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SB 82: An end to infinite arbitration clauses

In response to the controversial use of broad, "infinite arbitration clauses," SB 82 seeks to limit arbitration agreements in consumer contracts to claims directly arising from the contract.

By Tricia A. Bigelow

Imagine signing a television subscriber service agreement with Disney that includes an arbitration clause and then being forced into arbitration - based on that agreement - for a wrongful death claim arising from consumption of food at a Disney property. Impossible? Maybe not.

In May 2024, Disney moved to compel arbitration of a wrongful death claim filed by the husband of Kanokporn Tangsuan, who suffered a severe allergic reaction after consuming food at a restaurant at a Disney theme park. Disney asserted the claim was subject to binding arbitration because Tangsuan's husband executed the Disney+ subscriber agreement, with an arbitration clause.

That clause provided as follows: "You and Disney . . . agree to arbitrate, as provided below, all disputes between you (including any related disputes involving The Walt Disney Company or its affiliates), that are not resolved informally, except disputes relating to the ownership or enforcement of intellectual property rights. 'Dispute' includes any dispute, action, or other controversy, whether based on past, present, or future events, between you and us concerning the Disney Services or this Agreement, whether in contract, tort, warranty, statute, regulation, or other legal or equitable basis."

Disney argued that the allegations supporting the plaintiff's theory of recovery were "representations" about the restaurant on Disney's website. Because he relied on the website in choosing to dine at the restaurant, the broad language in the arbitration clause covered his claims. Although it could likely have compelled arbitration, Disney withdrew its request to arbitrate in August 2024 after a public backlash.

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SB 82

A new California bill seeks to prevent something like this from happening again. Senate Bill No. 82 (SB 82) would add Section 1670.15 to the Civil Code, relating to contracts. "This bill ... would, for contracts for the sale or lease of consumer goods or services entered into on or after January 1, 2026, require an agreement to arbitrate to be limited to a claim arising out of the contract containing the agreement to arbitrate."

Section 1670.15, subdivisions (a) through (c), would read as follows: "(a) For a contract for the sale or lease of consumer goods or services entered into on or after January 1, 2026, an agreement to arbitrate shall be limited to a claim arising out of the contract containing the agreement to arbitrate. (b) An agreement to arbitrate that violates subdivision (a) is void and unenforceable. (c) A waiver of the provisions of this section is contrary to public policy and void and unenforceable."

Infinite arbitration clauses

SB 82 is California's response to what legal scholars and various courts have dubbed "infinite arbitration clauses." In Infinite Arbitration Clauses ((2020) 168 U. Pa. L. Rev. 633), UC Davis Law School professor David Horton explains that infinite arbitration clauses have one or more of the following characteristics: They are not limited to disputes arising from or related to the transaction or contract at issue; they extend beyond the original contractual partners; and they have no sunset date.

"Thus, infinite provisions attempt to govern conduct that has nothing to do with the original transaction, such as sexual harassment after the purchase of household goods or 'a punch in the nose during a dispute over medical billing.' "

Customer agreements, according to Horton, may contain arbitration clauses that apply to the parties' "subsidiaries, affiliates, agents, employees, predecessors in interest, successors, and assigns, as well as all authorized or unauthorized users." Such clauses, which seem to be "stretch[ing] to the horizon and last[ing] forever," are "less a contractual provision and more a kind of arbitration servitude."

Infinite arbitration clauses, he says, are "the byproduct of a neglected area of doctrinal confusion." Courts often struggle in determining the scope of an arbitration agreement, i.e., the arbitrability of specific claims. Many agreements are written to capture a broad set of claims by including language that they apply to any claims that "arise out of or related to" the contract. While such broad language undoubtedly encompasses straightforward contractual claims, problems arise when, for example, plaintiffs sue their employers for intentional torts. The employment relationship is governed by the contract, but is any alleged wrongful conduct also governed by that same contract?

Determining the scope of arbitrability is compounded, Horton says, by tension between federal arbitration and state contract law. The U.S. Supreme Court has ruled that arbitration clauses must be "generously construed as to issues of arbitrability," but "contract doctrine cuts the other way by nullifying unconscionable terms, vindicating an individual's reasonable expectations, and construing ambiguities against

the drafter." (See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 626.)

Federal circuit split

A split exists among federal circuits regarding the interpretation of seemingly all-encompassing arbitration agreements. The Fourth and Ninth Circuits, for example, reached opposite conclusions on DIRECTV's consumer arbitration agreement.

In *Mey v. DIRECTV, LLC* (4th Cir. 2020) 971 F.3d 284 (*Mey*), the plaintiff alleged that DIRECTV violated the Telephone Consumer Protection Act (TCPA) by calling her cellular telephone to advertise DIRECTV products and services even though her telephone number was on the National Do Not Call Registry. (*Mey*, at p. 286.) When DIRECTV moved to compel arbitration, the district court denied the motion, concluding that the dispute fell outside the scope of the arbitration agreement. The Fourth Circuit reversed, concluding "[plaintiff] formed an agreement to arbitrate with DIRECTV and that this dispute fits within the broad scope of that agreement, construed, as it must be, to favor arbitration."

The customer agreement, it found, included an arbitration agreement through which plaintiff agreed to arbitrate "all disputes and claims" between herself and AT&T. (*Id.* at p. 287.) That agreement was to be "broadly interpreted" to include a full range of claims. It defined the parties to include their "respective subsidiaries, affiliates, agents, employees, predecessors in interest, successors, and assigns, as well as all authorized or unauthorized users or beneficiaries of services or Devices under this or prior Agreements between us."

It was immaterial, the court said, that the plaintiff had not signed the arbitration agreement with AT & T Mobility or that her husband was the named account holder, because the agreement covered "all authorized or unauthorized users or beneficiaries of services or Devices under this or prior Agreements." "Because [plaintiff] signed an acknowledgement expressly agreeing to the arbitration provision of the Wireless Customer Agreement, which provision applies to her as an authorized user, we reject [plaintiff's] argument that she did not form an agreement to arbitrate." (*Id.* at p. 289.)

Even though the agreement was not with DIRECTV, the court held that DIRECTV was included within the broad definition of parties and that "the parties did not intend to restrict the covered entities to those existing at the time the agreement was signed." (*Id.* at p. 291.)

In sum, an agreement with all the hallmarks of an infinite arbitration clause was valid. (*Mey, supra*, 971 F.3d at p. 295.) Acknowledging that "construing the broadest language of this arbitration agreement in the abstract could lead to troubling hypothetical scenarios," the Fourth Circuit said its holding was "tethered to the facts of this dispute and the categories of claims specifically included in this arbitration agreement." (*Id.* at p. 294.)

The Ninth Circuit expressly disagreed with *Mey*'s conclusion. In *Revitch v. DIRECTV, LLC* ((9th Cir. 2020) 977 F.3d 713 (Revitch)), it ruled that the plaintiff's claims could not be compelled to arbitration based on an identical arbitration clause to that in *Mey*. The plaintiff, who also sued DIRECTV under the TCPA, alleged that the company initiated telephone calls to his cell phone using a prerecorded message. Because he was a customer of AT&T, DIRECTV moved to compel arbitration based on a contract signed seven years earlier, when he upgraded his mobile device. DIRECTV was not affiliated with AT&T when the contract was signed - "it became an affiliate years later following a corporate acquisition that had nothing to do with [plaintiff] or his wireless services agreement" - but it argued that this did not matter.

The Ninth Circuit found this argument specious. Under DIRECTV's interpretation, it said, plaintiff "would be forced to arbitrate any dispute with any corporate entity that happens to be acquired by AT&T, Inc., even if neither the entity nor the dispute has anything to do with providing wireless services to [plaintiff] - and even if the entity becomes an affiliate years or even decades in the future." (*Id*, *supra*, at p. 717) This conclusion was based on " 'the reasonable expectation of the parties at the time of contract.' " (Citing *Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 832.)

"Here, when [plaintiff] signed his wireless services agreement with AT&T Mobility so that he could obtain cell phone services, he could not reasonably have expected that he would be forced to arbitrate an unrelated dispute with DIRECTV, a satellite television provider that would not become affiliated with AT&T until years later." (*Id*, at p. 718.) "Had the wireless services agreement stated that 'AT&T' refers to 'any affiliates, both present and future,' we might arrive at a different conclusion."

The court rejected *DIRECTV's reliance on Lamps Plus, Inc. v. Varela* ((2019) 587 U.S. 176), in which the U.S. Supreme Court held that "courts may not rely on state contract principles to 'reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent.' " (*Id.* at p. 187.) The Federal Arbitration Act (FAA), the Ninth Circuit said, does not preempt California's "absurd results" canon, which requires that courts interpret contracts to avoid absurd results.

Attorneys who draft arbitration agreements will have taken note of the language in *Revitch* to ensure they can be enforced against a broad scope of claims, as well as non-signatories and future disputes.

The future of SB 82

SB 82, by Senator Tom Umberg (D-Santa Ana), would restrict overly broad terms of infinite arbitration clauses. It would limit arbitration provisions in contracts for the sale or lease of consumer goods or services to claims arising out of those contracts and would make any arbitration agreements that violate the law, or purportedly force consumers to waive their rights, void and unenforceable.

While the law is noble in its intent to protect consumers, it is unclear if it could withstand a challenge before the U.S. Supreme Court. Since it decided *AT&T Mobility LLC v. Concepcion* ((2011) 563 U.S. 333 (*Concepcion*)), the Court has become increasingly hostile to state laws that, directly or indirectly, target arbitration agreements. As *Concepcion* and subsequent cases have held, "courts must place arbitration agreements on an equal footing with other contracts . . . , and enforce them according to their terms." (*Id.* at p. 339.) By singling out arbitration agreements, Senate Bill No. 82 could be ripe for a preemption challenge under the FAA.

SB 82 was co-sponsored by the Consumer Attorneys of California, Consumer Watchdog, and the Consumer Federation of California.

Tricia Bigelow (Ret.) *is a neutral with Signature Resolution. She served as a Los Angeles Municipal Court and Superior Court Judge prior to her appointment as an Associate Justice and then Presiding Justice of the California Court of Appeal, Second Appellate District, Division 8. She can be reached at tbigelow@signatureresolution.com.*