CLIENT ALERTS & INSIGHTS

Ninth Circuit Upholds Mass Arbitration Consolidation

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The Ninth Circuit's recent decision in Jones v. Starz Entertainment, LLC marks a significant development in the continued rapid evolution of mass arbitration. What began as a mass arbitration involving over one hundred thousand identical demands against Starz-which could have incurred over $12 million in arbitration fees if administered individually-may now provide critical guidance into the future of mass arbitrations across the country. By enforcing the parties' agreement to consolidate the claims, the Ninth Circuit has paved the way for a more efficient and cost-effective path to mitigate the mass arbitration risk, potentially transforming the arbitration landscape for companies and plaintiffs' lawyers alike.

Pre-Arbitration Consolidation

The initial dispute in *Jones v. Starz Entertainment, LLC* concerned purported violations of the Video Privacy Protection Act (VPPA), including claims against the video streaming provider for allegedly disclosing the identity of its consumers and their watched content. Notably, Starz had an arbitration agreement with its customers, requiring the resolution of any disputes through third-party arbitration provider Judicial Arbitration and Mediation Services (JAMS).

By incorporating the JAMS rules into the parties' arbitration agreement, the agreement provided the option for consolidation of claims, barring applicable law providing otherwise. Thus, following over 7,200 individual claimants initiating proceedings against Starz, JAMS ordered the consolidation of these filings to be presided over by a single arbitrator. This consolidation-favored by Starz but opposed by the claimants-had the additional effect of eliminating the need for Starz to pay over $12 million in initiation fees for the thousands of individual claims. Following the consolidation, the claimants repeatedly used their state statutory right to disqualify the appointed arbitrators, thereby preventing the arbitration from moving forward.

One of the claimants, named plaintiff Kiana Jones, attempted to circumvent this consolidation by filing a petition to compel individual arbitration of her claims in the Central District of California. According to the plaintiff, the consolidation of the claims amounted to Starz's failure, neglect, or refusal to engage in an individual, bilateral arbitration, as required by the parties' agreement. Thus, due to Starz's purported failure to engage in individual arbitration with her, plaintiff Jones claimed that she was a party aggrieved within the meaning § 4 of the Federal Arbitration Act (FAA), which allows for an aggrieved party to petition a federal district court to compel arbitration.

The district court and Ninth Circuit rejected these arguments and affirmed the arbitration provider's decision to consolidate thousands of individual claims into a single proceeding.

Summary of Decision

In upholding the lower court's ruling, the Ninth Circuit unanimously came to several conclusions that may shape the future management of mass arbitrations.

First, the court noted that consolidation is a procedural issue that should be decided by the arbitral forum rather than the court. In doing so, arbitration providers like JAMS gain additional authority to manage mass arbitrations, even before the appointment of an arbitrator.

Next, the court rejected the plaintiff's claim that she was an "aggrieved" party under the FAA due to Starz's alleged failure and refusal to arbitrate with her individually. Rather, the Ninth Circuit reasoned that the decision to consolidate does not qualify as a failure to arbitrate under the FAA, given that Starz had paid the required fees, complied with JAMS' procedures, and participated in arbitrator selection, thus further demonstrating the company's willingness to arbitrate. Additionally, the panel noted that because it was JAMS-rather than Starz-that opted to consolidate the claims, that decision should not be characterized as a refusal by Starz to arbitrate.

Lastly, the Ninth Circuit distinguished between class or representative arbitrations and consolidated arbitrations. The court clarified that class arbitrations involve named claimants binding absent class members to a decision, whereas consolidated arbitrations consist of each claimant pursuing their own claims, even if heard by the same arbitrator. The panel cited various similarities between the proceedings but ultimately focused on the fact that the arbitration agreement plainly contemplated the possibility of consolidation by incorporating the JAMS Rules. Moreover, the *Starz* court dismissed the plaintiff's concerns of unconscionability in Starz's terms based on similar reasoning, holding that Starz never agreed to the class arbitration that the plaintiff sought and that unconscionability claims cannot be used as a "sword" to modify the agreement.

Implications for Businesses

In unanimously affirming the trial court's ruling, the Ninth Circuit's decision carries several important implications for businesses, particularly those in the retail and e-commerce arena. Notably, the panel distinguished its conclusions from the Ninth Circuit's recent ruling in *Heckman v. Live Nation*, in which this same court found an arbitration agreement to be substantively unconscionable due to "serious misgivings" about the mass arbitration protocol at issue. Some plaintiffs' attorneys have gone so far as to read *Heckman* to suggest that mass arbitration procedures are, per se, unenforceable. Defendants, in turn, have tried to limit *Heckman* to its extreme facts and specific arbitration forum, which are discussed further here.

The Court's new decision in *Jones v. Starz Entertainment, LLC* takes the wind out of the former argument by illustrating that, barring unconscionable or otherwise invalid terms, mass arbitration provisions can act as legitimate strategies to mitigate costly arbitrations.

Call to Action - Mass Arbitration Provisions

Jones v. Starz Entertainment, LLC underscores the importance of well-drafted arbitration agreements and establishes an important precedent for companies facing costly mass arbitration, as well as the importance of properly invoking each arbitrator provider's procedural rules in managing the otherwise potentially crippling effects of mass arbitration.

By allowing arbitration providers like JAMS, American Arbitration Association, or National Arbitration and Mediation to consolidate claims and streamline the arbitration process, companies can reduce the administrative burden and costs associated with handling thousands of individual arbitrations.

Given the rapidly evolving landscape of arbitration in light of the Ninth Circuit's rulings in *Heckman* and now *Starz*, companies should closely evaluate their dispute resolution terms to avoid potential issues and expenses associated with mass arbitration. The Benesch team has extensive experience in this area and is here to help.

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