

RECENT DEVELOPMENTS

ARBITRATION

MOTION TO COMPEL ARBITRATION GRANTED

UNDER TEXAS LAW, “[U]NLESS A PARTY CAN SHOW SHE WAS FRAUDULENTLY INDUCED TO SIGN A CONTRACT, SHE ‘IS BOUND BY THE TERMS OF THE CONTRACT SHE SIGNED, REGARDLESS OF WHETHER SHE READ IT OR THOUGHT IT HAD DIFFERENT TERMS.’”

Rummage v. Bluegreen Vacations Unlimited, Inc., ___ F. Supp. 3d ___ (E.D. Tex. 2024).

<https://casetext.com/case/rummage-v-bluegreen-vacations-unlimited-inc-1>

FACTS: Robin Rummage (“Plaintiff”) was hired as a sales representative by Bluegreen Vacations Unlimited, Inc. (“Defendant”) in September 2019, let go, then rehired in 2020. Plaintiff was terminated again sometime later, then filed suit against Defendant, bringing claims of discrimination and retaliation under Title VII. In response, Defendant filed a motion to compel arbitration, which alleged that Plaintiff voluntarily signed the Bluegreen Entities Arbitration Agreement (“Agreement”) when she was hired. Defendants alleged that the Agreement was expressly labeled in the Plaintiff’s Onboarding Packet and was always available to Plaintiff during her employment. In response, Plaintiff argued she did not enter into a valid arbitration agreement; or, in the alternative, that the court should find the Agreement unconscionable.

HOLDING: Granted.

REASONING: Plaintiff argued the Agreement was invalid because there was no “meeting of the minds” because she did not have a meaningful opportunity to read the Agreement, and the Agreement was not discussed or presented at the new hire orientation before she signed it. The court rejected this argument and found that “meeting of the minds” is based on the objective

standard of what the parties said and did, and not on their subjective state of mind. The court explained in Texas employers may enforce an arbitration agreement if the employee received notice of the employer’s arbitration policy and accepted it. Arbitration

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agreements are governed by state contract law principles. Courts perform a two-step test to determine whether arbitration must be compelled. First, the court determines whether (a) there is a valid agreement to arbitrate, and (b) whether the dispute in question falls within the scope of the arbitration agreement. Second, the court assesses whether any applicable federal statute, policy, or waiver renders the claims not arbitrable. The court held that failure to read the Agreement or believing it had different terms is not a basis to show that there was no “meeting of the minds” or fraud. Plaintiff was bound by the Agreement

because of the objective fact that she signed it.

Plaintiff further argued the Agreement was unconscionable, alleging she was not adequately informed of its contents. The court dismissed this claim, explaining that failure to read a contract does not render it unconscionable.

The court ultimately found that Plaintiff’s claims fell within the scope of the Agreement because the Agreement specifically identified claims of discrimination or harassment based on sex/gender. Additionally, Plaintiff did not raise any federal statute, policy, or waiver that would render the claims non-arbitrable. Accordingly, the court granted Defendant’s motion to compel arbitration.

ARBITRATION PROVISION IS NOT ENFORCEABLE BECAUSE THE UNFETTERED DISCRETION DEFENDANT RETAINED TO MODIFY OR REVOKE THE PROVISION WITHOUT NOTICE.

ARBITRATION PROVISION PROMISE TO ARBITRATE IS ILLUSORY.

Lovinfosse v. Lowe’s Home Centers, LLP, ___ F. Supp. 3d ___ (E.D. Va. Aug. 8, 2024).

<https://law.justia.com/cases/federal/district-courts/virginia/vaedce/1:2023cv00574/537336/23/>

FACTS: Defendant Lowe’s Home Centers is a national home improvement retailer. Plaintiff Eleanor Lovinfosse purchased a washing machine from Lowe’s website. During checkout, the plaintiff clicked the “Place Order” button, which was accompanied by a statement that placing an order constituted agreement to Lowe’s Terms and Privacy Statement. Both “Terms” and “Privacy Statement” were hyperlinked, and the Terms included an arbitration provision binding most future claims to arbitration. The Terms also stipulated that Lowe’s retained the right to modify or terminate the Terms without notice.

Plaintiff filed suit against Lowe’s, alleging deceptive “Online Choice Architecture” led her to purchase an unnecessary water hose labeled “Required for Use” with her washing machine. Lowe’s moved to compel arbitration and dismiss the case, or alternatively, sought dismissal for failure to state a claim.

HOLDING: Motions denied.

REASONING: Defendant argued that since Plaintiff agreed to be bound by the Terms and Conditions, which included the arbitration provision, the parties formed a valid and enforceable arbitration agreement. The plaintiff countered that the arbitration agreement is unenforceable because (1) she was not given sufficient notice to assent to the term’s arbitration provisions, and (2) the arbitration agreement cannot be enforced for being illusory.

The court rejected Plaintiff’s argument that she lacked sufficient notice of the arbitration agreement, holding that Lowe’s website layout and language provided constructive notice of her assent. The court emphasized that an electronic “click” can signify acceptance of a contract if the layout gives reasonable notice of its terms. However, the court determined that Lowe’s arbitration provision was unenforceable because Lowe’s retained unfettered

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discretion to modify or terminate the Terms without notice. The court held this rendered Lowe's promise to arbitrate illusory, as the defendant's ability to revoke the arbitration agreement at any time undermined its mutuality and enforceability.

ARBITRATION AGREEMENT UNENFORCEABLE BECAUSE OF LINKING TO "BORDERLINE UNINTELLIGIBLE" ARBITRAL RULES

Skot Heckman v. Live Nation Entertainment Inc., ___ F.3d ___ (9th Cir. 2024).

<https://cdn.ca9.uscourts.gov/datastore/opinions/2024/10/28/23-55770.pdf>

FACTS: Plaintiffs-Appellees ("Plaintiffs") bought entertainment tickets from Live Nation Entertainment and Ticketmaster LLC ("Defendants") through Ticketmaster's website. The website's online ticket purchase agreement included an agreement to comply with Ticketmaster's Terms of Use ("Terms"), which provided that any claim arising out of a ticket, whether purchased in the present or prior, would be decided by an arbitrator employed by a newly created entity, New Era ADR Rules.

Plaintiffs brought a class action suit against Defendants, alleging anti-competitive practices in violation of the Sherman Act. The district court denied Defendants' motion to compel arbitration pursuant to the arbitration agreement, concluding that the agreement's delegation clause was unconscionable procedurally and substantively. Defendants appealed.

HOLDING: Affirmed.

REASONING: To render an agreement unenforceable, procedural and substantive unconscionability must be determined. In deciding procedural unconscionability under California law, the courts focused on factors of oppression and surprise in the agreement.

The court noted three reasons that rendered Ticketmaster's website Terms procedurally unconscionable. First, the power imbalance between Defendants and their consumers

The power imbalance between Defendants and their consumers is oppressive because it gives Defendants "market dominance in the ticket service industries."

is oppressive because it gives Defendants "market dominance in the ticket service industries." Second, the court stated that Ticketmaster's website Terms and the way users were bound to

them constituted elements of surprise. The Terms provided that users merely browsing their site agreed to the Terms and any of their changes. Changes were then applied prospectively and retroactively without prior notice. The court reasoned that this practice had consistently been held to be unenforceable. Lastly, the Terms on Ticketmaster's site is affirmatively misleading because they are inconsistent with New Era's Rules. The Terms read together with New Era's Rules were so "dense, convoluted and internally contradictory to be borderline unintelligible."

The court also held that four features of New Era's Rules features were substantively unconscionable. This included (1) the mass arbitration protocol, (2) the procedural limitations, (3) the limited right of appeal, and (4) the arbitrator selection provisions. These features violated basic principles of due process and insufficiently protected the interests of parties and nonparties. Because the delegation clause is unconscionable procedurally and substantively, the court held that the arbitration agreement is unenforceable.