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Ninth Circuit Clears Airline's Arbitration by Estoppel Argument for Takeoff

Minding Your Business on **March 28, 2024**

Earlier this month, in *Herrera v. Cathay Pacific Airways Ltd.*, a divided Ninth Circuit panel reversed the district court's order denying Cathay Pacific Airways Ltd.'s motion to compel arbitration of a putative class action brought by airline ticket purchasers.

Plaintiffs, who purchased international flights on Cathay Pacific using the website of third-party vendor ASAP Tickets, alleged that the airline breached its contract with plaintiffs when it failed to issue a refund for a cancelled flight. In an email from Cathay Pacific notifying plaintiffs of the cancellation, plaintiffs were instructed to contract their travel agent to request a refund. When plaintiffs contacted ASAP, whose Terms and Conditions stated that it would process refunds subject to certain restrictions and fees, plaintiffs were told Cathay Pacific would only offer travel vouchers and not a monetary refund. Cathay Pacific, maintaining that it never received a refund request from either plaintiffs or ASAP on behalf of plaintiffs, moved to dismiss or compel arbitration based on a theory of equitable estoppel.

Although Cathay Pacific's General Conditions of Carriage for Passengers and Baggage ("GCC") did not contain an arbitration clause, the Terms and Conditions on the ASAP website did, and neither party disputed that the Terms were an enforceable clickwrap agreement. Cathay Pacific argued that it should be permitted to enforce the arbitration provision in ASAP's Terms even as a nonsignatory because the Terms also related to plaintiffs' refund request. The district court, however, denied Cathay's motion, reasoning that plaintiffs had "base[d] their breach of contract claim on Cathay Pacific's obligations under its own GCC, not on any obligation contained in ASAP's Terms and Conditions."

On appeal, the majority of the Ninth Circuit panel reversed and remanded. The Court noted that under California contract law a nonsignatory to a contract containing an arbitration provision may enforce the provision using the doctrine of equitable estoppel when the claims against the nonsignatory are "intimately founded in and intertwined with" the underlying contract. One member of the panel dissented, writing that she found plaintiffs' claim against Cathay Pacific to be premised on "two different obligations, set out in two different contracts, involving two different sets of parties," but the majority disagreed and held that because plaintiffs' allegations about Cathay Pacific's breach were "intimately intertwined" with ASAP's alleged conduct processing the refund request under its own Terms, Cathay Pacific could enforce the arbitration clause in ASAP's terms.

Considering the fairness of compelling arbitration by estoppel, the Court also rejected plaintiffs' argument that ordering arbitration would be unfair because the refund process was unclear under both ASAP's Terms and Conditions and Cathay Pacific's GCC. The Court took issue with plaintiffs' interpretation of the fairness inquiry that accompanies equitable estoppel, concluding the proper focus should not be on whether the refund process was clear, but rather on whether the conduct at issue renders it unfair for plaintiffs to circumvent the relevant arbitration clause. Because plaintiffs' claim implicates ASAP's refund responsibilities under its own Terms, the Court found it would not undermine notions of fairness to enforce a valid arbitration provision in these circumstances.

The Court also briefly considered the issue of whether Cathay Pacific's motion to compel arbitration was barred by federal regulation 14 C.F.R. § 253.10, which provides that carriers cannot impose on passengers or ticket purchasers any contract of carriage with a choice of forum clause that prohibits claims against the carrier from being pursued in any court of competent jurisdiction. Finding that Section 253.10 only clearly and unambiguously regulated a carrier's ability to impose a choice-of-forum clause *in contracts of carriage* and did not prohibit a carrier from enforcing an arbitration agreement between passengers and third parties when permissible under the applicable law, the Court determined this regulation was no bar to arbitration.

Given the prevalence of arbitration encountered in everyday transactions, and the likelihood that third-party intermediaries play a part in facilitating those transactions, this Ninth Circuit opinion provides insight into the facts and circumstances in which a court may be inclined to compel arbitration in favor of a nonsignatory. This decision is also a good reminder to attorneys advising clients pursuing or defending against motions to compel arbitration that they should consider the possibility of arbitration by estoppel.

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- **Tara Brailey**
  Associate