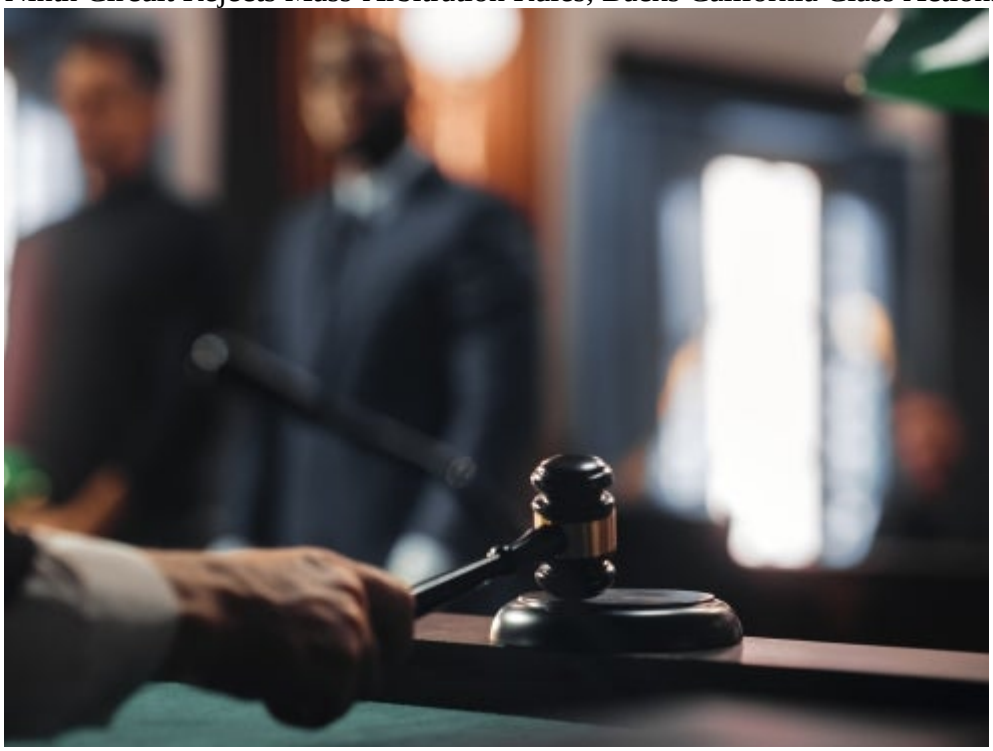
Updates
November 20, 2024
Ninth Circuit Rejects Mass-Arbitration Rules, Backs California Class Actions



In *Heckman v. Live Nation Entertainment, Inc.*, a panel of the U.S. Court of Appeals for the Ninth Circuit held that the mass-arbitration protocol in Ticketmaster's consumer agreement was unconscionable and unenforceable under California law.

The court also held "as an alternate and independent ground" that, given Ticketmaster's mass-arbitration protocol, the Federal Arbitration Act (FAA) "does not preempt California's prohibition of class action waivers contained in contracts of adhesion in large-scale small-stakes consumer cases." This ruling has potentially broad consequences for consumer-facing companies, including limiting the procedural requirements those companies can implement to mitigate the risk of mass arbitration and their ability to rely on the FAA to enforce such requirements.

The Rise of Mass Arbitration

Mass arbitration is a response to the growth of mandatory arbitration clauses and class-action waivers in consumer and employment contracts. It involves hundreds, thousands, or even tens of thousands of individual—but coordinated—arbitration demands filed against the same party and with those claimants usually represented by the same or coordinated counsel.

Because many arbitration providers immediately charge more than a thousand dollars in administrative fees for each arbitration demand, companies that require arbitration to resolve disputes may have to pay millions of dollars up front in a mass arbitration, regardless of the value or merits of the individual claims. Those initial fees can generate disproportionate settlement pressure on the responding company.

As mass arbitration has taken root, targeted companies have sought ways to mitigate high fees, including bellwether provisions that require test trials before thousands of individual claims are filed, fee-shifting

provisions for frivolous or harassing claims, or refusal to pay the initial arbitration fees. These new approaches have been subject to increasing judicial scrutiny.

The *Heckman v. Live Nation* Decision

After the plaintiffs filed a putative class action in district court alleging antitrust violations, Ticketmaster moved to compel arbitration under recently amended consumer terms. Those terms required arbitration with New Era ADR, a new provider whose "stated mission is to provide a 'critical prophylactic measure for client's mass arbitration risk.'" The court denied the motion, concluding that New Era's mass-arbitration procedures were unconscionable.

The Ninth Circuit agreed, characterizing New Era's rules as "so dense, convoluted and internally contradictory to be borderline unintelligible." The court concluded that Ticketmaster's terms and New Era's rules "evince an extreme amount of procedural unconscionability" and are "substantively unconscionable to a substantial degree" such that claimants could not effectively vindicate their rights. The appellate court also concluded that the district court did not abuse its discretion in declining to sever the offending provisions because "unconscionability permeate[d] all aspects of the arbitration agreement."

The Ninth Circuit panel was particularly concerned with New Era's rules that required in mass arbitration (1) batched arbitrations without claimant input, (2) precedential application of the decisions from three bellwether cases within a batch to all other arbitrations in the batch, and (3) limited discovery and evidence presentation. It was also concerned about New Era's unilateral control over arbitrator selection and the determination of which cases would proceed in a batch. The court identified other issues with Ticketmaster's terms, including binding customers who merely browsed its website to the terms and reserving the right to unilaterally modify the terms without prior notice and with retroactive application.

The court also issued an alternative holding that likely has broader implications for mass-arbitration terms. The court held that the FAA did not apply to the mass-arbitration model in Ticketmaster's terms. Therefore, California's *Discover Bank* rule—that class-action waivers in certain consumer contracts are unconscionable—independently invalidated Ticketmaster's arbitration agreement. In 2011, the Supreme Court of the United States held that *Discover Bank* is preempted by the FAA, but in the Ninth Circuit's view, the FAA addresses only bilateral arbitration, not mass (or "aggregative") arbitration. According to the court, "the FAA simply does not apply to and protect the mass arbitration model set forth in Ticketmaster's Terms and New Era's Rules."

In light of the *Heckman* decision, any terms that require coordination or consolidation of proceedings in mass arbitration, including bellwether or batching rules, should be carefully reviewed. The enforceability of such terms—and whether a company can rely on the FAA to support enforcing them—is now uncertain in the Ninth Circuit. Companies should engage counsel to review their arbitration agreements and advise them on strategies to mitigate mass-arbitration campaigns and associated costs.

Authors

Explore more in

Business Litigation | Class-Action Defense | Consumer Protection | Technology Transactions & Privacy Law | Digital Media & Entertainment, Gaming & Sports | Retail & Consumer Products

Related insights

Update

Quarterly Investment Update - 1st Quarter 2025

Update

New Registration Requirement for Noncitizens Staying in the United States for 30+ Days