Legal Update Article

Mass Arbitration Rules Under Scrutiny as Live Nation Asks SCOTUS to Overturn *Heckman*

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Takeaways

- Live Nation's petition to overturn the Ninth Circuit's *Heckman* decision highlights the importance of allowing parties to develop arbitration procedures tailored to mass arbitration.
- *Heckman* casts a shadow on attempts by arbitration services and companies to design rules needed to address the challenges and complexities of mass arbitration proceedings brought by consumers and employees.
- Until the Court weighs in, companies should exercise increased caution in drafting arbitration agreements with mass arbitration procedures.

Article

On May 5, 2025, Live Nation filed a petition for writ of certiorari asking the U.S. Supreme Court to address two issues: (1) clarify whether the Federal Arbitration Act (FAA) protects arbitration agreements with procedures designed for "mass arbitration" and (2) decide whether California's severability doctrine is preempted by the FAA because it targets and disproportionately invalidates arbitration agreements.

Background

Live Nation's petition comes in the wake of the U.S. Court of Appeals for the Ninth Circuit's decision in *Heckman v. Live Nation Ent. Inc.,* which invalidated arbitration agreements between Live Nation and consumers who bought tickets on Ticketmaster's website. 120 F. 4th 670 (2024).

The agreements at issue were to be administered by New Era ADR and contained provisions designed to manage mass arbitrations. Specifically, the agreements offered two types of arbitration: (1) "Standard Arbitration" procedures akin to traditional arbitration on an individual basis and (2) "Mass Arbitration" procedures designed for the management of five or more cases with common issues of law or fact.

The Mass Arbitration rules included special mechanisms to manage mass arbitrations, including "batching" of similar cases and using "bellwether" cases to inform and encourage settlement. The rules also included discovery limitations, briefing limitations, limited rights to appeal grants of injunctive relief, and arbitrator selection provisions that, according to the plaintiffs, conflicted with California law.

The Ninth Circuit held that the arbitration agreement was procedurally and substantively unconscionable. It took issue with how the agreements were presented to consumers and criticized New Era's rules as "internally inconsistent, poorly drafted, and riddled with typos." The court went on to portray portions of the New Era rules as unfair

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and designed to protect the company and force claimants into an unfavorable forum. (New Era modified its Mass Arbitration rules in August 2023, and those modified rules were not addressed by the Ninth Circuit.)

The Ninth Circuit then held on "alternate and independent grounds" that "the FAA does not preempt California's *Discover Bank* rule as it applies to mass arbitration." Under *Discover Bank*, the California Supreme Court effectively held that most class actions waivers are unconscionable in consumer contracts. This rule was later extended to employment arbitration agreements in *Gentry v. Superior Court,* 42 Cal. 4th 443 (2007). However, in *Concepcion*, the Supreme Court held that the *Discover Bank* rule was preempted by the FAA because it was hostile to arbitration agreements. By holding that the FAA does not preempt *Discover Bank* in the context of mass arbitrations, the Ninth Circuit may have opened the door to invalidating arbitration agreements with mass arbitration procedures, though the decision might be limited to the unique facts presented in *Heckman*.

Cert. Petition

Live Nation's petition to overturn *Heckman* highlights the importance of allowing parties to develop arbitration procedures tailored to mass arbitration. The plaintiffs' bar has pioneered the tactic of filing hundreds or thousands of identical arbitration claims to saddle companies with significant filing fees upfront and using that leverage to pressure companies into settlement, regardless of the merit of the claims. Companies and arbitration service providers should be free to develop arbitration procedures designed to resolve mass arbitrations fairly, including reasonable experimentation batching, bellwether cases and less-punitive fee structures. The Supreme Court has repeatedly recognized that arbitration is a matter of contract, and both the Supreme Court and other circuit courts have recognized that classwide arbitration procedures can be permissible under the FAA if properly agreed on. The tension between these precedents and the Ninth Circuit's decision in *Heckman* may lead the Supreme Court to take up the case.

Additionally, Live Nation's petition contends that the district court should have severed any unconscionable provisions from its agreement or enforced a provision to use a back-up arbitration service provider (FairClaims) if New Era was unable to conduct the arbitration. The petition contends that California's severability doctrine facially targets arbitration agreements, and, in practice, California courts decline to sever offensive clauses from arbitration contracts but liberally sever offensive clauses from non-arbitration contracts. The petition provides a detailed analysis showing that California courts invalidate the entire contract at a statistically higher rate for arbitration contracts compared to non-arbitration contracts. In a prior case in 2015, the Supreme Court granted certiorari to address whether California's arbitration-specific severability rule is preempted by the FAA, only to have the case settle prior to oral argument. The Court's previous interest in this issue suggests the Court might grant certiorari again.

Takeaways

The scope of the Ninth Circuit's decision in *Heckman* is not readily clear and might be limited to the specific arbitration agreement and provisions used by Live Nation. Yet, the decision casts a shadow on attempts by arbitration services and companies to design rules needed to address the challenges and complexities of mass arbitration

proceedings brought by consumers and employees. Until the Supreme Court weighs in, companies should exercise increased caution in drafting arbitration agreements with mass arbitration procedures. Companies should also carefully review arbitration agreements for compliance with California law, as strict application of California's unconscionability and severability doctrines can result in the complete invalidation of arbitration agreements.

For questions, please consult a Jackson Lewis attorney.