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PERSPECTIVE

California Supreme Court Review: June 2023

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This month's column reviews *Jack v. Ring LLC*, 91 Cal. App. 5th 1186 (2023), a case decided in May 2023 in the First District Court of Appeal, and a case that supports a continued theme of the higher-court's seeming preoccupation with arbitration provisions. This decision takes aim at arbitration provisions seeking to limit injunctive awards to individuals – rather than a collective – only.

Plaintiffs brought a class action lawsuit against home security device provider Ring, alleging violation of various consumer protection laws in connection with Ring's subscription prices. *Id.* at 1191. Plaintiffs sought injunctive relief that would require Ring to disclose information about its products and services. *Id.* Ring subsequently moved to compel arbitration, arguing that its terms of service (Terms) included a mandatory arbitration provision. *Id.* at 1192-93.

Plaintiffs argued that the arbitration provision violates California Supreme Court authority, which holds that pre-dispute arbitration agreements are unenforceable to the extent they wholly preclude parties from seeking public (i.e., class) injunctive relief. *Id.* at 1193 (citing *McGill v. Citibank*, 2 Cal. 5th 945, 961 (2017)). The San Francisco County Superior Court sided with Plaintiffs, denying Ring's motion to compel arbitration. *Id.* at 1195.

The Court of Appeal for the First District affirmed the lower court's decision. First, the Court confirmed that the trial court – not the arbitrator – properly considered the validity of the arbitration agreement where the Terms included language that "point[ed] in two directions" with respect to the proper venue to decide arbitrability. *Id.* at 1199-1201. Specifically, the Court pointed to the provision's severability language, which contemplated severability of issues between a court and an arbitrator if "a court decides that applicable law precludes enforcement." *Id.* at 1200 (emphasis added); *see also id.* at 1209.

Second, the Court of Appeal assessed the arbitration provision's requirements that arbitration be "conducted only on an individual basis and not in a class, representative or private attorney general action" and that arbitration awards must be provided "on an individual basis," including with respect to awards of injunctive relief. *Id.* at 1204. The Court agreed with the trial court's finding that these provisions "prohibit[] public injunctive relief in arbitration," placing the provisions in direct violation of California Supreme Court authority ruling that arbitration agreements cannot preclude plaintiffs from seeking public injunctive relief in every forum (i.e., in arbitration and in court). *Id.* at 1204 (citing *McGill*, 2 Cal. 5th at 956) ; *id* at 1206-07.

As with other recent higher-court decisions that this column has previously explored (see here and here), *Jack v. Ring* can be used as a roadmap and cautionary tale for companies hoping to compel arbitration, and as guidance for those individuals and companies hoping to challenge arbitration provisions in California. Companies may want to review their arbitration provisions with an eye towards ensuring that all issues are delegated explicitly and wholly

to arbitration. To that end, companies could potentially determine that they should reconsider the value of any "severability" provisions attempting to save issues for arbitration in the event that a court intervenes; such provisions may backfire, creating ambiguity regarding the proper venue to decide arbitration and moving the whole controversy before a court. Finally, companies should likely think carefully about how their arbitration provisions refer to arbitration of individual and class actions. *Jack v. Ring* suggests that arbitration provisions should avoid limiting the award of injunctive relief in arbitration to "the individual party seeking relief" and "only to the extent necessary to provide relief warranted by that party's individual claim." *Id.* at 1205. Instead, companies might consider drafting arbitration provisions that concretely place *all* injunctive claims – whether brought on behalf of an individual or a collective – in front of an arbitrator.

Those individuals and companies seeking to avoid being compelled to arbitrate should also likely review any arbitration provision carefully to see if there is any suggestion that a court could decide the arbitration provision. As noted above, such ambiguity may put the enforceability of the agreement before a court rather than an arbitrator.

But above all, *Jack v. Ring* seems to confirm that California consumers have many protections when it comes to their injunctive rights. Before clicking "accept" on a set of terms and conditions, a savvy consumer should likely read the arbitration provision to confirm either that injunctive class actions are excluded from arbitration, or that the arbitrator has the power to award a collective injunction. *Jack v. Ring* seemingly suggests that should the arbitration provision fail to do either of these two things, the consumer will be able to bring a collective injunctive action before a court. In other words, should the arbitration provision fail to protect a collective injunctive right, the consumer could likely remain in court under California's now even more clearly signaled intent to protect a public injunctive right.

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