ Consequently, the district court held that it could not address Lee's unconscionability argument; this issue was for an arbitrator.¹³⁸

All four of the above cases resulted in successful motions to compel arbitration against drivers. However, Uber has also proven successful in cases that resulted in motions to compel against riders. For example, Rachel Cullinane (and others) represented a class of Massachusetts residents who alleged they were charged with inflated toll fees or surcharges.¹³⁹ The district court found that the parties agreed to arbitrate, the dispute fell within the scope of the arbitration provision, and arbitration was not an illusory remedy.¹⁴⁰ Therefore, the district court granted Uber's motion to compel arbitration.¹⁴¹

Above are examples of Uber successfully compelling arbitration clauses against drivers and riders filing suit. However, Uber has also been denied motions to compel. For example, Ali Razak (and other plaintiffs) brought claims under the

129. *Id.*

130. *Id.*

131. *Id.* at 663.

132. *Id.*

133. *Bruster*, 188 F. Supp. 3d at 665.

134. *Bruster v. Uber Techs., Inc.*, No. 15-CV-2653, 2016 WL 4086786, *1 (N.D. Ohio Aug. 2, 2016).

135. *Lee v. Uber Techs.*, No. 15 C 11756, 2016 WL 5417215, *1 (D. Ill. Sept. 21, 2016).

136. *Id.*

137. *Id.* at *5; *See Suarez v. Uber Techs., Inc.*, No. 8:16-cv-166-T-30MAP, 2016 WL 2348706, *4 (M.D. Fla. May 4, 2016) (concluding that identical language in Rasier Agreement was clear and unmistakable evidence of intent to arbitrate arbitrability); *Varon v. Uber Techs., Inc.*, No. MJG-15-3650, 2016 WL 1752835, *6 (D. Md. May 3, 2016) (same); *Sena v. Uber Techs., Inc.*, No. CV-15-02418-PHX-DLR, 2016 WL 1376445, *3-4 (D. Ariz. Apr. 7, 2016) (same).

138. *Lee*, 2016 WL 5417215, at *7.

139. *Cullinane v. Uber Techs.*, No. 14-14750-DPW, 2016 WL 3751652, *2 (D. Mass. July 11, 2016).

140. *Id.* at *10.

141. *Id.*

Fair Labor Standards Act (FLSA) and the Pennsylvania Minimum Wage Act alleging that Uber misclassified the plaintiffs as independent contractors.¹⁴² The plaintiffs alleged, and the district court agreed, that they had satisfactorily opted out of Uber's arbitration clause.¹⁴³ The district court found this was a significant factual distinction between this case and precedent (for example, *Bruster*).¹⁴⁴ Because the plaintiffs complied with conditions of the opt-out procedure outlined in Uber's Terms, the district court found that there was no agreement to arbitrate the issues of arbitrability.¹⁴⁵ Consequently, the district court denied both Uber's motion to compel arbitration and its motion to stay the proceeding.¹⁴⁶

The Ninth Circuit is still grappling with the Uber driver employment status issue. Abdul Mohamed, a former Uber driver, represents plaintiffs in a putative class action against Uber.¹⁴⁷ The claims allege violations of the Fair Credit Reporting Act and various state statutes, and further, that the plaintiffs were misclassified as independent contractors rather than employees.¹⁴⁸ The district court denied Uber's motion to compel arbitration.¹⁴⁹ The Ninth Circuit concluded that the district court erred.¹⁵⁰ This error was because the district court incorrectly assumed it had the authority to decide whether Uber's arbitration clause was enforceable against the plaintiffs.¹⁵¹ The Ninth Circuit held that contractual provisions are binding, and because the opt-out agreement provision was included in the Terms and Conditions, the plaintiffs were bound to it.¹⁵² The plaintiffs did not opt out of the arbitration clause, and therefore, accepted the agreement.¹⁵³

Regardless of the Ninth Circuit's holding, the former Uber drivers requested that the federal appeals court reconsider.¹⁵⁴ Lawyers for the drivers argue that these arbitration pacts are not valid just because they allow drivers to opt out.¹⁵⁵ Eventually, the question as to whether Uber drivers are employees or independent contractors will need to be answered to determine the scope of rights being violated in these cases.

Like Uber, other TNCs have confronted litigation regarding the employment status of ride sharing company drivers. For example, in *Bekele v. Lyft, Inc.*, Bekele filed a class action suit against Lyft alleging that drivers were being misclassified

142. *Razak v. Uber Techs.*, No. 16-573, 2016 WL 3960556, *1 (D. Penn. July 21, 2016).

143. *Id.* at *3.

144. *Id.* Bruster opted out of his arbitration agreement with Uber after Uber had deactivated Bruster's account, or revoked his ability to pick up riders. *Bruster v. Uber Techs., Inc.*, 188 F. Supp. 3d 658, 661-62 (N.D. Ohio 2016). However, in *Razak*, the plaintiffs opted out of their arbitration agreements when still driving for Uber. *Razak*, 2016 WL 3960556, at *1.

145. *Razak*, 2016 WL 3960556, at *5.

146. *Id.* at *6.

147. *Mohamed v. Uber Techs., Inc.*, 836 F.3d 1102, 1106 (9th Cir. 2016).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 1107.

153. *Mohamed v. Uber Techs., Inc.*, 836 F.3d 1102, 1107 (9th Cir. 2016)..

154. *Uber Drivers Seek Review of 9th Circuit Arbitration Ruling*, 31 No. 6 WESTLAW J. EMP. 12, *1 (Oct. 11, 2016).

155. *Id.*

as independent contractors rather than employees.¹⁵⁶ Lyft moved to compel arbitration.¹⁵⁷ Bekele contended that he did not receive adequate notice of the arbitration agreement, and therefore, he did not assent to it.¹⁵⁸ The United States District Court in the District of Massachusetts disagreed, and granted Lyft's motion to compel arbitration.¹⁵⁹

The court found that Lyft satisfied the burden of demonstrating that the arbitration provision in Lyft's Terms of Service provided users with reasonable notice of the arbitration provision.¹⁶⁰ The court compared the format of Lyft's arbitration provision with another provision from an Uber agreement.¹⁶¹ The court stated that "Lyft's arbitration provision was communicated in a more prominent manner than Uber's arbitration provision" upheld in another case also decided in the United States District Court in the District of Massachusetts.¹⁶²

In another case, the United States District Court in the Northern District of California granted Lyft's motion to compel arbitration against Lyft drivers.¹⁶³ The Lyft drivers filed a class action lawsuit accusing Lyft of withholding bonus payments for drivers.¹⁶⁴ Because Lyft did not process applications for certain drivers to be cleared by the Department of Motor Vehicles quickly enough, drivers were unable to collect a one-thousand-dollar bonus.¹⁶⁵

The Lyft drivers argued against arbitration, and claimed that the arbitration provision was an unconscionable contract of adhesion because the drivers did not have any power to change the terms of the agreement.¹⁶⁶ The Northern District of California disagreed with the Lyft drivers, and found that there was no sufficient oppression or surprise to demonstrate sufficient unconscionability.¹⁶⁷ The court found the arbitration provision enforceable, and granted Lyft's motion to compel arbitration against the plaintiffs.¹⁶⁸

In addition to TNCs, other sharing economy companies have faced class action suits where plaintiffs allege employment misclassification. For example, Handy is an online platform where users can hire an experienced, fully-equipped professional to show up and clean the house, paint a room, or perform other tasks around the home as requested by the user.¹⁶⁹ In the United States District Court in the Northern District of California, Handy cleaners filed a class action lawsuit alleging that Handy misclassified the plaintiffs as independent contractors.¹⁷⁰ The Handy cleaners alleged that because of this misclassification, Handy failed to pay overtime and

156. *Bekele v. Lyft, Inc.*, 199 F. Supp. 3d 284, 288 (D. Mass. 2016).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 297.

161. *Id.*

162. *Id.* See *Cullinane v. Uber Techs.*, No. 14-14750, 2016 WL 3751652, *7 (D. Mass. July 11, 2016) (holding that Uber demonstrated the plaintiffs were given reasonable notice of the arbitration provision).

163. *Loewen v. Lyft, Inc.*, 129 F. Supp. 3d 945, 948 (N.D. Cal. 2015).

164. *Id.* at 950.

165. *Id.* at 950-51.

166. *Id.* at 955.

167. *Id.* at 956.

168. *Id.* at 966-67.

169. See *Book your local, trusted cleaner*, HANDY, <https://www.handy.com/home> (last visited Apr. 5, 2017).

170. *Zenelaj v. Handybook Inc.*, 82 F. Supp. 3d 968, 970 (N.D. Cal. 2015). Handy was formerly named Handybook. Ryan Lawler, *Handybook Rebrands As Handy In An Effort To Become Amazon For Home*

minimum wages among other claims.¹⁷¹ Handy moved to compel arbitration, and the court granted this motion in favor of Handy.¹⁷² The court stated that because the parties incorporated the American Arbitration Association rules into the employment agreement, the arbitrator needed to decide the arbitrability of the Handy cleaners' claims.¹⁷³

Although sharing economy companies like Uber, Lyft, and Handy have remained successful, some sharing economy companies cannot withstand the significant litigation costs. For example, Homejoy, a home-cleaning marketplace company, ceased operations following four lawsuits by employees.¹⁷⁴ The Homejoy cleaners claimed that they were employees as opposed to independent contractors.¹⁷⁵ A common dilemma for startup companies like Homejoy is that many workers sign up because of the flexibility, but then startups want to provide a consistent customer experience.¹⁷⁶ As a result, startups will provide training and a uniform, and these factors imply an employee status.¹⁷⁷ Consequently, the workers want certain employee benefits such as overtime pay and social security benefits.

Other sharing economy companies, such as Airbnb, have successfully enforced the Terms of Service, including an arbitration agreement, against plaintiffs bringing suit. Gregory Selden, an African-American man, created an Airbnb account in advance of a trip to Philadelphia.¹⁷⁸ After creating the user profile, which includes posting his own photograph, Selden contacted an Airbnb "host" regarding a listed residence.¹⁷⁹ The host responded that the residence was unavailable that weekend.¹⁸⁰ After this rejection, Selden created a new account under a pseudonym, used a photograph of a Caucasian person, and contacted the same host about the same accommodation.¹⁸¹ The host agreed to let the pseudonym account stay the same weekend that Selden had requested to stay in the listed residence.¹⁸²

Following an increase in discrimination claims against Airbnb by African-American travelers with similar experiences to Selden, Selden filed suit against the Airbnb for race discrimination.¹⁸³ Selden sought to hold Airbnb "responsible under federal civil rights laws for the discriminatory conduct of those who offer accommodations on its website."¹⁸⁴

Services, TECHCRUNCH (Sept. 16, 2014), <https://techcrunch.com/2014/09/16/handybook-rebrands-as-handy/>.

171. *Zenelaj*, 82 F. Supp. 3d at 970.

172. *Id.*

173. *Id.* at 972. Rule 7(a) states: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." *Commercial Arbitration Rules and Mediation Procedures*, AM. ARBITRATION ASS'N (Oct. 1, 2013), https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004130.

174. Ellen Huet, *Homejoy Shuts Down, Citing Worker Misclassification Lawsuits*, FORBES (July 17, 2015 2:58 PM), <https://www.forbes.com/sites/ellenhuet/2015/07/17/cleaning-startup-homejoy-shuts-down-citing-worker-misclassification-lawsuits/#61a130c578be>.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Selden v. Airbnb, Inc.*, No. 16-cv-00933, 2016 WL 6476934, *1 (D.D.C. Nov. 1, 2016).

179. *Id.* at *2.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at *1.

184. *Selden*, 2016 WL 6476934, at *1.

In response, Airbnb claimed that because Selden accepted the Terms of Service when signing up to use the site, he was required to resolve his dispute in arbitration.¹⁸⁵ Further, Airbnb claimed that class action suits are prohibited under its Terms of Service.¹⁸⁶ Airbnb filed a motion to compel arbitration of Selden's claims.¹⁸⁷ Selden responded that no contract existed (and therefore the arbitration clause did not apply) because he was not on adequate notice of the mandatory arbitration, and further, that even if a contract was formed, the arbitration provision is unconscionable.¹⁸⁸

On November 1, 2016, the court found that Selden entered into a valid and enforceable arbitration agreement with Airbnb.¹⁸⁹ Further, the court granted Airbnb's Motion to Compel Arbitration and to stay the case.¹⁹⁰ The court found that the law in this case is clear: "[m]utual arbitration provisions in electronic contracts – so long as their existence is made reasonably known to consumers – are enforceable, in commercial disputes and discrimination cases alike."¹⁹¹ The court found that Airbnb's sign-up procedure was sufficiently clear to put Selden on notice that he was agreeing to the Terms of Service, including the arbitration clause.¹⁹²

The court notes in its memorandum opinion accompanying the motion to compel arbitration that the court is not the proper forum for policy objections, meaning mandatory arbitration clauses in adhesion contract issues should be taken up with regulators or with Congress.¹⁹³

The court found that Selden's claim of unlawful race discrimination arose out of his use of Airbnb's services.¹⁹⁴ Therefore, his claims fell within the scope of the mandatory arbitration clause.¹⁹⁵ The court rejected both arguments that the federal civil rights claims are not subject to arbitration and that the arbitration clause is unconscionable.¹⁹⁶

This ruling will likely have a major impact on sharing economy companies beyond Airbnb and home-sharing services. For example, this means that consumers who claim Uber drivers are not giving them rides based on race or gender may be required to arbitrate any discrimination claims. This domino effect will impact any consumer who uses a sharing economy service that requires providing a personal profile or personal information to use the services.

IV. POTENTIAL EFFECT ON FUTURE ARBITRABILITY OF LABOR AND EMPLOYMENT CLAIMS

Like Mohamed's case above, there are multiple cases currently on appeal against Uber regarding employment status. For example, in *O'Connor*, a group of current and former Uber drivers filed a class action suit alleging that drivers were

185. *Id.*

186. *Id.*

187. *Id.* at *3.

188. *Id.* at *1.

189. *Id.* at *9.

190. *Selden*, 2016 WL 6476934, at *9.

191. *Id.* at *2.

192. *Id.*

193. *Id.*

194. *Id.* at *2.

195. *Id.* at *3.

196. *Selden*, 2016 WL 6476934, at *1, *9.

employees rather than independent contractors.¹⁹⁷ Consequently, the drivers argued that they were eligible for expense reimbursement and converted tips.¹⁹⁸ In the Northern District of California, the district court denied a preliminary approval of a proposed settlement due to inadequate settlement claims under California's Private Attorneys General Act (PAGA).¹⁹⁹

O'Connor calls into question the future arbitrability of employment status claims. Initially, the district court found the entire arbitration agreement void because of the inability to sever the PAGA waiver from the remainder of the arbitration agreement.²⁰⁰ Two days after the district court found the arbitration agreement invalid as a matter of public policy, Uber distributed a new arbitration agreement (December 2015 Agreement) to all Uber drivers.²⁰¹ This subsequent arbitration agreement was also sent to the drivers that were members of pending class action lawsuits against Uber.²⁰² The plaintiffs in *O'Connor* filed a motion to enjoin the December 2015 Agreement on the basis that the new agreement was meant to undermine participation in the pending cases against Uber.²⁰³

The district court declined to rule on the enforceability of the December 2015 Agreement.²⁰⁴ However, it did conclude that the December 2015 Agreement could not be enforced unless Uber sent a review cover letter to all users and drivers regarding the ability to opt out of the arbitration portion of the Terms of Use.²⁰⁵ Uber argued that requiring notice of a simplified opt-out option for drivers was a violation of First Amendment rights.²⁰⁶

Uber moved to stay the case while it sought interlocutory review of the December 9, 2015 Class Certification Order.²⁰⁷ This ruling could impact both Uber and the plaintiffs in different ways. If the court finds that one or both of the arbitration clauses are valid and enforceable, this would likely change the scope and course of the lawsuit.²⁰⁸ Assuming both arbitration clauses are enforceable, a vast majority of the *O'Connor* class would be forced to arbitrate on their non-PAGA claims, and this would jeopardize the viability of the class.²⁰⁹ Even if only the more recent contracts were found enforceable, the class could decrease from 240,000 drivers to about 8,000 drivers.²¹⁰

Although this outcome would be dangerous to the sustainability of the class itself, the upshot for Uber is either a mass settlement, or substantial costs to facilitate the arbitration of thousands of claims.²¹¹ Because the PAGA claims cannot be compelled to arbitration, the courts could still decide the employment classification

197. *O'Connor v. Uber Techs., Inc.*, 2016 WL 4398271, *1 (N.D. Cal. 2016) (order denying preliminary approval).

198. *Id.*

199. *Id.*

200. *Id.* at *3.

201. *Id.*

202. *Id.*

203. *O'Connor*, 2016 WL 4398271, at *3.

204. *Id.*

205. This order is currently on appeal in the 9th Circuit; consequently, a cover letter has not been issued to users and drivers at this time. *Id.*

206. *Id.*

207. *Id.* at *4.

208. *Id.* at *9.

209. *O'Connor*, 2016 WL 4398271, at *9.

210. *Id.*

211. *Id.* at *12.

question.²¹² If a court finds that Uber drivers are employees (as opposed to independent contractors), the statutory penalty for Uber could exceed \$1 billion.²¹³ Furthermore, if a portion of the drivers is not bound by arbitration due to properly opting out, these claimants could still litigate the merits of their claims.²¹⁴ If Uber lost the employment status question in court, this would affect the outcome of future arbitration agreements.²¹⁵

O'Connor has drawn significant attention, likely due to its determinative nature in the employment status of ride-sharing drivers. For example, one of the plaintiff attorneys representing in the *O'Connor* case, Shannon Liss-Riordan, has created a webpage exclusively dedicated to the *O'Connor* suit.²¹⁶ Another attorney, Daniel Rockey, has created a “Sharing law Blog” which focuses on prevalent issues in the sharing economy today.²¹⁷ Some posts have solely focused to the *O'Connor* case.²¹⁸

Recurring issues within Uber’s employment disputes include the conscionability of the arbitration clause within Uber’s Terms, and the employment status question. Uber drivers are joining forces, pursuing class action suits, and arguing that they have the right to certain benefits such as gratuity, gas money, and car maintenance.²¹⁹ In *O'Connor*, the plaintiffs claimed that Uber was tortiously interfering with contractual relations and receiving unjust enrichment.²²⁰ The plaintiffs claimed that although Uber advertised that gratuity was included in the cost of the ride service, plaintiffs were not receiving any of these proceeds.²²¹ Furthermore, the plaintiffs claimed that Uber drivers were misclassified as independent contractors, and paying business expenses, such as gas and car maintenance fees, was a violation of California labor law.²²² The question regarding the employment status of Uber drivers is still under debate.

Although Uber drivers’ employment status remains an open question, it seems that the Ninth Circuit recognizes including an “opt-out” right within an arbitration clause deems the clause conscionable.²²³ Uber drivers often make the claim that the opt-out provision is either illusory or hidden and a violation of contract rights.²²⁴ However, the Ninth Circuit has recognized in a number of cases that the existence of a meaningful right to opt-out of arbitration renders the arbitration clause procedurally conscionable.²²⁵ Specifically, in *Mohamed*, the district court acknowledged

212. *Id.*

213. *Id.*

214. *O'Connor*, 2016 WL 4398271, at *13.

215. *Id.*

216. Shannon Liss-Riordan & Adelaide Pagano, *Uber Drivers*, [UBER LAWSUIT INFO.](http://uberlawsuit.com), <http://uberlawsuit.com> (last visited Mar. 10, 2017).

217. BRYAN CAVE, LLC, *Sharing Law*, <http://bcsharinglaw.com> (last visited Mar. 10, 2017).

218. Daniel Rockey, *Uber Settlement Under Fire, As Named Plaintiff, Others Object*, [SHARING LAW](http://bcsharinglaw.com/uber-settlement-under-fire-as-named-plaintiff-others-object/) (May 16, 2016), <http://bcsharinglaw.com/uber-settlement-under-fire-as-named-plaintiff-others-object/>; Daniel Rockey, *Uber Class Action Settlement Faces Objections from Plaintiffs’ Lawyers*, [SHARING LAW](http://bcsharinglaw.com/uber-class-action-settlement-faces-objections-from-plaintiffs-lawyers/) (Apr. 26, 2016), <http://bcsharinglaw.com/uber-class-action-settlement-faces-objections-from-plaintiffs-lawyers/>.

219. Class Action Complaint & Jury Demand at 8, *O'Connor v. Uber Techs., Inc.*, 2013 WL 4502818 (N.D. Cal. Aug. 16, 2013) (No. cv-13-3826).

220. *Id.*

221. *Id.*

222. *Id.* at 9.

223. *Id.* at 26.

224. *Id.* at 27.

225. Arbitration agreement was not procedurally unconscionable because it allowed the signatories to reject arbitration within sixty days of signing the agreement. *Kilgore v. KeyBank Nat’l Ass’n*, 718 F.3d

that the opt-out provision in Uber's 2014 Agreement was "highly conspicuous" and enabled "drivers to obtain all of the benefits of the contracts, while avoiding any potential burdens of arbitration."²²⁶

Although these pending cases deal with agreements made in the years 2013, 2014, and 2015, Uber recently sent an email to its users stating, "Our updated Terms are effective as of November 21, 2016, so please make sure to read them fully (you can access them here)."²²⁷ Upon clicking the hyperlinked word "here," users can view the updated U.S. Terms of Use (Terms) effective November 21, 2016.²²⁸ Paragraph three of section one, "Contractual Relationship," states in all bold and capital letters to "please review the arbitration agreement set forth below carefully . . ."²²⁹ Further below in section two, "Arbitration Agreement," the Terms state that "[b]y agreeing to the Terms, you agree that you are required to resolve any claim that you may have against Uber on an individual basis in arbitration, as set forth in this Arbitration Agreement."²³⁰ The clause further precludes any person from "bringing any class, collective, or representative action against Uber," in "any current or future class, collective, consolidated, or representative action brought against Uber."²³¹ The Terms reflect how Uber continues to be proactive in preventing class action suits.

Within in the arbitration provision, it states that a person may "reject any such change by providing Uber written notice of such rejection within 30 days of the date such change became effective," meaning that if Uber changes the Arbitration Agreement after the date that someone first agreed to the Terms, the user may opt of the new Terms within 30 days of the changes.²³² So long as Uber continues to provide the opportunity to opt out of changes within the Arbitration Agreement, it is likely the courts will continue to support the conscionability of Uber's Terms.

Beyond the effect of class action employment suits against Uber, it seems that so long as courts recognize arbitration clauses within sharing economy contracts as conscionable, other companies will also succeed on their motions to compel. Until a more structured regulatory system is in place, sharing economy companies will continue to succeed in compelling arbitration of individual claims. Although this might be discouraging for litigious plaintiffs, companies such as Uber and Airbnb

1052, 1059 (9th Cir. 2013) (en banc). See also *Hoffman v. Citibank (South Dakota) N.A.*, 546 F.3d 1078, 1085 (9th Cir. 2008) ("[P]roviding a 'meaningful opportunity to opt out' can preclude a finding of procedural unconscionability."); *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1073 (9th Cir. 2007) ("[I]f an employee has a meaningful opportunity to opt out...then it is not procedurally unconscionable.")

226. Class Action Complaint & Jury Demand at 26, *O'Connor v. Uber Techs., Inc.*, 2013 WL 4502818 (N.D. Cal. Aug. 16, 2013) (No. cv-13-3826).

227. E-mail from Uber Tech., Inc. to users (Nov. 14, 2016, 04:34 CST) (on file with author).

228. *U.S. Terms of Use*, UBER (Nov. 21, 2016), <https://www.uber.com/legal/terms/us/>.

229. *Id.* at § 1.

230. *Id.* at § 2.

231. *Id.*

232. *Id.* at § 1. Under these Terms with the additional 30-day opt-out period following Term updates, it is very likely that the *Bruster* case (discussed above) would have resulted in a different outcome. In the *Bruster* case, Uber deactivated Bruster's account, meaning Uber deactivated Bruster's ability to pick up riders using the Uber application, in November 2015. *Bruster*, 188 F. Supp. 3d at 661. Nonetheless, in December 2015, Bruster accepted Uber's new Technology Services Agreement, and subsequently opted out of the arbitration agreement. *Id.* at 662. The Northern District of Ohio ultimately held that because they withdrew contractual relations with Bruster as a driver, Bruster's acceptance of the December 2015 Agreement was not sufficient to replace the June 2014 Agreement. *Id.* at 663. If the up-to-date Uber arbitration agreement applied during the *Bruster* case, it might have turned out differently for Bruster, and he might have been able to litigate his claims against Uber.

will likely benefit from this outcome so long as consumers forget to opt out of the arbitration agreement.

Courts have also recognized arbitration clauses within other kinds of sharing economy contracts as conscionable. For example, in *Cobarruviaz v. Maplebear, Inc.*, the United States District Court in the Northern District of California granted a motion to compel arbitration in favor of the sharing economy company, Instacart.²³³ The court stated that after severing two challenged clauses, the individual arbitration agreement was enforceable.²³⁴ Even though the court found some of the clauses within the arbitration provision unconscionable, it nonetheless upheld the arbitration agreement, and decided that the “offending provisions may easily be grammatically severed without reforming the [arbitration agreements].”²³⁵

Similar to the *Cobarruviaz* decision, the United States District Court in the Southern District of Texas granted a motion to compel arbitration in favor of a sharing economy company, Dasher, after the court decided to sever the unconscionable elements from the arbitration agreement.²³⁶ Dasher, the defendant in this case, is an online platform where customers may order food and delivery items from restaurants.²³⁷ Plaintiff filed suit under the FLSA alleging that the plaintiff workers were misclassified as independent contractors, and consequently were not properly receiving overtime and minimum wage rates.²³⁸

When deciding this case, the court referenced the California Civil Code that gives California courts the power to sever unconscionable provisions of a contract.²³⁹ In this case, the court found that the cost-splitting provision coupled with the choice of forum provision unconscionable.²⁴⁰ Nonetheless, applying California law according the choice-of-law provision within the independent contractor agreement, the court recommended that the motion to dismiss be granted and that the plaintiff worker be compelled to arbitrate his claims.²⁴¹ After reviewing the Magistrate Judge’s Memorandum and Recommendation, the court adopted the recommendation, and granted Dasher’s motion to compel arbitration against the plaintiff.²⁴²

V. CONCLUSION

So long as the sharing economy continues to grow, so do the number of questions regarding the future regulation of these companies. In addition, certain legal issues, such as the employment status of Uber drivers, call into question the future arbitrability of employment claims against Uber. Nonetheless, many courts find that employment questions fall within Uber’s arbitration clause. Until *O’Connor* is resolved, the question as to whether TNC drivers are employees or independent contractors will likely remain on hold.

233. *Cobarruviaz v. Maplebear, Inc.*, 143 F. Supp. 3d 930, 935 (N.D. Cal. 2013).

234. *Id.* at 943.

235. *Id.*

236. *Edwards v. Doordash, Inc.*, No. H-16-2255, 2016 WL 7852532 *1, *12 (S.D. Tex. 2016).

237. *Id.*

238. *Id.*

239. *Id.* at *12 (citing CAL. CIV. CODE § 1670.5(a)).

240. *Edwards*, 2016 WL 7852532 at *12.

241. *Id.* at *14.

242. *Edwards v. Doordash, Inc.*, No. H-16-2255, 2017 WL 244862 *1 (S.D. Tex. 2017).

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The need for answers to these legal questions is pivotal. Even without answers, the sharing economy will continue to grow. These highly funded and fast-growing companies remain the portfolio darlings of venture capital firms. So long as the technology industry continues to develop, access to resources becomes much easier, and unicorns will continue to appear within the growing sharing economy sector.