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California Federal Court Denies Motion to Compel New Era ADR Arbitration; Questions Remain on Unmanageability of Mass Actions

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The recent ruling by the U.S. District Court for the Central District of California denying a motion to compel arbitration in *Heckman v. Live Nation Entertainment, Inc.*, illustrates the importance of maintaining fairness and mutuality for creating enforceable online terms and conditions.

THE CASE

In *Heckman*, Live Nation and Ticketmaster updated the arbitration agreement in their terms of use to change the arbitration provider from JAMS to New Era ADR and to adopt New Era ADR's arbitration rules. New Era ADR offers businesses the option to pay an annual subscription fee for its arbitration services. New Era ADR also offers standardized procedures for administering mass, individual consumer arbitrations. Under those rules, where multiple cases are filed against defendants, the neutral may group them together based on

his or her determination that the cases involve the same or similar evidence, witnesses, or issues of law and fact. Once that determination is made, the neutral renders a decision in three bellwether cases to "act as" precedent on all existing and subsequent cases, excluding those that the neutral determines presents individualized issues of law and/or fact that should not be subject to the bellwethers' precedent.

Defendants moved to compel arbitration on the grounds that other than the terms' adoption of New Era ADR and its arbitration rules, the case was substantially identical to *Oberstein v. Live Nation Entertainment, Inc.* In *Oberstein*, the same court had compelled the question of arbitrability to the arbitrator based on its conclusion that plaintiffs assented to the terms, which contained an enforceable delegation clause.

Here, however, plaintiffs did not contest that they repeatedly agreed to defendants' updated terms of use. Instead, they contended that defendants switched their arbitration provider to New Era ADR in light of the growing number of consumers pursuing individual arbitrations and that its "batched/bellwether"

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case resolution rules were unfair to plaintiffs and other claimants.

THE COURT'S DECISION

Notwithstanding its conclusion that the updated terms indisputably delegated the issue of enforceability to New Era ADR, the court denied defendants' arbitration motion, holding that the delegation clause itself was unenforceable on grounds of procedural and substantive unconscionability.

The court's finding of procedural unconscionability focused on "the factors of oppression and surprise." The court reasoned that the arbitration provision was contained in a contract of adhesion with no opportunity for consumers to negotiate, and considering defendants' market dominance in the ticketing industry, consumers were forced to accept their terms or forego attending events altogether. While observing that these findings alone satisfied the elements of procedural unconscionability, the court further concluded that the manner in which defendants updated their terms created "an extreme amount of procedural unconscionability far above and beyond a run-of-the-mill contract-of-adhesion case."

In particular, the court noted that defendants' selection of New Era ADR caused a significant change in the parties' agreement from individual, bilateral arbitration to mass arbitration, which would be applied retroactively to already accrued claims. The court also noted that defendants made this change unilaterally without notifying existing customers, without explaining the new mass arbitration procedure, and while *Oberstein* remained pending. To avoid mass arbitration, the court explained that ticket purchasers would need to carefully compare defendants' operative terms to the prior terms, discover the switch to New Era ADR and read its procedures, comprehend those procedures to discover the mass arbitration procedure, and then decide to refrain from transacting with defendants. Because the "cumulative result" of these facts was "significant," the court found that defendants' arbitration agreement was "extremely procedurally unconscionable."

As for substantive unconscionability, the court looked primarily to "potential due process concerns." The court noted that "the mass arbitration protocol

creates a process that poses a serious risk of being fundamentally unfair to claimants" because they were ambiguous about how a neutral would exercise his or her discretion to apply bellwether precedent. This aspect was "uniquely problematic" considering that the neutral would have unchecked power to apply this precedent to thousands of claims, including for claimants who were not parties to the earlier proceedings. The court reasoned that New Era ADR's rules lacked critical procedural safeguards present in multidistrict litigation and class actions, such as procedures for providing notice to other interested parties, appointing claimants' leadership, and opting out.

It further observed other considerations that "when coupled with the due process concerns . . . further exacerbate the level of unfairness to claimants." These factors included requiring claimants to pay a fee and obtain defendants' consent to upgrade to a standard arbitration procedure with a formal discovery process; incorporating an arbitration selection and disqualification procedure that appeared to waive a nonwaivable right in California regarding the selection of an arbitrator; and providing a right to appeal only to the party against whom injunctive relief is awarded.

CONCLUSION

Live Nation does not address important issues concerning the lack of manageability in mass actions and the potential infringement on due process. In drafting online consumer terms, consider the following practical tips:

- Where possible, provide customers notice of substantive changes to the arbitration agreement to minimize the potential for an unfair surprise.
- Reduce the amount of review consumers must perform to understand the applicable procedures by explaining or summarizing the relevant arbitration procedures directly in the terms, without relying on a cross-reference or link to the arbitration services' separately posted rules.
- Avoid provisions that materially limit claimants' access to discovery and an appellate review of an arbitration decision.

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