

Ninth Circuit Holds Clause Delegating Authority to Decide Arbitrability Is Valid Even If Broader Arbitration Agreement Is Not

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Parties to an arbitration agreement sometimes choose to include a delegation clause, which is a provision that delegates to the arbitrator—rather than a court—gateway questions of arbitrability, such as whether the agreement covers a particular controversy or whether the arbitration provision is enforceable at all. See [Caremark LLC v. Chickasaw Nation](#).

In [Holley-Gallegly v. TA Operating, LLC](#), the Ninth Circuit recently reinforced the Supreme Court’s decade-old distinction between the analysis needed to determine whether a dispute is subject to arbitration on the one hand, and whether an arbitrator has been legally delegated the authority to make that threshold determination on the other. The decision provides important lessons to practitioners litigating disputes regarding the enforceability of delegation clauses.

Background

Defendant-Appellant TA Operating LLC (“TA”) owns and operates truck stops and convenience stores. Kenneth Holley-Gallegly had been a truck mechanic for TA.

As a condition of his employment, Holley-Gallegly was required to sign an agreement to arbitrate all employment-related claims that could not be resolved through TA’s grievance process (the “Agreement”).

The Agreement contained a delegation clause, which provided that “[a]ll challenges to the interpretation or enforceability of any provision of this Agreement shall be brought before the arbitrator, and the arbitrator shall rule on all questions regarding the interpretation and enforceability of this Agreement.”

In January 2022, Holley-Gallegly filed a class action lawsuit against TA in California state court alleging various labor violations, including the failure to pay all overtime wages at the lawful overtime rate. After removing the case to federal court, TA moved to compel arbitration, arguing pursuant to the delegation clause that whether Holley-Gallegly's claims were arbitrable in the first place "rested solely with the arbitrator."

The district court denied TA's motion. Although the court found that the delegation clause clearly and unmistakably delegated whether Holley-Gallegly's claims were arbitrable, it found that the delegation clause was unconscionable under California law. Specifically, the court found the clause procedurally unconscionable because signing the Agreement of which it was a part was a condition of employment, and therefore a contract of adhesion. And it found the clause substantively unconscionable because the Agreement required Holley-Gallegly to waive his right to a jury trial if the Agreement was deemed to be unenforceable.

Having concluded that the delegation clause was unenforceable, the court proceeded to adjudicate whether the Holley-Gallegly's claims were subject to arbitration. Based on the jury waiver provision, as well as various others, the district court concluded the entire Agreement was "permeated with unconscionability" and therefore unenforceable.

The Ninth Circuit Reverses

On appeal, the Ninth Circuit recounted the Supreme Court's opinion in [*Rent-A-Center, W., Inc. v. Jackson*](#), and explained that "delegation clauses are essentially severable mini-agreements within agreements to arbitrate." As a result, a party challenging a delegation clause must show that the specific clause delegating the power to decide whether the underlying dispute is subject to arbitration is unenforceable. In other words, showing that the overall agreement to arbitrate is unenforceable is not enough, because such a showing can and should be made to the arbitrator if the clause specifically delegating the authority to make that determination to an arbitrator is valid.

Focusing on whether the delegation clause was substantively unconscionable under California law, the Ninth Circuit rejected TA's argument that the district court erred because it did not focus on any feature of the delegation clause itself, and instead relied on other unrelated provisions to conclude that the delegation clause was unenforceable. The court explained that provisions outside of a delegation clause may, in fact, demonstrate that allowing an arbitrator to decide whether a dispute is subject to arbitration is unconscionable. For example, it may be unconscionable to require a party to arbitrate whether the agreement to arbitrate is unenforceable if depositions are entirely precluded or limited to fewer than those allowed under the procedural rules applicable in litigation.

However, the Ninth Circuit held that the district court nonetheless erred when finding that the delegation clause was unconscionable based on the jury waiver provision because the jury waiver provision would only take effect—if at all—after the determination of whether the agreement to arbitrate was upheld. Thus, the jury waiver provision could not show that arbitrating whether to enforce the arbitration agreement was unconscionable because it had no effect on, or relevance to, the way in which *that* determination would be made.

Notably, the Ninth Circuit refused to consider Holley-Gallegly's arguments on appeal that the delegation clause was substantively unconscionable because (1) the Agreement stated that enforceability must be decided by Delaware law, and (2) based on a fee-splitting provision, two arguments that parties regularly make to show unenforceability, because Holley-Gallegly merely raised those arguments before the district court to argue that the *entire* arbitration agreement was unenforceable, not that those provisions rendered unenforceable the delegation clause in particular. *Id.* at *11 n.3.

Upshot

As the Ninth Circuit's decision makes clear, those seeking to invalidate a delegation clause must focus specifically on why an arbitrator should not be allowed to decide whether the underlying dispute is subject to arbitration and a court must adjudicate that issue. In making such arguments, parties need not constrain themselves by basing arguments solely on the delegation clause's language, and can look to other provisions, so long as they show that those other provisions make delegating the decision as to whether the underlying dispute is arbitrable to an arbitrator unfair, rather than merely showing that arbitrating the underlying dispute would be unfair.

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