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Ninth Circuit kicks data breach class actions against sporting goods retailers to arbitration

by Stephanie N. Bedard

The Ninth Circuit recently affirmed a district court's decision to grant motions to compel arbitration and dismiss without prejudice six putative class actions against sporting goods retailers based on "sufficiently conspicuous" arbitration provisions in the applicable terms and conditions.

In *Patrick v. Running Warehouse*, --- F.4th ---, Nos. 22-56078, 22-56080, 22-56081, 22-56082, 22-56086, & 22-56087, 2024 WL 542831 (9th Cir. Feb. 12, 2024), the putative class plaintiffs purchased goods online from several websites selling sporting goods, including Running Warehouse, LLC; Wilderness Sports Warehouse, LLC d/b/a Tackle Warehouse; Sports Warehouse, Inc d/b/a Tennis Warehouse; and Skate Warehouse, LLC. After a data breach in October 2021, the plaintiffs brought six putative class actions against the defendants, asserting claims of negligence, breach of contract and of implied contract, and quasi contract. 2024 WL 542831, at *1.

Each defendant's website hyperlinked to substantially identical terms of use ("Terms") providing, in relevant part, that "You agree to arbitrate any and all claims, including all statutory claims, and any state or federal claims. By agreeing to arbitration, you understand and agree that you are giving up any rights to litigate claims in a court or before a jury, or to participate in a class action or representative action with respect to a claim." *Id.* at *2. The arbitration agreement in the Terms further provided that any claim, dispute, or controversy would be "resolved exclusively and finally by binding arbitration" pursuant to the JAMS commercial arbitration rules and procedures. *Id.* Based on these provisions, the defendants moved to compel arbitration.

In October 2022, the district court granted the defendants' motions to compel arbitration and dismissed the six class actions without prejudice. *Id.* On appeal, the Ninth Circuit affirmed the district court's decision on four grounds.

A. The hyperlinked terms of service put class plaintiffs on inquiry notice of the arbitration agreement.

First, the Ninth Circuit upheld the district court's finding that the hyperlinked terms of service put the plaintiffs on sufficient notice of the arbitration provision. *Id.* at *3-5.

As an initial matter, the Ninth Circuit affirmed that all named plaintiffs other than one had acknowledged seeing a hyperlink to the Terms and therefore had "inquiry notice" of the arbitration provision. *Id.* at *4 (quoting *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 79 (2d Cir. 2017) ("While it may be the case that many users will not bother reading the terms, that is the choice the user makes; the user is still on inquiry notice.")).

For the remaining plaintiff, Arcilla, the Ninth Circuit upheld the district court's finding that the website provided sufficient information to put him on inquiry notice. *Id*. The website provided sufficiently conspicuous notice to Arcilla on the final order review page because the notice was (1) located directly below key information such as the purchase total and the button Arcilla tapped to complete his purchase; (2) on an uncluttered page that was "not hidden or obscured"; (3) the notice itself was clear and legible; (4) the hyperlinked phrase "terms of use" was colored bright green, in contrast with the background and adjacent text; and (5) the hyperlink was the same color as other hyperlinks on the page. *Id*.

The Ninth Circuit distinguished these facts from its prior decision in *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849 (9th Cir. 2022), where it found that terms were not sufficiently conspicuous when the text disclosing the terms and conditions was "printed in a tiny gray font considerably smaller than the font used in the surrounding website elements, and indeed in a font so small that it is barely legible to the naked eye." *Id.* at 856–57.

The Ninth Circuit also found that Arcilla assented to the Terms because, by clicking the "Place Order" button to complete his purchase, he thereby confirmed he "agree[d] to [the website's] privacy policy and terms of use." 2024 WL 542831, at *4.

B. The arbitration agreement did not violate California law prohibiting restrictions on public injunctive relief.

Second, the Ninth Circuit affirmed the district court's finding that the arbitration agreement in the Terms did not improperly restrict any right to seek public injunctive relief. *Id.* at *5-6. Under California law, a clause prohibiting a party from seeking public injunctive relief is invalid and unenforceable. *McGill v. Citibank, N.A.*, 216 Cal. Rptr. 3d 627, 393 P.3d 85, 87 (2017).

The Ninth Circuit agreed with the district court that the arbitration agreement did not bar an arbitrator from awarding public injunctive relief; in fact, it did not address awardable remedies at all. 2024 WL 542831, at *5. As a result, even though the Terms prohibited customers from seeking class-wide arbitration, this prohibition did not run afoul of *McGill* because the arbitrator would not be restricted from awarding any specific *type* of relief. *Id.*

C. The unilateral modification clause in the Terms did not render the arbitration provision unconscionable.

Third, the Ninth Circuit quickly dismissed the plaintiffs' assertion that the Terms, which contained a unilateral modification clause, rendered the arbitration provision unconscionable. *Id.* at *6-7. The Ninth Circuit reasoned that the mere presence of a unilateral modification clause in the Terms, without more, would not render the arbitration clause (a separate provision in the Terms) substantively unconscionable. *Id.* at *7.

D. The parties delegated the threshold question of arbitrability.

Fourth, the Ninth Circuit held, as an issue of first impression, that incorporation of the JAMS arbitration rules by reference constitutes "clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Id.* at *8. In so finding, the Ninth Circuit joined other circuits, including the Tenth Circuit, Fifth Circuit, and Second Circuit, in holding that parties may agree to delegate the threshold question of arbitrability to JAMS. *Id.*

The plaintiffs argued that this should not be the case in consumer contracts between a sophisticated entity and an average, unsophisticated consumer, but the Ninth Circuit dismissed this argument because the plaintiffs had offered no evidence about their level of sophistication – or lack thereof – at the district court level. *Id.*

Takeaways: the Ninth Circuit's decision in *Patrick v. Running Warehouse* demonstrates that arbitration provisions remain enforceable if the plaintiffs are put on reasonably conspicuous notice of hyperlinked terms.

The Ninth Circuit's decision also provides insight for future litigants by making clear that incorporating the JAMS arbitration rules will demonstrate the parties agreed to arbitrate the key issue of arbitrability.