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NINTH CIRCUIT CURBS ENFORCEABILITY OF FORUM SELECTION AND CHOICE OF LAW CLAUSES AGAINST CALIFORNIA CONSUMERS

"Find yourself here" is not only California's slogan, it is a warning to out-of-state companies that conduct business with California consumers, according to the Ninth Circuit's recent ruling in *Doe 1 v. AOL LLC*, 2009 WL 103657, No. 07-15323 (9th Cir. Jan. 16, 2009). In that case, the court held that forum selection and choice of law provisions may not be sufficient to keep California consumers out of California courts or to prevent them from applying California law to their claims, even against out-of-state companies. According to the court's per curiam opinion—signed by Judges Dorothy Nelson, Stephen Reinhardt, and Carlos Bea—a forum selection clause designating the "courts *of* Virginia" as the fora for disputes between AOL (formerly America Online, Inc.) and its members limited consumers to filing suit in Virginia *state* courts and could not be read to include federal courts sitting in Virginia. Having interpreted the clause to limit the parties to suit in Virginia state court, the Ninth Circuit found the forum selection clause—when combined with the agreement's choice of law clause applying Virginia law—was unenforceable for two reasons: (1) requiring California consumers to litigate in Virginia state court would violate California public policy favoring consumer class actions, because consumer class actions are not available in Virginia state courts; and (2) California plaintiffs would be limited to establishing violations of the Virginia Consumer Protection Act, rather than California's Consumer Legal Remedies Act ("CLRA"), which allows for greater relief and includes an antiwaiver provision.

AOL'S FORUM SELECTION CLAUSE

Members of Virginia-based AOL filed a class action complaint in the Northern District of California alleging that in July of 2006, AOL made publicly available roughly 20 million AOL internet search records. The data allegedly contained the addresses, Social Security numbers, and other personal information of AOL members, and also revealed the plaintiffs' (potentially

embarrassing) search histories. The plaintiffs alleged two causes of action—violation of the federal Electronic Communications Privacy Act and unjust enrichment—on behalf of all class members, and five causes of action under California law on behalf of the California plaintiffs. The California law claims included allegations that AOL violated the CLRA and California's Unfair Competition Law.

As a prerequisite to registering for AOL service, AOL members were required to sign a member agreement that contained a forum selection clause designating the "courts of Virginia" as the fora for disputes between AOL and its members. The agreement also contained a choice of law clause that designated Virginia law, excluding its conflict of law rules.

The district court dismissed the action for improper venue, concluding that the forum selection clause required that the controversy be adjudicated "in a court in Virginia," and the plaintiffs appealed.

"COURTS *OF* VIRGINIA" MEANS "VIRGINIA *STATE* COURTS"

On appeal, the parties disputed the meaning of the forum selection clause's designation of the "courts of Virginia." Paradoxically, AOL took the position that the clause should be read liberally to include both federal and state courts, while the plaintiffs argued that the clause limited them to the state courts of Virginia. The court sided with plaintiffs' interpretation, concluding that by using the preposition "of"—rather than "in"—AOL plainly designated *only* state courts as proper fora for resolving disputes. The court explained that, because "of" denotes "that from which anything proceeds," the forum selection clause excluded federal courts, which "proceed from, and find their origin in, the federal government." If AOL intended to permit the filing of suit in Virginia federal court, it should have drafted the clause to permit adjudication in the "courts *in* Virginia," since "in" expresses relation of existence or situation.

In drawing a distinction between forum selection clauses that use the preposition "of" and those that use the preposition "in," the Ninth Circuit adopted the reasoning of three sister circuit courts. *Id.* at *4 (citing *Am. Soda, LLP v. U.S. Filter Wastewater Group, Inc.*, 428 F.3d 921, 926 (10th Cir. 2005) (interpreting "Courts of the State of Colorado" to mean Colorado state courts); *Dixon v. TSE Int'l Inc.*, 330 F.3d 396, 398 (5th Cir. 2003) (interpreting "Courts of Texas, U.S.A." to mean Texas state courts; "[f]ederal district courts may be *in* Texas, but they are not *of* Texas"); *LFC Lessors, Inc. v. Pac. Sewer Maint. Corp.*, 739 F.2d 4, 7 (1st Cir. 1984) (interpreting forum selection and choice of law clause stating the contract shall be interpreted according to "the law, and in the courts, of the Commonwealth of Massachusetts" to designate the state courts of Massachusetts)). Because four circuit courts have now reached the same conclusion—and no contrary case law exists—companies that use forum selection clauses are on notice of the importance of selecting precise language in defining the preferred forum. After *AOL*, the safest course is to not rely exclusively on prepositions but to specify in the forum selection clause whether it is intended to mean state, federal, or state and federal courts in the particular forum chosen.

FORUM SELECTION CLAUSES THAT VIOLATE CALIFORNIA PUBLIC POLICY ARE UNENFORCEABLE

After interpreting the AOL forum selection clause to permit adjudication solely in Virginia state courts, the panel addressed the clause's enforceability. Despite acknowledging that forum selection clauses are presumptively valid, the court noted that such clauses are unenforceable "if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972). Under the circumstances, the Ninth Circuit concluded that California public policy precluded AOL from enforcing a clause limiting the plaintiffs to Virginia law claims in Virginia state courts.

The Ninth Circuit relied heavily on *America Online, Inc. v. Superior Court* ("*Mendoza*"), 90 Cal. App. 4th 1 (2001), in which the California Court of Appeal refused to enforce an identical AOL membership agreement on the ground that doing so would diminish the rights of California consumers. In *Mendoza*, the court concluded that if the agreement's forum selection and choice of law clauses were valid: (1) California plaintiffs would be unable to maintain consumer class actions, which are generally not available in Virginia

state courts; and (2) California plaintiffs would be limited to establishing violations of the Virginia Consumer Protection Act, rather than the California Consumer Legal Remedies Act, which allows for greater relief and includes an antiwaiver provision. *See id.* at 15-17. According to the Ninth Circuit, enforcing the AOL Member Agreement would contravene California public policy, as declared in *Mendoza*. The court therefore reversed and remanded for further proceedings in the district court.[1]

COMPLYING WITH *AOL*

To understand the full import of *AOL*, it is important to recognize that the Ninth Circuit identified two distinct problems with AOL's membership agreement. First, the forum selection clause was unenforceable because it channeled consumer suits into Virginia state courts, which do not permit consumer class actions. The good news for companies that use forum selection clauses, however, is that while *AOL* may require some modifications, companies will still be able to channel California consumer suits into local courts in order to benefit from the logistical advantages of proximity. To ensure that forum selection clauses are enforced in the future, companies must simply edit their forum selection clause to: (1) explicitly permit suits in both federal and state courts in the designated forum, so that consumers may file in federal court, which—pursuant to Federal Rule of Civil Procedure 23—permits class actions irrespective of the underlying cause of action; or (2) select a state court that does not deprive consumers of significant procedural protections.[2] Of course, a company that currently uses its membership agreement to channel its consumers into a state that, like Virginia, does not provide the same procedural protections as California courts may continue to enforce such provisions against non-California consumers. But companies that fail to change their forum selection clauses to comply with *AOL* should expect to wage litigation on two fronts: one action in the designated forum against non-California plaintiffs, and one action in California against the California plaintiffs.[3]

Overcoming the second problem identified by the Ninth Circuit in *AOL* may cause bigger headaches for companies that conduct business with California consumers. In addition to the forum selection clause, the court refused to enforce AOL's choice of law provision, which applied Virginia law to the plaintiffs' claims, because Virginia's consumer protection statute does not offer remedies comparable to the CLRA. In the wake of *AOL*, courts are not likely to enforce choice of law provisions that channel California consumers away from claims under California's broad consumer protection statutes, unless a defendant can show that the applicable law would provide similar protections.

What is apparent from *AOL*'s reasoning is that companies cannot address this second problem simply by changing their forum selection clause. Although not expressly held in either *Mendoza* or *AOL*, one is hard pressed to explain how the result would have differed even if California consumers were permitted to sue in Virginia federal court, as long as the choice of law clause still precluded them from relying on the CLRA. *AOL* and *Mendoza* leave open the possibility, therefore, that companies will not be permitted to enforce an agreement featuring a non-California choice of law clause against California consumers if the designated forum lacks a consumer statute with sufficiently comparable remedies to the CLRA.

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1. The panel split on whether the plaintiffs had already established that the AOL forum selection clause was unenforceable as to them, or whether further development of the record was necessary. *See AOL*, 2009 WL 103657 at *6 n.14. Judges Nelson and Reinhardt held that, by alleging that they were California residents at the time the complaint was filed, the plaintiffs established that they were entitled to the benefit of California public policy. In dissent, Judge Bea concluded that the plaintiffs should have had to establish that California law in fact applied to their claims, which could only be determined by a conflict of law analysis conducted by the district court. The upshot of the judges' disagreement is that trial courts confronted with a forum selection clause's enforceability may not be obligated to determine if California law would even apply to the particular plaintiffs' claims. As long as some plaintiffs are California residents, California public policy may preclude enforcement of the forum selection clause.

2. Only a few states—including Virginia and Tennessee, *see Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301 (Tenn. 2008)—do not permit consumer class actions.

3. Of course, drafting a forum selection clause that permits suit only in state court continues to run the additional risk that the clause will be held void and unenforceable if the plaintiffs bring suit under the Sherman Act or some other law that provides for exclusive jurisdiction in federal courts. *See United States ex rel. B & D Mech. Contractors, Inc. v. St. Paul Mercury Ins. Co.*, 70 F.3d 1115, 1117-18 (10th Cir. 1995) (forum selection clause that designated state court forum was void and unenforceable because it attempted to divest federal courts of their exclusive jurisdiction under Miller Act to hear claims asserted by subcontractor on federal construction project).

To address this aspect of the court's ruling, companies have two practical options, neither terribly attractive. First, companies can edit their contracts to apply the law of a forum that has a consumer protection law with provisions arguably akin to the CLRA, so that California consumers cannot argue that a public policy would be violated by enforcement of the choice of law clause. Second, companies can leave their consumer contracts as they are and run the risk of litigating against non-California plaintiffs under the law designated by contract and against California plaintiffs under the CLRA. Because neither option provides certain immunity from liability under the CLRA, companies that heretofore have trusted their forum selection and choice of law clauses to shield them from the CLRA's terms would do well to evaluate their compliance with that statute.

CONCLUSION

The bottom line is that companies that conduct business with California consumers cannot avoid the procedural and substantive disadvantages of California law simply by inserting a forum selection and choice of law clause into their consumer contracts. To ensure enforcement of a forum selection clause, companies must not limit California consumers to a forum—such as Virginia state court—that fails to provide the significant procedural protections afforded by California courts. To ensure application of a choice of law clause, companies must analyze whether the designated body of state law provides remedies for injured consumers that are at least arguably akin to the remedies set forth in the CLRA. No matter what steps are taken, companies that have relied on their consumer contracts to shield them from liability under the CLRA should consider evaluating their compliance with that statute.

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