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PERSPECTIVE

Consumer arbitration wrinkles

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Recently, the 9th U.S. Circuit Court of Appeals issued two opinions involving consumers and arbitration agreements. In September, the court ruled that a company could not compel arbitration even though the consumer had agreed with a different entity to arbitrate claims against "affiliates," because the parent company's acquisition of the affiliate post-dated the agreement. Revitch v. DIRECTV, LLC, 977 F.3d 713, 718 (9th Cir. 2020). And in October, the court ruled that a consumer who had previously subscribed to a credit monitoring service was required to arbitrate her claims as she initially agreed despite a later change to the arbitration clause. Stover v. Experian Holdings, Inc., 978 F.3d 1082, 1086 (9th Cir. 2020). Both decisions implicate how companies craft arbitration clauses going forward. They also further illustrate just how difficult it can be for consumers to avoid arbitration.

The *Stover* Opinion

In Stover, in 2014 the consumer subscribed to Experian's credit monitoring service and assented to its terms-of-use containing an arbitration clause and class action waiver. The agreement also included a "change-of-terms" clause binding the consumer to updated terms-of-use in the future if she continued to access Experian's services. The consumer cancelled her subscription the same year she initiated it, in 2014.

In 2018, the consumer accessed the website just once, then filed a putative class action against Experian alleging violations of the Fair Credit Reporting Act. In the four years between her original use of the service and her revisit to Experian's website in 2018, Experian had changed the terms of the arbitration clause to include a carve-out enabling consumers to avoid arbitration for certain types of claims, including claims arising out of the FCRA.

The district court granted Experian's motion to compel arbitration reasoning that while the updated 2018 terms applied, the consumer's claims were not within the carveout; therefore, the consumer was required to arbitrate. The consumer appealed.

The 9th Circuit framed the issue as "whether a mere website visit after the end of a business relationship is enough to bind parties to changed terms in a contract pursuant to a change-of-terms provision in the original contract." Experian argued "no," and the Court of Appeals agreed, holding that the original 2014 terms remained binding. This still meant a loss for the consumer, but without the need to analyze the 2018 carve-out as the district court had done.

The consumer's single visit to Experian's website in 2018 was not sufficient to activate the change in terms because she had not alleged notice of the new terms when filing her class-action. "[N]otice — actual, inquiry, or constructive — is the touchstone for assent to a contract, and the resulting enforceability of changed terms in an agreement." And, the appellate court concluded, the "change-of-terms" clause in the original agreement could not act as a surrogate for any and all future notice because that would give too much power to contract drafters who could bind consumers on a daily or hourly basis after updating the contract's terms. "We therefore hold that in order for changes in terms to be binding pursuant to a change-ofterms provision in the original contract, both parties to the contract — not just the drafting party — must have notice of the change in contract terms."

The *Revitch* Opinion

In Revitch, the 9th Circuit considered whether an arbitration clause extended to an affiliate company acquired years after the contract was formed.

In 2011, the consumer and AT&T Mobility LLC entered into an agreement which included an arbitration clause extending to "all disputes and claims," including any with AT&T Mobility "affiliates." In 2015, AT&T, Inc., the parent company to AT&T Mobility, acquired DIRECTV, which made it AT&T Mobility's affiliate. In 2018, the consumer brought a putative class action against DIRECTV, LLC alleging violations under the Telephone Consumer Protection Act.

DIRECTV moved to compel arbitration, arguing that the consumer was bound by the contract with AT&T Mobility because it was an "affiliate" under the terms of that agreement, even though it was not an affiliate in 2011. The district court denied the motion concluding the consumer and AT&T Mobility did not intend to arbitrate claims against unknown and then nonexistent affiliates.

In a split panel decision, the 9th Circuit affirmed. Applying California contract law, the majority concluded that the consumer and AT&T Mobility intended the arbitration clause to extend only to present (and not future) affiliates. The majority reasoned that under DIRECTV's reading of the agreement, the consumer would be forced to arbitrate any dispute with any corporate entity later acquired by AT&T, Inc. The majority also noted that had the arbitration clause expressly stated it extended to "affiliates, both present and future," the court may have arrived at a different conclusion.

The dissent contended that DIRECTV was an affiliate within the meaning of the arbitration clause. Following the reasoning of a similar 4th Circuit decision, Mey v. DIRECTV, LLC, 971 F.3d 284 (4th Cir.

2020), the dissent argued that the unmodified term "affiliate" included future affiliates and that nothing in the arbitration clause conferred a "temporal scope" on the term that would limit it to present affiliates.

Arbitration Angle

Though the two opinions arrived at different outcomes on enforceability, they bear some important similarities. Each rejected arguments to read the initial contract's terms expansively — Stover rejected reading the "change-of-terms" clause alone as sufficient to constitute notice of new terms added in the future, and Revitch rejected the definition of "affiliates" as including new affiliates arising post-contract formation. In doing so, both panels analyzed the intent of the parties at the time the contract was formed. And each reasoned that a contrary interpretation of the parties' intent would lead to absurd results.

At first glance, the implication of these decisions could be viewed as favorable to consumers. Though Stover required the consumer to arbitrate, it was because the consumer was not presumptively on notice of the new, more favorable terms. In a different case, that might be a good thing, such as in circumstances when the new terms are less favorable. But ironically in Stover, the new terms included an arbitration carve out, which would have enabled the consumer to avoid arbitration. Call it a case of a reasonable principle — adequate notice — defeating application of the less sweeping, more consumer friendly arbitration clause.

As for Revitch, the consumer avoided arbitration because the arbitration clause failed to reference future affiliates — a seemingly bright line approach favorable to consumers signing such contracts.

In reality, though, Stover and Revitch's consumer benefits may be in short supply. Stover is likely to be a factual outlier because the consumer only visited Experian's website once since the terms-of-use were updated, the day before filing a complaint. She was hardly engaging Experian's service much less assenting to new terms. For actual users, Stover is not likely to offer a consumer escape hatch. In re Holl, 925 F.3d 1076, 1084-85 (9th Cir. 2019) (holding arbitration agreement bound consumer who clicked on box agreeing to terms of service); Lee v. Ticketmaster L.L.C., 817 Fed. App'x 393, 394-95 (9th Cir. 2020) (concluding a consumer that signed into Ticketmaster's website assented to arbitration provision each time he accessed the service); Dohrmann v. Intuit, Inc., 823 Fed. App'x 482, 484 (9th Cir. 2020) (determining that the TurboTax website provided sufficient notice of arbitration provision where users had to sign in and the terms-of-use were displayed to users through a hyperlink).

But all that aside, these decisions offer some guidance to companies drafting and revising arbitration clauses in the future. In Revitch, the majority asserted that the outcome may have been different had the arbitration clause expressly stated it included "future affiliates." And Stover hardly erected an insurmountable wall around updated terms-of-use. It's all in the method and means of notice. If anything, these recent 9th Circuit opinions demonstrate that when it comes to contracts, getting consumers to arbitration remains a largely uneven battle field — and companies hold the high ground. ■

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