Kilpatrick

APRIL 2, 2018

Ninth Circuit: If you want an arbitration agreement enforced, don't try to slide it by later

by Jay Bogan

Takeaway: If you want to avoid exposure to class action litigation, you might think about putting an arbitration clause and class action waiver in your consumer-facing terms and conditions. But if you want those terms and conditions enforced, you need to prove that the consumer assented to them at the time he or she entered into the contract. Recently, the Ninth Circuit again refused to enforce an arbitration agreement because its terms were not known at the time the consumer entered into an agreement with the class action defendant.

In a prior post [*Ninth Circuit: An enforceable arbitration agreement requires notice to and assent by the consumer*], we reported on the Ninth Circuit's decision in *Norcia v. Samsung Telecommunications America, LLC*, 845 F.3d 1279 (9th Cir. 2017), where the court refused to enforce an arbitration agreement set out in a warranty brochure that was ***inside*** the box containing the purchased product. In other words, advising a consumer after the fact – such as when the consumer takes a product home, opens the box, and then has an opportunity to read the agreement – does not cut it in terms of proving contractual assent.

The Ninth Circuit recently applied *Norcia* in *Robinson v. OnStar LLC*, No. 3:15-cv-01731-WQH-BGS, 2018 WL 1323630 (9th Cir. Mar. 15, 2018), when it made short shrift of and vacated a district court order enforcing an arbitration agreement. There, the parties entered into a contract when the plaintiff (Ms. Robinson) called OnStar to activate a one-year trial subscription. At the time she called, Ms. Robinson had no notice of OnStar's terms and conditions (which contained the arbitration clause). Instead, OnStar later sent her the terms and conditions containing the clause. Quoting *Norcia*, the court observed: "[A] consumer [must] be on notice of the existence of a term before he or she can be legally held to have assented to it." 2018 WL 1323630, at *1 (quoting *Norcia*, 845 F.3d at 1289). OnStar's transmittal of the terms and conditions after the services already had been ordered failed this test because Ms. Robinson "had neither actual nor constructive notice of" the terms and conditions "at the time of her agreement with OnStar." *Id.* Accordingly, the panel reversed the district court's decision and remanded her class action lawsuit for proceedings in the district court.