

Ninth Circuit Sets Low Bar for Challenges to Delegation Clauses in Arbitration Agreements and Allows Expansive Review by District Courts

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When parties are battling over whether a court should compel a putative class action to arbitration, the outcome often turns on who decides the “gateway” arbitrability issues of whether a valid arbitration agreement exists and whether it encompasses the dispute at issue, the court or the arbitrator. If the arbitration agreement contains a delegation clause that assigns these gateway issues to the arbitrator, plaintiffs will frequently argue that the provision is unenforceable because it is unconscionable. How exactly do these battles play out?

In *Bielski v. Coinbase, Inc.*, the Ninth Circuit addressed two issues of first impression regarding challenges to delegation clauses in arbitration provision left open by the Supreme Court’s decision in *Rent-A-Center, West, Inc. v. Jackson*: first, what must a party “do to specifically challenge a delegation provision to ensure that a court can review its challenge,”¹ and second, what may a court “consider when evaluating the enforceability of a delegation provision.”

To put a finer point on it, can a party that challenges a delegation

provision rely on the party's challenges to the arbitration agreement as a whole, or must the party raise a specific objection to the delegation provision itself? And when evaluating a challenge to a delegation clause, is it okay for the court to examine the entire arbitration agreement or must it focus its attention on the delegation provision alone? Although the Court concluded that the plaintiff had sufficiently raised his challenge to the delegation clause and that the district court had permissibly examined the arbitration agreement as a whole in reviewing the plaintiff's challenge, at the end of the day, the Ninth Circuit rejected the district court's conclusion that the delegation provision was unconscionable and thus unenforceable.

As a reminder, under the [Federal Arbitration Act](#), arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract." Arbitration agreements are, of course, contracts and like any contract they can be rendered invalid "by generally applicable contract defenses, such as fraud, duress, or unconscionability," the Ninth Circuit wrote in *Bielski*, quoting one of its own decisions from 2017. Generally speaking, a court tasked with deciding whether to send a dispute to arbitration is limited to deciding whether there is, in fact, a valid agreement between the parties to arbitrate and, if so, whether that agreement covers the parties' dispute. Even then, the court's review can be further limited if the arbitration agreement delegates these threshold questions to an arbitrator, as the defendant argued in *Bielski*. In response, the plaintiff argued that the arbitration agreement and the delegation clause were unconscionable and therefore could not be enforced. In other words, the plaintiff objected to sending any of these threshold questions to an arbitrator in the first instance.

Although a party can raise the same types of challenges – for

example, fraud, duress, unconscionability – to both an arbitration agreement as a whole and a delegation clause within that agreement, the Ninth Circuit joined the Second, Third, and Fourth Circuits in concluding that the party must specifically explain “why each reason renders the specific [delegation] provision unenforceable.” Nonetheless, the Court set a low bar: “[I]f a party’s challenge mentions and specifically relates to the validity of the delegation provision in its opposition to the motion to compel arbitration or other pleading, the federal court has a green light to consider those arguments.”

In sum, following *Bielski*, “to sufficiently challenge a delegation provision, the party resisting arbitration must specifically reference the delegation provision and make arguments challenging it.” Moreover, “a party may use the same arguments to challenge both the delegation provision and arbitration agreement, so long as the party articulates why the argument invalidates each specific provision.”²

Applying these principles, the Court concluded that the plaintiff had done enough to specifically challenge the enforceability of the delegation provision; not only did he mention the provision in his opposition to the defendant’s motion to compel arbitration, but he also “crafted arguments directly addressing its unconscionability.” The fact that he also argued the arbitration agreement as a whole was unconscionable for the same reasons was of no consequence.

Next, the Court considered whether a court reviewing a challenge to a delegation provision could consider other parts of the arbitration agreement or was required to limit its review to the delegation clause alone. Looking to the applicable state law (California) governing contract interpretation and unconscionability,

and building upon its own jurisprudence, the Ninth Circuit held that it was appropriate for a court to consider “the whole context surrounding the delegation provision in its analysis of the provision’s validity.”

The Court noted two reasons that supported its conclusion. First, “the [delegation] provision itself may not provide enough information for the court to evaluate the challenge, especially where the delegation provision incorporates defined terms.” And second, “restricting a court’s review may incentivize contract drafters to write sparse delegation provisions to evade meaningful review. Drafters could hide layers upon layers of unconscionable provisions in the arbitration agreement.” Disallowing a court from reviewing the rest of the arbitration agreement could prevent the court from “see[ing] how delegating questions of arbitrability to an arbitrator was unconscionable.”

Applying this approach, the Ninth Circuit stated that the district court needed to look beyond the delegation provision to the arbitration agreement in order to fully comprehend and analyze the plaintiff’s unconscionability challenge to the delegation clause. In doing so, the Ninth Circuit held, the district court “correctly considered the whole context surrounding the delegation provision in its analysis of the provision’s validity.”

Ultimately, plaintiff’s victory was pyrrhic. After resolving these issues, the Ninth Circuit addressed the enforceability of the delegation provision at issue and held, contrary to the District Court, that the provision was not unconscionable under California law because there were only “low” levels of procedural and substantive unconscionability. Those “low levels of procedural and substantive unconscionability fail[ed] to tip the scales to render the provision unconscionable and therefore unenforceable.”

Consequently, the district court “erred in refusing to enforce the delegation provision.” Accordingly, the Court reversed the District Court’s order denying the defendant’s motion to compel arbitration.

¹ “*Rent-A-Center* makes clear that a party must at least mention a delegation provision to challenge it. But the Supreme Court has not provided parties with more specific instructions on what it takes to sufficiently challenge a delegation provision to ensure federal court review.”

² The Court acknowledged that its view diverged from that of the Sixth and Eleventh Circuits, which held respectively that “a party’s mere statement that it is challenging the delegation provision is not enough” and that it is enough if “the substantive nature of the party’s challenge meaningfully goes to the parties’ precise agreement to delegate threshold arbitrability issues.” One judge disagreed that the Sixth and Eleventh Circuits had taken a different approach, presumably in an effort to prevent readers, such as the Supreme Court, from interpreting the Ninth Circuit’s decision as creating a circuit split that might invite Supreme Court review.

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