Class Action Litigation Update:

Busy Ninth Circuit Issues Four Important Decisions on Arbitration

Companies that rely on arbitration provisions should take note of four significant decisions from the Ninth Circuit in recent weeks. These decisions address circumstances under which state law may be able to bar arbitration clauses, when California's *McGill* rule applies, the importance of delegation clauses to arbitrability, and how companies can use arbitration clauses to defeat class actions quickly even when a named plaintiff has opted out.

1 Ninth Circuit Upholds California's Limitation on Using Arbitration Clauses in Employment Agreements.

In *Chamber of Commerce v. Bonta*, 2021 WL 4187860 (9th Cir. 2021), the Ninth Circuit held, in a 2-1 decision, that the Federal Arbitration Act does not preempt a California Labor Code provision prohibiting employers from requiring any applicant or employee "to waive any right, forum, or procedure" for certain claims. According to the majority, preemption does not apply because the Labor Code does not create a special arbitration-specific rule; it instead focuses on regulating "pre-agreement" behavior (as opposed to the agreements themselves).

Bonta could have ramifications outside the labor context. The California law prohibits employers from relying on voluntary opt-out clauses to establish consent to arbitration. The Legislature may be emboldened to adopt similar rules for arbitration agreements outside the employment context, such as in agreements with financial services or technology companies.

The Ninth Circuit, however, may not have the last word. The majority's conclusion created a split with the First and Fourth Circuits, which have held that the FAA preempts state laws that amount to de facto bans on mandatory arbitration agreements in the employment context. And as the Ninth Circuit dissent pointed out, *Bonta* is difficult to reconcile with the Supreme Court's decision in *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017), which struck down Kentucky's "clear-statement rule" imposing a special rule banning arbitration agreements made between a nursing home and an attorney-in-fact unless the attorney-in-fact had received express authority to agree to arbitration.

2 Ninth Circuit Narrowly Defines What Qualifies as "Public Injunctive Relief" Within the Meaning of California's *McGill* Rule.

California's *McGill* rule is often invoked by plaintiffs to invalidate arbitration agreements that purport to waive the right to seek public injunctive relief in any forum. But the Ninth Circuit's decision in *Hodges v. Comcast Cable Communications, LLC*, 2021 WL 4127711 (9th Cir. 2021), limits the impact of the *McGill* rule by narrowly defining the types of claims that seek "public injunctive relief." The court defined such relief as "prospective injunctive relief that aims to restrain future violations of law for the benefit of the general public as a whole, rather than a discrete subset of similarly situated persons, and that does so without requiring consideration of the individual claims of non-parties." Since the *Hodges* plaintiff, a former cable subscriber, brought a putative class action seeking injunctive relief that would benefit only cable subscribers, the court held that he did not seek public injunctive relief and the case should have been sent to arbitration.

In reaching this conclusion, the court recognized that its definition of public injunctive relief was narrower than that adopted by California state appellate courts in *Mejia v. DACM Inc.*, 54 Cal. App. 5th 691 (2020), and *Maldonado v. Fast Auto Loans, Inc.*, 60 Cal. App. 5th 710 (2021), which held that an injunction affecting the contract terms a business can offer to the public—not just its existing customers—should qualify as public injunctive relief. In light of *Hodges*, companies seeking to compel arbitration should consider strategies to litigate *McGill* issues in federal courts, which currently embrace a narrower definition of "public injunctive relief" than may be encountered in state courts.

3 Ninth Circuit Adopts New Approach to Deciding When Arbitrability-Related Questions should be Delegated to an Arbitrator.

Arbitration agreements often delegate to the arbitrator threshold questions of arbitrability, including whether the agreement itself is valid and enforceable. The Second, Third, and Fourth Circuits have invalidated entire arbitration agreements as prospective waivers—unenforceable waivers of a party's right to pursue federal statutory remedies—without separately analyzing or enforcing the delegation clauses in those agreements.

The Ninth Circuit took a different approach in *Brice v. Plain Green, LLC*, 2021 WL 4203337 (9th Cir. 2021), a putative class action challenging the legality of certain payday loans. The contracts at issue included an arbitration agreement that delegated to the arbitrator "any issue concerning the validity, enforceability, or scope" of the loan contract or arbitration agreement. The loan contracts also contained choice-of-law provisions selecting tribal law and required arbitrators to apply tribal law. The borrowers argued that the arbitration agreements were unenforceable because they prevented an arbitrator from considering federal-law arguments, including a prospective-waiver challenge to the arbitration agreements as a whole.

The Ninth Circuit disagreed, holding that a court should focus on the narrower question of whether a *delegation clause* is enforceable; if it is, the court should not consider whether *the arbitration agreement as a whole* is enforceable. Since the delegation clauses at issue did not

limit the unenforceability arguments that could be presented to the arbitrator, the court concluded, the case should have been sent to arbitration.

Brice illustrates the importance of carefully drafting an arbitration agreement, including the choice-of-law provisions. Even under the Ninth Circuit's approach, the delegation clauses in *Brice* might have been deemed unenforceable if they had precluded the borrowers from pursuing enforceability challenges in arbitration under federal law.

4 Ninth Circuit Permits Companies to File Early Motions to Defeat Class Certification if Most of the Class has Agreed to Arbitration.

A company facing a putative class action from a plaintiff who has opted out of an arbitration agreement may still file an early motion to defeat class certification if the company can prove that most of the class has agreed to arbitration. In *Lawson v. Grubhub, Inc.*, 2021 WL 4258826 (9th Cir. 2021), the plaintiff was one of two members of the putative class who had opted out of an arbitration agreement containing a class action waiver, and the defendant filed an early motion to defeat class certification. The Ninth Circuit held that the district court properly considered the motion even though the plaintiff had not yet sought class certification, and that class certification was properly denied because a plaintiff who opted out of the arbitration agreement was not a typical or adequate class representative.

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