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Ninth Circuit Champions FAA Preemption Over Georgia Decision

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While the U.S. Court of Appeals for the Ninth Circuit has often found that state limitations on arbitration agreements are not in conflict with the Federal Arbitration Act (FAA), a recent ruling there confirms that arbitration agreements are a potent defense against class action lawsuits, even in the Ninth Circuit.

A panel has concluded that the FAA preempts a Georgia Supreme Court decision holding that the named plaintiff's filing of a class action complaint suspended the contractual time limits for putative class members to opt out of a bank's arbitration agreement until after a decision on class certification was made.

In *O'Connor v. Uber Technologies, Inc.*, class action plaintiffs relied on the Georgia Supreme Court's decision in *Bickerstaff v. Suntrust Bank* in arguing that the district court properly denied the defendant's motion to compel arbitration. In *Bickerstaff*, the defendant bank's arbitration agreement permitted individual depositors to opt out of arbitration if they provided notice to the bank within a specific period of time. Although the depositor did not formally opt out of arbitration, he commenced a class action against the bank during the opt-out period. The Georgia Supreme Court held that the lawsuit substantially complied with the opt-out notice requirements and, under Georgia law, tolled the time for all putative class members to reject arbitration until after class certification was decided.

The *O'Connor* court rejected the plaintiffs' reliance on *Bickerstaff*. The court found that no federal cases have relied on *Bickerstaff*, "nor could they" since "[t]hat decision rested exclusively on state law grounds and did not discuss the [FAA]."

The Ninth Circuit emphasized that the FAA requires arbitration agreements to be enforced according to their terms in order to place them on the same footing as other contracts. Therefore, "[a]n arbitration specific rule, such as the one set forth in *Bickerstaff*, would be preempted by the FAA." The appeals court reversed the district court's denial of the defendant's motion to compel arbitration.

We often recommend that companies provide their customers with the right to opt out of an otherwise binding arbitration provision by notifying such companies of their desire to do so within a prescribed time period after the contract is entered into. The opt-out language also prescribes a specific method that the customer must use to effectuate an opt-out and typically states that a customer may only opt out of an arbitration provision that is binding on him or her and may not opt out on behalf of other customers.

We suggest the use of an opt-out because it is very fair to consumers and, under most state laws, undermines the argument that the arbitration provision is procedurally unconscionable. Most courts routinely enforce such opt-out provisions.

The *O'Connor* court itself referred to Ninth Circuit precedent holding that an arbitration provision is procedurally conscionable where it provides plaintiffs with "a meaningful opportunity to opt out." *Bickerstaff* is an outlier opinion that permitted the named plaintiff to ignore the bank's prescribed procedure for opting out not only on his own behalf, but also on behalf of the putative class members simply by filing a class action in court. It is refreshing to see the Ninth Circuit—which historically has been hostile to consumer arbitration agreements—reject the misguided holding in *Bickerstaff*.