

# Class Action Waivers Redux: Ninth Circuit Upholds Arbitration Provision Delegating Enforceability Determination to Arbitrator

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In *Brice v. Haynes Investments LLC*, No. 19-15707 (9th Cir. Sept. 16, 2021), the Ninth Circuit considered an appeal by shareholders in Native American tribe-linked online lenders of a district court order denying the shareholders' motion to compel arbitration. The Ninth Circuit reversed the order because, under the terms of the parties' agreement, the enforceability of the arbitration agreement was a question for the arbitrator, not the judge, to decide.

A class of consumers filed suit against investors in the now-defunct online lender Think Finance, alleging that investors violated federal racketeering law, charged consumers interest rates that were usurious under California law, and that tribal sovereign immunity did not apply. The borrowers' loan documents contained an arbitration agreement with a provision delegating to the arbitrator questions concerning its enforceability. The district court denied the defendant shareholders' motion to compel arbitration, holding that a choice of law provision in the parties' agreement requiring the arbitrator to apply tribal law effectively constituted a "prospective waiver" of the plaintiffs' substantive rights to pursue federal statutory claims.

On appeal, the shareholders argued that the lower court erred because it failed to address the threshold question of whether the provision delegating questions of arbitrability to the arbitrator was unenforceable. If the delegation provision was enforceable, then any questions concerning the enforceability of the broader agreement to arbitrate were for the arbitrator to decide.

In an [opinion](#) authored by the Hon. Danielle J. Forrest, the Ninth Circuit panel majority agreed with the defendant shareholders. "Where a delegation provision exists, courts first must focus on the enforceability of that specific provision, not the enforceability of the arbitration agreement as a whole." Under the governing Supreme Court precedents of *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010) and *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013) "the delegation provision is enforceable because it d[id] not eliminate Borrowers' right to pursue in arbitration their prospective-waiver challenge to the arbitration agreement as a whole, even though that challenge arises under federal law."

The dissent, authored by the Hon. William A. Fletcher, disagreed and argued that the majority “misunderst[ood] the effect of the choice-of-law provisions in the agreements,” which in his view precluded the arbitrator from applying anything other than tribal law and a small, irrelevant subset of federal law. For the dissent, the choice of law provision effectively invalidated both the delegation provision and the arbitration clause.

The *Brice* decision creates a circuit split with the Second, Third and Fourth Circuits, which have affirmed decisions refusing to compel arbitration in similar cases involving the application of tribal law to consumer loan agreements. The panel majority addressed these decisions, noting that the out-of-circuit cases conflated “the question of who decides arbitrability with the separate question of who prevails on arbitrability.” Where “there is a clear delegation provision” the question of enforceability is “not for us — or anyone else wearing a black robe — to decide. Instead, it is for the arbitrator to decide so long as the delegation provision itself does not eliminate parties’ rights to pursue their federal remedies[.]” While this question may ultimately need to be decided by the Supreme Court, in the meantime businesses should review their consumer arbitration clauses and carefully consider whether they intend the arbitrator or the court to determine enforceability in the first instance.

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