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Ninth Circuit decides two pro-arbitration cases

by Michele Floyd

The Ninth Circuit concluded that arbitration agreements were enforceable in two opinions that addressed three significant arbitration issues: (1) the standards applicable to the mutual assent analysis in online transactions; (2) unconscionability based on the California Supreme Court's decision in *McGill v. Citibank, N.A.*; and (3) delegation of the gateway issue of arbitrability based on the incorporation of the JAMS arbitration rules.

On the mutual assent issue, the panel in *Keebaugh v. Warner Bros. Entertainment Inc.*, 100 F.4th 1005 (9th Cir. 2024), confirmed three important points: (1) "objective reasonableness" is the correct standard; (2) conspicuousness is the "foremost" consideration in the analysis; and (3) the "context of the transaction"—a concept derived from the decisions in *Oberstein v. Live Nation Ent., Inc.*, 60 F. 4th 677 (9th Cir. 2023), *B.D. v. Blizzard Entertainment, Inc.*, 76 Cal. App. 5th 931 (2022), and *Sellers v. JustAnswer LLC*, 73 Cal. App. 5th 444 (2021)—is a "*nondispositive* factor used to evaluate whether a website's notice is sufficiently conspicuous." *Id.* at 1019 (emphasis added). In short, the panel confirmed that the analysis considers the totality of the circumstances viewed through the lens of "objective reasonableness." In reversing the district court, the Ninth Circuit concluded that the arbitration provision was enforceable because the parties contemplated an ongoing transaction and the defendant's website provided "conspicuous notice that a reasonably prudent Internet user would have seen." *Id.* at 1020-21

The *Keebaugh* decision also addressed unconscionability in the context of *McGill.* Under California's "*McGill* rule," arbitration agreements cannot waive claims for "public injunctive relief." *See generally McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2007). Further, in *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819 (9th Cir. 2019), the Ninth Circuit held that – given the limitations placed on "public injunctive relief" in *McGill* – the Federal Arbitration Act ("FAA") did not preempt the *McGill* rule.

The plaintiffs in *Keebaugh* argued that the arbitration agreement violated *McGill* and was therefore unconscionable because it required arbitration of all claims but limited the arbitrator's ability to award relief to the "individual seeking relief." While the panel agreed that the individual relief limitation violated *McGill* and was therefore unenforceable, it did not agree that violating *McGill* rendered the arbitration agreement substantively unconscionable. Noting that "unenforceable" does not mean "unconscionable," the Court found that that no aspect of the individual relief limitation "shocked the conscience" and, accordingly, did not rise to the level of substantive unconscionability. Because the element of substantive unconscionability was not satisfied, the violation of *McGill* was not enough to sustain invalidation of the arbitration provision on unconscionability grounds. 100 F.4th at 1023.

The panel in *Patrick v. Running Warehouse, LLC*, 93 F.4th 468 (9th Cir. 2024), also addressed mutual assent and unconscionability. The Court concluded that notice of the arbitration clause was reasonably conspicuous, that the arbitration provision did not violate *McGill,* and that including a unilateral modification provision in the Terms of Service did not render the contract unconscionable.

The *Patrick* panel also concluded that incorporating the JAMS arbitration rules was sufficiently "clear

and unmistakable" evidence of an intent to delegate threshold issues of arbitrability to the arbitrator in a consumer transaction and arbitration. But the panel pointed out that because Plaintiffs submitted no evidence of sophistication in the district court, the panel did not have to resolve the sophistication issue on appeal. Accordingly, while plaintiffs may try to distinguish *Patrick* by submitting evidence of a lack of sophistication, it confirms that incorporating tribunal rules is at least facially sufficient to "clearly and unmistakably" delegate threshold issues of arbitrability to the arbitrator.