



The End of a New ADR Era? Ninth Circuit Affirms Finding of Mass Arbitration Rules as Unenforceable

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The [Ninth Circuit](#) recently affirmed a district court's ruling denying a motion by Live Nation and Ticketmaster to compel arbitration of claims by ticket purchasers, finding that the arbitration agreement contained in Ticketmaster's website Terms of Use was procedurally and substantively unconscionable and thus unenforceable under California law. Notably, the arbitration clause required arbitration with a digital arbitration vendor (New Era ADR) under New Era's rules for Expedited/Mass Arbitrations. Mass arbitration, a developing dispute resolution system, involves a large group of demands filed on behalf of or against a common party, out of which one plaintiff may be chosen to represent the larger group of plaintiffs, otherwise known as a "bellwether plaintiff."

The plaintiffs in *Heckman v. Live Nation Entertainment, Inc.* filed a putative class action alleging that the defendants engaged in predatory ticket pricing. In response, the defendants sought to enforce Ticketmaster's Terms of Use, which required the dispute to be resolved through arbitration. These Terms specifically provided that claims stemming from current or prior online ticket purchases be decided by an arbitrator employed by New Era, who, under its delegation clause, also had the authority to determine the validity of the arbitration agreement. The district court denied the motion to compel arbitration.

In affirming the district court's decision, the Ninth Circuit emphasized the lack of protections afforded to single claimants, non-parties, and non-bellwether plaintiffs under the arbitration agreement's delegation clause. The court concluded that the defendants' mass arbitration provisions were substantively unconscionable, in part, because they would impose binding decisions on non-bellwether plaintiffs who "had no chance to participate in the arbitration and who are ignorant of the decision until it is invoked against them." To support this conclusion, the court pointed to provisions of the rules that let New Era unilaterally

choose which cases would be batched together, as well as the individual and confidential nature with which bellwether decisions were to be made. The Ninth Circuit further criticized the coordination between New Era and the defendants' attorneys in drafting the set of procedures that resulted in limits on evidence and briefing, as well as the lack of discovery or hearing rights under New Era's arbitration rules.

Additionally, the court found the delegation clause to be procedurally unconscionable, given the significant power imbalance between Ticketmaster and consumers due to Ticketmaster's market dominance in ticket service industries. This power imbalance, together with Ticketmaster's Terms permitting retroactive changes without notice, unilateral modification without prior notice, and misleading language suggesting that all claims would be resolved by individual arbitration, supported the district court's finding. Overall, the Ninth Circuit appears to have elevated the need for fairness over efficiency in the developing mass arbitration landscape.

While criticizing New Era's arbitration procedures, the court clearly distinguished New Era from traditional forums such as the Judicial Arbitration and Mediation Services (JAMS) and the American Arbitration Association (AAA), thereby reinforcing the validity of those dispute resolution providers.

Finally, on an alternate and independent ground, the court held that the Federal Arbitration Act ("FAA") does not preempt California's *Discover Bank* rule as it applies to mass arbitration. The *Discover Bank* court held that class action waivers are unenforceable when included in a consumer contract of adhesion, but the Supreme Court held in *AT&T Mobility LLC v. Concepcion* that the *Discover Bank* rule is preempted by the FAA because it thwarted the objectives of the FAA. The Ninth Circuit in *Heckman*, however, held 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." And, a concurring opinion concluded that mass arbitration as a whole lies "outside the bounds of the 'norm of bilateral arbitration as our

precedents conceive of it.” Therefore, *Heckman* suggests a resurgence of California’s *Discover Bank* rule in the mass arbitration context.

The Ninth Circuit’s decision ultimately serves as useful guidance for entities to consider when drafting or revising consumer arbitration clauses and mass arbitration provisions – and simultaneously serves as a warning to companies who currently implement, or are considering implementing, similar mass arbitration procedures.

The Ninth Circuit has since denied a petition for panel rehearing and/or rehearing *en banc* filed by defendants.

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