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heckman v. live nation: ninth circuit hold mass arbitration clause to be unconscionable

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Earlier this week, the Ninth Circuit affirmed a District Court's decision in *Heckman v. Live Nation Entertainment Inc.*, finding that the delegation clause of Ticketmaster's arbitration agreement is unconscionable, that the arbitration agreement as a whole is unconscionable, and that the application of California's unconscionability law is not preempted by the Federal Arbitration Act (FAA). This ruling carries significant implications for service providers seeking to enforce arbitration agreements with consumers.

In January 2022, a group of plaintiffs filed a putative class action in the U.S. District Court for the Central District of California against Live Nation Entertainment, Inc. and Ticketmaster LLC ("Defendants"), alleging anticompetitive practices in violation of the Sherman Act. Defendants sought to compel arbitration. Judge Wu denied the Motion, finding the delegation clause unconscionable and deeming the arbitration agreement as a whole unenforceable. *Heckman v. Live Nation Ent., Inc.*, 686 F. Supp. 3d 939, 967 (C.D. Cal. 2023).

The defendants appealed. The Ninth Circuit not only upheld the District Court's decision but went further, ruling that with respect to mass arbitrations, California's law relating to class waivers is not preempted by the FAA. This decision on preemption may have profound implications, as explored below.

Key Takeaways for Service Providers

The Ninth Circuit's decision provides valuable insights into arbitration provisions contained in unilateral consumer agreements. Here are some of the crucial points from the Court's ruling:

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Unilateral Modifications Without Notice. With respect to companies that provide terms and conditions online, many companies reserve the right to modify those terms unilaterally, with changes taking effect immediately upon posting or when the consumer next visits the website. Under Ticketmaster's Terms, any changes took effect immediately upon posting, with continued site use indicating acceptance. *Heckman*, 686 F. Supp. 3d at 954. The Court found such lack of prior notice or affirmative acceptance procedurally unconscionable, stating that consumers are "[f]orced to accept Terms that can be changed without notice." *Heckman v. Live Nation Ent., Inc*., No. 23-55770, WL 4586971, at *11 (9th Cir. 2024).

Retroactive Arbitration Provisions. The Ninth Circuit also scrutinized Ticketmaster's arbitration provision, which applied retroactively to all prior ticket purchases. This broad application raised procedural concerns, with the Court emphasizing that arbitration clauses should be clearly limited to future transactions to avoid ambiguity and perceived unfairness. *Heckman*, WL 4586971, at *7. The Court held that these retroactive terms, especially in combination with unilateral modification and deemed acceptance by continued use of the service, are particularly unfair because consumers often revisit the site to access previously purchased digital tickets, making retroactive application of changes almost unavoidable.

One-Sided or Asymmetrical Terms. The Ninth Circuit found many of the provisions Asymmetrical. Courts generally disfavor terms that overwhelmingly favor one party. *See Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC*, 282 P.3d 1217, 1232 (Cal. 2012) ("Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided.") Asymmetrical terms are often fatal for the online terms of use. In 2023, a California appeals court refused to enforce an arbitration clause in Skillz's Terms of Use. As a gaming platform, Skillz had crafted terms that limited its liability and funneled consumer disputes into arbitration. The Court found the terms excessively one-sided, especially regarding exceptions for litigation on intellectual property disputes and limits on liability and indemnity clauses, which benefited only the service provider. *Gostev v. Skillz Platform, Inc.,* 88 Cal.App.5th 1035, 305 Cal. Rptr. 3d 248 (Cal. Ct. App. 2023). Ticketmaster's arbitration provision contained multiple provisions that clearly favored the service provider unilaterally. For example, the Court found that while an award of injunctive relief could be appealed to JAMS, a denial of such relief could not. The provision was deemed asymmetrical because "injunctive relief will virtually always be sought by the plaintiff rather than the defendant," resulting in an unfair operational asymmetry. *Heckman*, WL 4586971, at *5.

The New Era's Mass Arbitration Procedures. In finding the New Era Mass Arbitration Rules[1] ("New Era Rules") substantially unconscionable, the Ninth Circuit focused on four key factors: "(1) the application of precedent from the "bellwether" decisions to claimants who had no opportunity to participate in, or even learn the content of, those decisions; (2) the lack of discovery and other procedural limitations; (3) the provisions governing the selection of arbitrators; and (4) the limited right of appeal." *Heckman*, WL 4586971, at *8 citing *Heckman*, 686 F. Supp. 3d at 957. Additionally, the Ninth Circuit raised due process concerns over New Era's "batching" procedures, which allowed unilateral grouping of similar claims by the provider, which did not include participation by claimants' counsel. Specifically, the Court found:

1. **The Right to be Heard.** The Court noted that under the New Era Rules, not all claimants were afforded the opportunity to be heard or have the right to opt out of the "class." *Heckman*, WL 4586971, at *8. The Court explained that while not all claimants would have the opportunity to participate in the bellwether cases, an arbitrator's decision on the validity of the delegation clause made in the bellwether cases would be binding on all claimants. *Id*. In this way, a claimant whose case is not a bellwether case has no notice of the bellwether cases and no opportunity to be heard in those cases. (The Court assumed not all claimants have the same counsel, which may not be an apt assumption.)

2. **Bellwether Precedent Is Discretionary**. The Court found the New Era Rules made the application of the bellwether "precedent" completely discretionary. However, failure to apply bellwether precedent "would defeat the very purpose of the mass arbitration protocol." *Heckman*, WL 4586971, at *9. This discretionary application of precedent created uncertainty and potential for inconsistent outcomes, which raised additional concerns about the fairness of the arbitration process

3. **Procedural Limitations.** The Court also concluded the procedural limitations inherent in New Era Rules were tailored in a way that disproportionately favored the service provider, thereby undermining the fairness of the arbitration process. Two specific procedural deficiencies were highlighted:

- **Lack of Discovery**: The New Era Rules provided no right to discovery for claimants, severely limiting their ability to gather evidence and build a robust case.

- **Limitations on the Evidentiary Record and Briefing**: Under New Era Rules, claimants were constrained by strict limits on the number of documents they could submit, the length of their closing briefs, and even the length of their complaints. For example, initial complaints were limited to just 10 pages, yet they were still required to cover detailed aspects of the dispute, including applicable dates, parties involved, and the nature of the dispute itself.

These limitations, the Court found, created an unbalanced and inequitable process that failed to provide claimants with the necessary tools to present their claims effectively.

1. **The Right To Appeal.** In addition to procedural concerns, the Ninth Circuit also addressed the one-sided nature of the appeal process. Under New Era Rules, appeals were permitted only if injunctive relief was granted against the respondent. This limitation effectively reserved appeal rights exclusively for the service provider, as claimants are typically the party seeking injunctive relief. The Court concluded that this structure further exacerbated the imbalance of power in favor of the respondent, contributing to the substantive unconscionability of the delegation clause. *Heckman*, WL 4586971, at *10.

2. **Arbitrator Selection.** Finally, the Court examined New Era's arbitrator selection rules, which were found to violate California law. *Heckman*, WL 4586971, at *11. Key concerns included:

- **Option to Override Claimants' Disqualification Decisions**: New Era had the power to override a claimant's decision to disqualify an arbitrator, undermining claimants' ability to ensure neutrality in the process.

- **Disqualification Rights:** Under the New Era Rules, each "side," rather than each individual party, had the right to disqualify an arbitrator, limiting the autonomy of individual claimants.
- **Multiple Cases per Arbitrator:** The practice of assigning a single arbitrator to preside over multiple cases at the same time was deemed problematic, as it raised concerns about the quality of decision-making and the fairness of the proceedings.

Mass Arbitration and FAA Preemption. Perhaps most significantly, the Ninth Circuit panel held that the FAA does not preempt California's *Discover Bank* rule as it applies to mass arbitration. *Heckman*, WL 4586971, at *14. The *Discover Bank* court held, among other things, that class waivers are unenforceable when included in a consumer contract of adhesion. *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 864 (Cal. App. 2002). Later, however, the Supreme Court held that *Discover Bank* rule is preempted by the FAA because it posed an obstacle to the objectives of the FAA. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

The *Heckman* panel limited *Concepcion*'s reach, stating that "[a]s applied to the Expedited/Mass Arbitration procedures set forth in Ticketmaster's Terms and New Era's Rules, the *Discover Bank* rule poses no such obstacle, because those procedures do not apply to the forms of arbitration covered by the FAA." *Heckman*, WL 4586971, at *13. In a concurring opinion, Judge Vandyke concluded that mass arbitration as a whole lies "outside the bounds of the norm of bilateral arbitration as our precedents conceive of it" suggesting a resurgence of California's *Discover Bank* rule in the mass arbitration context. *Heckman*, WL 4586971, at *15.

What Should Service Providers Do Next?

The Ninth Circuit's decision in *Heckman v. Live Nation* sends a clear message: arbitration provisions in consumer contracts must be fair and balanced to survive judicial scrutiny. Does this mean that parties should rush to remove waivers from their terms of use or reconsider arbitration as a forum for consumer disputes? These questions are pressing and rapidly evolving. Each new decision reshapes the understanding of what courts consider fair in the consumer context.

[1] The New Era Mass Arbitration Rules that were in effect at the time of the operative events.