

Arbitration

By LeRyan Paige Lambert

Given the presence of interstate e-commerce in almost every aspect of our lives, growing opportunity exists to maximize the use and effectiveness of arbitration.

# A Collective Power Against Jackpot Jury Awards in the Expanding World of E-Commerce

For many defense attorneys and risk managers, the escalating trend of rogue jury awards is alarming. There is some evidence that this “lottery mentality trend” is the culmination of the rise of populism; distrust in

corporations and the legal system; as well as decreasing attention spans and educational levels—all compounded by the information and social media era. Modern technology then allows these awards (as well as unfavorable corporate disclosures) to repeatedly flash across future jurors’ twenty-four hour news channels or Facebook timelines. Each headline or online comment establishes precedent for the next even higher jury award. And then, this cycle repeats. See Autumn Heisler, *5 Reasons Why Juries Are Awarding Billion-Dollar Verdicts*, Risk & Insurance (2018), <https://riskandinsurance.com>.

Many of the venues that were once reliable for defendants are now unpredict-

able, and the venues previously avoided like the plague are even worse and infecting those nearby. Moreover, the long-recognized unpredictability of jury trials has become not just a million dollar gamble but instead a billion dollar gamble—especially for well-known companies. Perhaps recognizing these trends and their threat on the justice system, a unanimous U.S. Supreme Court, in Justice Kavanaugh’s first authored opinion, again reiterated, in no uncertain terms, the broad and sound enforceability of arbitration agreements under the Federal Arbitration Act (FAA). See *Henry Schein, Inc., et al. v. Archer & White Sales, Inc.*, 586 U.S. \_\_\_, 202 L. Ed. 2d 480, \_\_\_ S. Ct \_\_\_ (2019).

Noteworthy, Justice Kavanaugh’s opinion also affirmed confidence in the competency of arbitrators to adjudicate disputes properly. See *id.* Indeed, arbitration is designed to encourage matters to be adjudicated by well-informed arbitrators, less prone to political or emotional influence and better equipped to understand an



■ LeRyan Paige Lambert is a senior litigation associate with Hawkins Parnell & Young LLP in Atlanta. She represents technology companies, manufacturers, retailers, insurers, and other corporate defendants against class actions and personal injury and wrongful death claims pursued under theories of product liability, premise liability, negligence, intentional acts, and uninsured/underinsured liability.

increasingly complex world. Additionally, arbitration can offer more confidentiality, limit class actions, expedite litigation with condensed discovery, and diminish opportunities for and the value in grandstanding or pursuing abusive, frivolous, and exaggerated claims. With the support of the U.S. Supreme Court, collective use of arbitration can be the yin to the run-away-jury yang.

Moreover, the very technologies that are bolstering jackpot jury awards inversely provide new opportunities to use arbitration. Historically, people did not customarily assent to terms of service before engaging in their daily activities. To do so would have inconvenienced routine acts of hailing cabs, ordering food and beverages, visiting malls, purchasing products, attending entertainment events, securing domestic services, applying for employment, parking cars, and so on. In today's world though, people routinely use technology platforms, such as the internet and mobile applications, to simplify their daily activities. These convenient technological services have introduced interstate e-commerce into practically every aspect of people's lives—along with their terms of use, including their arbitration provisions.

Collectively making a practice of maximizing these opportunities to arbitrate could effectively mitigate the otherwise uncontrollable societal factors influencing Monopoly-like jury awards. At minimum, defendants and their counsel can no longer afford to treat arbitration as an afterthought or costly, unfamiliar method of dispute resolution. Instead, arbitration must be one of the primary factors considered in case management and litigation strategies from inception. Failing to do so could be a billion dollar mistake.

### Is There a Valid Agreement to Arbitrate?

The first step in pursuing arbitration is identifying the arbitration agreements to use. (As illustrated in the next section, this inquiry should expand beyond the immediate parties.)

The second step is determining if an arbitration agreement is valid. Before arbitration can be compelled, a court must determine whether a valid arbitration agreement exists. *Henry Schein, Inc.*, *supra*, at \*6 (citing 9 U.S.C. §2). State courts “have

a prominent role to play as enforcers of agreements to arbitrate” and must enforce arbitration agreements that fall within the scope of the FAA. *KPMG LLP v. Cocchi*, 565 U.S. 18, 19, 132 S. Ct. 23, 181 L. Ed. 2d 323 (2011). The FAA applies when a contract requiring arbitration involves interstate commerce. Arguably, in the expanding world of e-commerce, the vast majority of all transactions may fall within the FAA's reach. See 9 U.S.C. §1.

The validity of an arbitration agreement is generally governed by state law principles of contract formation. If the parties possess a paper arbitration agreement with a John Hancock scribed with ink on the dotted line, determining assent is simple, absent exceptional circumstances. The technology-based economy increasingly requires digital assent through an online platform, and confirming assent is more complex than “is this your signature?”

Nevertheless, fundamental principles of contract formation still apply, and many jurisdictions have established precedent on how to evaluate digital assent within those principles. Generally, assent via an electronic platform (*i.e.*, webpage, mobile app) is established when (1) a user is conspicuously notified that he or she must agree to the platform's terms and conditions, (2) the user is provided access to those terms, and (3) the user's subsequent conduct manifests agreement. *See, e.g., Starke v. Squaretrade, Inc.*, \_\_\_ F.3d \_\_\_, 2019 WL 149628, 2019 U.S. App. Lexis 859 (2nd Cir. 2019); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829 (S.D.N.Y. 2012). Whether or not a user decides to read those terms is irrelevant, as long as notice of required assent and the terms were conspicuously provided. *See, e.g., Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 908, 911–12 (N.D. Cal. 2011).

In *Nguyen v. Barnes & Noble, Inc.*, a seminal case on digital assent, the Ninth Circuit explained that notice is sufficient if it would place a reasonably prudent website user on “inquiry notice” of the terms of the contract. 763 F.3d 1171, 1177 (9th Cir. 2014). To determine if a user was sufficiently placed on inquiry notice, courts evaluate the platform's interface, including its coloring, font style and size, page expansion, and other factors. *Starke, supra*, 2019 U.S. App. Lexis, at \*15. Simply placing a statement or the terms somewhere on a webpage is insuf-

ficient. For example, without alternative evidence of actual or constructive notice, notice may be insufficient if the platform's terms or the language explaining assent are either missing, buried, outside the scope of the user's immediate view (*i.e.*, requires scrolling), or inconspicuous among other text. Ultimately, the question is whether a reasonably prudent person would have

## The technology-based

economy increasingly requires digital assent through an online platform, and confirming assent is more complex than “is this your signature?”

understood that his or her continued use of the platform would manifest agreement to its terms. *See Nguyen*, 763 F.3d 1171 (providing an in-depth summary of factors considered by courts in determining sufficiency of notice).

When some notice is evidenced, a court must also evaluate not only whether the notice was sufficient but also whether the user manifested assent. Online agreements typically range on a spectrum from “clickwrap agreements” to pure “browsewrap agreements.” Clickwrap agreements (also known as “click-through agreements”) are generally upheld as valid. A clickwrap agreement is when a user is presented with the terms and conditions or a hyperlink thereto and must then affirmatively assent by clicking an “I Agree” tab or some similar direct expression of agreement such as clicking a box next to “I have read and agree to the Terms and Conditions.”

At the opposite end of the spectrum are pure “browsewrap agreements.” The linchpin feature of browsewrap agreements is that the user is able to continue using website or its services without ever visiting the actual terms or even being provided prior notice that they exist. Pure browsewrap

agreements are often in the form of a website containing a notice that states, “By visiting this website, you are agreeing to its Terms and Conditions.” Of course, a user must have the opportunity to know of his or her required assent and the terms before he or she can manifest assent. For this reason, pure browsewrap agreements are rarely deemed as valid without some alternative evidence of the user’s actual or constructive notice.

There are agreements all along the spectrum between pure clickwrap and browsewrap agreements for which detailed factual analysis is required to assess their validity. When a mobile application requires a user to register and the user is conspicuously notified that registering for the application manifests agreement to conspicuously provided terms, clicking a “Sign up” or “Done” tab (as opposed to an “I Agree”) sufficiently manifests agreement. *See, e.g., Meyer v. Uber Techs., Inc.*, 868 F.3d 66 (2nd Cir. 2017); *Cordas v. Uber Techs., Inc.*, 228 F. Supp. 3d 985 (N.D. Cal. Jan. 5, 2017). Likewise, when an online shopper is conspicuously notified that placing an order will manifest assent to the website’s terms and conditions, provided in the form of a traditional hyperlink, the user’s completion of the order sufficiently manifests assent. *See, e.g., Nicosia v. Amazon.com, Inc.*, 84 F. Supp. 3d 142, 151 (E.D.N.Y. 2015). Courts have even gone so far as to validate an agreement to a website’s terms and condition when no affirmative click was required, but the website “explicitly” notified the user on every screen that continued use would manifest assent to its terms. *See Nguyen*, 763 F.3d at 1177.

Ultimately, the analysis in the middle of the spectrum can hinge on the minutest details: font size and color, whether a hyperlink to the terms is underlined or blue, or whether the pertinent information is understandable and within the user’s direct view, un-crowded by other text.

Even in jurisdictions that have not yet established precedent for clickwrap agreements, browsewrap agreements, or the agreements in between, the general principles of contract formation and each state’s standards for evidencing mutual assent should be applied. For instance, in Georgia, the courts generally apply an “objective theory of intent” standard when evaluat-

ing mutual assent. This means that “a party’s intention is deemed to be that meaning a reasonable person in the position of the other contracting party would ascribe to the first party’s manifestations of assent.” And in making this determination, Georgia courts are free to consider extrinsic evidence and the circumstances surrounding the making of the contract, such as correspondence, discussions, and conduct of the parties, before and after entering the agreement. *See Hart v. Hart*, 297 Ga. 709, 711–13, 777 S.E.2d 431 (Ga. 2015). Thus, in these jurisdictions, opportunity exists to confirm manifestation of mutual assent even without expressed agreement or focusing on the tiniest technicalities of the interface of a website or mobile application.

### **Can a Nonsignatory Move to Compel a Valid Arbitration Agreement?**

A defense practitioner should not narrow his or her inquiry into whether a plaintiff and a client signed an arbitration agreement; rather, he or she should expand this inquiry to determine whether any arbitration agreements exist between other parties or even nonparties. Although arbitration is a matter of contract and the policy strongly favoring arbitration generally only applies to disputes between the signatories of an arbitration agreement, exceptions exist. *See Lawson v. Life of the South Ins. Co.*, 648 F.3d 1166, 1171 (11th Cir. 2011). Because the binding effect of an arbitration agreement relies on state contract law principles, if a state recognizes ways to bind nonsignatories or allow them to enforce contracts, those same principles equally apply to arbitration agreements. *See Arthur Anderson, LLP v. Carlisle*, 556 U.S. 624, 631, 129 S. Ct. 1896, 173 L. Ed. 2d 832 (2009). *See also KPMG LLP v. Cocchi*, 565 U.S. 18, 21, 132 S. Ct. 23, 181 L. Ed. 2d 323 (2011). Some traditional principles that allow contracts to be enforced by or against nonsignatories include, but are not limited to, assumption, incorporation by reference, third-party beneficiary theories, waiver, and equitable estoppel. *See id.*

Federal appellate courts have specifically addressed at least three circumstances when nonsignatories can enforce or be bound by arbitration agreements. *See MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (quoting *Sunkist*

*Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 756–57 (11th Cir. 1993).

First, the principle of equitable estoppel can bind nonsignatories to an arbitration agreement when the claims asserted are so “intimately founded in and intertwined with” the underlying contract containing the arbitration provisions, or when the claims against the defendants are based on the same operative facts and are inherently inseparable. *See, e.g., McBro Planning and Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342 (11th Cir. 1984) (citing *Hughes Masonry Co. v. Greater Clark County School Bldg. Corp.*, 659 F.2d 836 (7th Cir. 1981); *Sam Reisfeld & Son Import Company v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976). Some courts have found that an allegation that defendants are joint tortfeasors, without more, is insufficient to trigger this exception. However, a plaintiff certainly cannot rely on a contractual relationship to assert his or her claims when it is beneficial but then repudiate that same agreement when it works to a plaintiff’s detriment. *See Hughes Masonry Co.*, 659 F.2d at 839 (followed by *Wachovia Bank, N.A. v. Schmidt*, 445 F.3d 762, 769 (4th Cir. 2006) and district courts in almost all appellate circuits).

A second exception may exist when the relationship between the signatory and nonsignatory defendants is so intimate that allowing the nonsignatory to compel arbitration is the only way to maintain the arbitration agreement between the signatories. Employment and agency relationships often fall within this category. *See MS Dealer Serv. Corp.*, 177 F.3d at 947. *See also J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320–21 (4th Cir. 1988); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281 (6th Cir. 1990). Examples of other relationships falling within this exception include a spousal relationship, parent–child relationship, and general partner to a limited partnership. *See Crowley Maritime Corp. v. Boston Old Colony Ins. Co.*, 158 Cal. App. 4th 1061, 1077–78 (Cal. Ct. App. 2008). Another potential example falling within this exception may be the indemnitee–indemnitor relationship.

Finally, a third-party beneficiary can compel or be compelled to arbitrate under an arbitration agreement. *MS Dealer Serv. Corp.* 177 F.3d at 947.



## Is an Arbitration Agreement Enforceable?

Once a valid arbitration agreement is determined, whether the subject dispute falls within the arbitration agreement must be decided. As explained by the U.S. Supreme Court in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 1745, 179 L. Ed. 2d 742 (2011), and more recently in *Kindred Nursing Centers Ltd. P'ship v. Clark*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1421, 197 L. Ed. 2d 806 (2017), the FAA requires liberal enforcement of arbitration policies and expressly provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. §2; *Kindred Nursing Centers*, 137 S. Ct. at 1428. Notably, Congress enacted the FAA to overcome “widespread judicial hostility to the enforcement of arbitration agreements.” *Hall St. Assocs., L.L.C. v. Mattei, Inc.*, 552 U.S. 576, 581, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008). See also *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006). As such, the FAA is designed “to move the parties to an arbitratable dispute out of court and into arbitration as quickly and easily as possible.” *Moses H Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

Because of the liberal policy favoring arbitration, “[a]ny doubts concerning the scope of arbitratable issues should be resolved in favor of arbitration.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 939, 944-945, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). Most state laws and the rules of the American Arbitration Association express a similar standard. See, e.g., American Arb. Ass’n, Consumer Arb. Rules and Mediation P. R. 14(a)–(b) (2014).

A court, however, has no power to determine the scope of an arbitration agreement if there is clear and unmistakable evidence that the parties agreed that the arbitrator shall determine scope and enforceability (the “gateway issues”). See *Henry Schein, Inc.*, 586 U.S. at \*10 (quoting *First Options of Chicago, Inc.*, 514 U.S. at 944. See also *Epic Sys. Corp. v. Lewis*, \_\_\_ U.S. \_\_\_, 138 S. Ct. 1612, 1624, 138 S. Ct. 1612 (2018); 9 U.S.C. §§2, 3, 4. Within this framework, the FAA “leaves no place for the exercise of discretion by a court, but instead man-

dates that courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” See *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985). As Justice Kavanaugh recently made clear, arbitrators are fully capable of remanding a case to the civil venue if it does not fall within the applicable arbitration provisions. See *Henry Schein, Inc.*, 586 U.S. at \*7–8.

## Are Certain Disputes Prohibited from Arbitration?

The FAA does not prohibit arbitration of specific types of cases but rather focuses on the contractual terms of the agreement. Some states, however, have attempted to limit the types of disputes in which arbitration can be compelled. States often assert the interests of public policy. Sometimes, these efforts are codified in the state regulations. For example, Georgia statutorily prohibits mandatory arbitration in certain types of dispute involving wrongful death and injury arising from torts, class actions, medical malpractice claims, consumer loan agreements for \$25,000 or less, insurance agreements, consumer goods and transactions, and agreements involving residential real estate and employment unless the arbitration provision is initialed by all signatories. See Ga. Comp. Code Ann. §9-9-2 (c). In other states, the government or courts prohibit mandatory arbitration when they believe that it would be unconscionable. See, e.g., *Kindred Nursing Ctrs. L.P.*, 137 S. Ct. 1421. The U.S. Supreme Court has made clear, however, that such state efforts are preempted by the FAA, which has no such prohibitions. See *id.* See also *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012); *AT&T Mobility, LLC*, 563 U.S. at 341 (2011). With this, unless a claim results from a transaction that lacks interstate connections, there are no cases banned from mandatory arbitration provisions.

## Conclusion

Certainly, all cases are not within the reach of arbitration. Yet, given the presence of interstate e-commerce in almost every aspect of our lives, growing opportunity exists to maximize the use and effectiveness of arbitration. Not only can arbitration

contain exposure in individual suits, but systematic exercise of arbitration opportunities can more broadly mitigate the accelerating inflation of jury awards. Having more informed adjudicators who are more married to the law and facts typically reduces award values. The ability to assert greater levels of confidentiality assists public media efforts of corporations and can

## Consistent enforcement

of arbitration opportunities could force plaintiffs to think harder about recklessly adding “deep-pocket” defendants to simple disputes. It could also force plaintiffs to assess their own costs of litigation before pursuing frivolous or exaggerated claims.

reduce the wildfire announcements of large award values. Consistent enforcement of arbitration opportunities could force plaintiffs to think harder about recklessly adding “deep-pocket” defendants to simple disputes. It could also force plaintiffs to assess their own costs of litigation before pursuing frivolous or exaggerated claims. Finally, the contracted litigation and discovery in arbitration can protect companies from being inundated with unreasonable discovery inquiries, forced disclosure of unrelated, sensitive commercial information and could save them and their insurers millions of dollars in litigation costs. Overall, when analyzing initial case strategies, identifying opportunities to compel arbitration should be of paramount consideration—not only to avoid an unexpected jury free-for-all, but to also help ring in these awards more generally. 