

## Ninth Circuit Denies Mandamus After District Court Compels Arbitration Based on Allegedly Inconspicuous Arbitration Provision

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The Ninth Circuit recently denied a petition for a writ of mandamus seeking to overturn a district court's decision compelling arbitration. The petition principally argued the arbitration clause was inconspicuous because it was only found in a document that users had to: (1) click a link to access; and (2) then find another document incorporated in the first document on UPS' website.

Randall Holl filed a putative class action alleging that UPS overcharged him for a package he shipped. UPS responded by moving to compel arbitration. It claimed Holl had enrolled in the UPS My Choice program. In so doing, he clicked a box stating he agreed to, *inter alia*, the UPS My Choice Service Terms, which could be accessed by clicking a hyperlink next to the checkbox. That hyperlink brought users to a short document that incorporated several other documents but did not mention arbitration. The other documents were not hyperlinked to that page, but could be accessed on UPS' website. One of the documents incorporated was the UPS Tariff/Terms and Conditions of Service, which was 32 pages in length and contained a mandatory arbitration clause. Holl claimed, *inter alia*, that these multiple levels of incorporation made the arbitration clause inconspicuous.

The district court disagreed, and Holl petitioned the Ninth Circuit for a writ of mandamus. The court noted that this case "test[ed] the outer limits of what constitutes a 'reasonably conspicuous'" arbitration provision. The Ninth Circuit nevertheless denied Holl's petition because the district court's decision was not clearly erroneous as a matter of law, which was required for Holl to prevail under the strict requirements of a mandamus. Applying California contract law, the court noted that "California courts have deemed analogous incorporations by reference valid."

The court also noted that UPS had since changed its arbitration disclosure to make it more conspicuous. That was probably wise. While UPS prevailed in this case, the Ninth Circuit noted that the facts stretched the limits of what is conspicuous, and the court's holding was based on the extraordinary requirements of a writ of mandamus. It is not clear that UPS would have prevailed but for the strict standard of review, and other courts might well disagree with the district court. UPS seems to have recognized as much when it changed its disclosure.

[\*In re Holl\*](#), No. 18-70568 (9th Cir. May 30, 2019).

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