ARBITRATION

MARKETER THAT CALLED VERIZON CUSTOMERS CANNOT ASSERT ARBITRATION CLAUSE CONTAINED IN CUSTOMERS CONTRACTS WITH VERIZON

In Re Henson, 869 F.3d 1052 (9th Cir. 2017).
http://cdn.ca9.uscourts.gov/datastore/opinions/2017/09/05/16-71818.pdf

FACTS: Plaintiffs Anthony Henson and William Cintron (collectively "Henson"), were cellular and data subscribers who contracted with Verizon under a Customer Agreement. Defendant Turn, Inc., was a "middle man" for internet-based advertisers that separately contracted with Verizon to deliver advertisements to its subscribers. Henson alleged that Turn exploited Verizon users through the installation of its "zombie" cookies by collecting data about users without their knowledge. Furthermore, Henson alleged that Turn used the data collected through the "zombie" cookies for commercial gain without the subscriber's consent.

Henson filed a putative class action on behalf of Verizon subscribers residing in New York against Turn for its alleged use of these "zombie" cookies, claiming Turn engaged in deceptive trade practices and committed trespass to chattels by intentionally interfering with the use and enjoyment of Verizon subscribers' mobile devices. Because Turn was not a signatory in Henson and Verizon's contract, it sought to compel arbitration through equitable estoppel. The district court granted Turn's motion to compel arbitration and stayed the action. Henson timely filed a writ of mandamus to vacate the district court's order compelling arbitration.

HOLDING: Petition granted.

REASONING: Turn argued that equitable estoppel prevented Henson from refusing arbitration against it as a non-signatory. Under the forum state's applicable law, equitable estoppel applies in two circumstances. First, when a signatory to a contract must rely on the terms of the contract in asserting its claims against a non-signatory or the claims are intimately founded in and intertwined with the contract. Second, when the signatory alleges substantially interdependent and concerted misconduct by the non-signatory and a co-signatory, and the allegations of interdependent misconduct are founded in or intimately connected with the obligations of the contract.

First, the court reasoned that because Henson's complaint was replete with allegations of wrongdoing against Turn that had nothing to do with the Customer Agreement, the first circumstance did not apply. Second, the court reasoned that because Henson did not allege collusion between Verizon and Turn, but alleged Turn conducted its practices in secret and without Verizon's consent, the second circumstance also did not apply.

GAS COMPANY THAT GAVE DISCOUNT ON BANK CREDIT CARD CANNOT COMPEL ARBITRATION

White v. Sunoco, Inc., 870 F.3d 257 (3rd Cir. 2017).
http://law.justia.com/cases/federal/appellate-courts/ca3/16-2808/16-2808-2017-09-05.html

FACTS: Appellant, Sunoco a Pennsylvania corporation, sought to force Appellee, Donald White, to enter into mandatory arbitration for his claims against Sunoco pursuant to a credit card agreement that White signed with Citibank– unnamed in the lawsuit. The lawsuit centered around the "Sunoco Rewards Program," which offered customers who purchased gasoline at Sunoco locations using a Citibank-issued credit card a five-cent per gallon discount either at the pump or on their monthly billing statements. White alleged he did not receive a five-cent per gallon discount on every purchase made with his Citibank-issued card.

White filed suit, individually and on behalf a putative class, against Sunoco alleging fraud. Sunoco filed a motion to compel arbitration based on the arbitration clause in the credit card agreement between White and Citibank. The District Court denied Sunoco's motion. Sunoco appealed.

HOLDING: Affirmed.

REASONING: Sunoco argued that equitable estoppel prevented White from refusing arbitration against it as a non-signatory. Under applicable law, equitable estoppel applies in two circumstances. First, if a plaintiff-signatory alleges concerted conduct on the part of both the non-signatory and another signatory, that plaintiff may be equitably estopped from avoiding arbitration with the non-signatory. Second, if a plaintiff-signatory asserts a claim against a defendant in reliance on the terms of an agreement, that plaintiff may be equitably estopped from avoiding arbitration on the basis that the defendant was not a signatory to that same agreement. The court reasoned that equitable estoppel did not apply to White because there was no alleged "concerted conduct" or misconduct on the part of Sonoco and Citibank. Further, the claims that White asserted against Sunoco did not rely on any terms in the card agreement. Therefore, neither of the equitable estoppel scenarios applied.

The claims that White asserted against Sunoco did not rely on any terms in the card agreement, therefore neither of the equitable estoppel scenarios applied.

Sunoco also argued that its promotional materials and the Card Agreement should be read as constituting one "integrated whole" contract between White, Citibank, and Sunoco. The court disagreed, reasoning that Sunoco's own representations that the promotional materials neither constituted an offer nor conferred obligations or terms to "integrate" with the Card Agreement contradicted this position. Lastly, Sunoco argued the Card Agreement's arbitration clause compelled White to arbitrate claims against "connected" entities, of which Sunoco claimed to be one. The court rejected this argument by noting that while the Card Agreement encompassed claims "made by or against anyone connected with [Citibank] or [White] or claiming though [Citibank] or [White]," Sunoco confused the nature of the claims covered with the question of who can compel arbitration.

AMAZON'S ARBITRATION CLAUSE IN ITS CONDITIONS OF USE IS ENFORCEABLE

Wiseley v. Amazon.com, Inc., ___ F.3d ___ (9th Cir. 2017).
http://law.justia.com/cases/federal/appellate-courts/ca9/15-56799/15-56799-2017-09-19.html

FACTS: Plaintiff-Appellant, Allen Wiseley, became involved in a dispute with Defendant-Appellee, Amazon.com, Inc., an online retailer, over advertising practices.

Wiseley filed a class action suit against Amazon in California state court that was removed to the U.S. District Court for the Southern District of California. The district court granted Amazon's motion to compel arbitration and dismiss under the arbitration clause in its Conditions of Use ("COU"). Wiseley appealed.

HOLDING: Affirmed.

REASONING: Wiseley argued that the arbitration clause found in the COU was procedurally unconscionable given its adhesive nature and incorporation of the American Arbitration Association (AAA) rules. In the alternative, Wiseley argued the arbitration clause was substantively unconscionable because: (1) the unilateral modification provision was unconscionable; (2) the clause's exemption of intellectual property claims for injunctive relief made the provision overly harsh and one sided; and (3) the attorneys' fees provision created substantive unconscionability.

The court found that Amazon's arbitration clause was neither procedurally nor substantively unconscionable and, therefore, was enforceable.

The court found that Amazon's arbitration clause was neither procedurally nor substantively unconscionable and, therefore, was enforceable. Adhesion was insufficient to support a finding of procedural unconscionability. Further, alerts on Amazon's account registration and checkout pages featured sufficient notice that clicking the corresponding button constituted agreement to the linked COU. Wiseley was provided with a "reasonable opportunity to understand" he would be bound by additional terms. The arbitration clause was one such term and appeared in the same size font as the rest of the COU with key terms bolded. Incorporation of the AAA rules was also acceptable because Wiseley had reasonable opportunity to understand the rules before accepting the terms.

Wiseley's arguments in favor of substantive unconscionability also failed because Amazon was limited under the unilateral modification by the implied covenant of good faith and fair dealing. In addition, the intellectual property exemption was acceptable because a provision that gives only one party the option of requiring arbitration was not substantively unconscionable. Lastly, the court held provisions related to attorneys' fees were also not unconscionable because they mirrored Washington State's statutory language for providing attorneys' fees for frivolous claims.

ONE-SIDED ARBITRATION AGREEMENT UNCONSCIONABLE AND UNENFORCEABLE

Baxter v. Genworth N. Am. Corp. 224 Cal.Rptr.3d 556 (2017).
https://law.justia.com/cases/california/court-of-appeal/2017/a144744.html

FACTS: Plaintiff Maya Baxter transitioned from being an employee of AssetMark Investment Services, Inc. to an employee of defendant Genworth North America Corp. after Genworth acquired AssetMark. As a condition of her continued employment, Genworth required Baxter to sign an agreement to arbitrate employment disputes according to its alternative dispute resolution program known as "Resolve." After her promotion to a supervisory role, Baxter expressed concern regarding Genworth's employee evaluation protocol that included race, age, and gender coding. As a result, Baxter claimed she was subject to harassment and retaliation. During Baxter's medical leave of absence granted under the California Family Rights Act ("CFRA"), Genworth eliminated Baxter's position. Baxter filed suit against Genworth and AssetMark asserting wrongful termination, associational and racial discrimination in violation of FEHA, and retaliation in violation of the CFRA, the Fair Employment and Housing Act ("FEHA"), and Labor Code section 1102.5. Genworth filed a motion to compel arbitration pursuant to Resolve. AssetMark joined in Genworth's motion.

The trial court denied Genworth's motion and concluded that the arbitration agreement was procedurally and substantively unconscionable rendering it unenforceable. Genworth appealed.

HOLDING: Affirmed.

REASONING: Genworth argued that the trial court erred in finding the agreement procedurally unconscionable. Procedural unconscionability focuses on "oppression" arising from unequal bargaining power and resulting in a lack of both negotiation and meaningful choice. The court found Baxter had no opportunity to negotiate the agreement and, in the interest of maintaining her employment, lacked any meaningful choice but to accept. The court concluded that the facts indicated unequal bargaining power and a "high degree of oppressiveness," thus supporting a finding of procedural unconscionability.

Genworth also argued the trial court erred in finding several provisions substantively unconscionable. The court explained that substantive unconscionability focuses on overly harsh or unfairly one-sided results unreasonably favorable to the imposing party. Courts may refuse to enforce an arbitration agreement if it is both procedurally and substantively unconscionable. Genworth contended Resolve's prohibition of employees' communication with co-workers simply limited access to Genworth's proprietary information outside of formal discovery. The court disagreed and noted the prohibition did not apply to Genworth and is thus unfairly one-sided.

Genworth further argued that Resolve permitted arbitrators to allow additional discovery and thus its default limits were not unconscionable. The court again disagreed and inferred that a reasonable arbitrator would be constrained under Resolve to sufficiently expand discovery to avoid frustrating statutory rights to prove claims. Genworth then asserted that

Resolve did not shorten the statute of limitations that would apply to file a court action. Because a party would have up to three years to file a FEHA action, the court found a one-year limitation under Resolve insufficient to protect employees' statutory rights.

Genworth next argued that Resolve did not preclude pursuing administrative remedies, however the court inferred Resolve may preclude employees' rights to an administrative investigation before a FEHA claim must be arbitrated. Finally, Genworth argued the trial court erred in refusing to sever offending provisions. The court construed the provisions as signifying a "systematic effort to impose arbitration" favorable to the employer and asserted that no single provision could be severed to remove the "unconscionable taint from the agreement."

MISCELLANEOUS

SECOND CIRCUIT AFFIRMS DISMISSAL BASED ON *SPOKEO*

Katz v. Donna Karan Co. Store, L.L.C., 872 F.3d 114 (2d Cir. 2017).
http://caselaw.findlaw.com/us-2nd-circuit/1874398.html

FACTS: Plaintiff-Appellant, Yehuda Katz, was a private citizen who made two separate purchases from Defendant-Appellee, Donna Karan Co. Store, L.L.C., at locations in New York and New Jersey. Katz claimed that both locations operated by Defendant provided him a sales receipt that printed the first six digits of his credit card number.

Katz filed suit, alleging that by publishing the first six digits of his card number, Defendant had violated §1681c(g)(1) of the FACTA, which prohibited the printing of more than the last five digits of the card number. The district court dismissed Katz's complaint on the basis that the complaint lacked well-pleaded facts, and Katz appealed. The circuit court vacated and remanded the case to allow him an opportunity to replead his claim in light of the Supreme Court of the United States recent decision in *Spokeo Inc. v. Robins*, 136 S. Ct 1540 (2016). On remand, the district court granted Defendant's motion to dismiss for lack of subject matter jurisdiction, finding that Katz did not plead a concrete injury-in-fact sufficient to establish Article III standing.

HOLDING: Affirmed.

REASONING: Katz argued Defendant's printing of the first six digits of his credit card number violated FCTA requirements, which created a heightened vulnerability of Katz's information. The court applied a two-part test to evaluate the concrete harm requisite for standing to sue under a bare procedural violation, where: (1) a plaintiff must demonstrate that Congress conferred the procedural right to protect a plaintiff's concrete interests as to the harm in question; and (2) that the procedural violation presents a risk of real harm to that concrete interest. First, the court reviewed the district court's analysis of the scope and purpose of the "procedural right" provided by FACTA, and agreed that §1681c(g)(1) was enacted to protect customers by preventing disclosure of identifying information about the cardholder.

Second, in light of Defendant's fact-based Rule 12(b)(1) motion, the burden shifted to Katz to prove an increased risk of harm from identity theft. The district court was not clearly erroneous in its factual findings that the first six numbers of a credit card only identify the institution issuing the card, and not the cardholder's information. The receipt did not increase the risk of real harm. Because Katz failed to establish a concrete injury sufficient to maintain Article III standing, his suit was properly dismissed.

COURT APPROVES A CY PRES ONLY SETTLEMENT

In re Google v. Holyoak, 869 F.3d 737 (9th Cir. 2017).
http://caselaw.findlaw.com/us-9th-circuit/1871595.html

FACTS: Plaintiffs-Objectors were five members of a class of Google Search users ("Objectors") that used Google Search in the United States between October 25, 2006 and April 25, 2014. When users submit search terms to Google, it returns a list of relevant websites in a new webpage, the "search results page." When a user then visits a website via that search results page, that website is allegedly privy to the search terms the user submitted to Google because Google generates a unique "Uniform Resource Locator" ("URL") that includes the user's search terms. Every major desktop and mobile web browser by default reports the URL of the last webpage that the user viewed before clicking on the link to the current page as part of the "referrer header" information.

The *cy pres doctrine* permits a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the "next best" class of beneficiaries for the indirect benefit of the class.

A class action suit was filed, alleging that Google violated users' privacy by disclosing their Internet search terms to owners of third-party websites. Following mediation, the parties reached a settlement providing that Google would pay $8.5 million. After attorney's fees, administrative costs, and incentive payments to the named plaintiffs, the remaining $5.3 million was allocated to six cy pres recipients provided they agreed "to devote the funds to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the internet." After a hearing, the district court certified the class for settlement purposes and preliminarily approved the settlement. Objectors filed objections. Following a final settlement approval hearing, the district court granted final approval of the settlement. Objectors appealed.

HOLDING: Affirmed.