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Doe 1 v. AOL LLC

No. 07-15323, US Court of Appeals for the Ninth Circuit, 16 January 2009.

The US Court of Appeals for the Ninth Circuit overturns a district court order granting AOL's motion to dismiss for 'improper venue' a class action filed in a Californian Court, alleging violations of the federal Electronic Communications Privacy Act and other laws.

A recent ruling by a federal court of appeals suggests that forum selection and choice of law clauses may not be effective as to California residents, if they deprive those residents of the ability to file a class action lawsuit. In its *per curiam* opinion in Doe 1 v. AOL LLC, No. 07-15323 (9th Cir. Jan. 16, 2009), the Ninth Circuit ruled that a clause in a clickwrap agreement between AOL and its customers that designated the 'courts of Virginia' as the forum for dispute resolution was unenforceable as to California residents, because Virginia does not allow class action suits, whereas California has a 'public policy favoring consumer class actions'. Because requiring the plaintiffs to litigate in a Virginia state court would have forced them to waive class action rights guaranteed under California law, the Ninth Circuit overturned a district court order granting AOL's motion to dismiss for improper venue.

Background

Plaintiffs, members of AOL, filed a putative class action suit against AOL in a federal district court in California, alleging violations of the federal Electronic Communications Privacy Act[1], federal common law, and various provisions of California consumer protection law. Their claims were based on the company's public release of a database containing millions of search records for 658,000 members. The complaint alleged that the search data contained addresses; phone, credit card and social security numbers, passwords and other personal information. It also alleged that the search data revealed AOL members' 'personal struggles with various highly personal issues, including sexuality, mental illness, recovery from alcoholism, and victimization from incest, physical abuse, domestic violence, adultery, and rape', by showing that they searched the internet for information on these issues. AOL admitted its mistake and removed the data from the internet, but 'mirror sites' allegedly reproduced the material in a manner accessible to, and searchable by, the public.

AOL, whose headquarters are in Virginia, moved to dismiss for improper venue, contending that the members had agreed to settle all disputes in the 'courts of Virginia' by assenting to a forum selection clause in the AOL Member Agreement. The Agreement also stated that the members would be governed by the 'laws of the Commonwealth of Virginia'. Before registering online for AOL's services, each member was required to click on a box stating that the member had agreed to the terms of the Member Agreement. The district court granted AOL's motion to dismiss, finding that the forum selection clause 'expressly require[d] that [the] controversy be adjudicated in a court in Virginia' and that the plaintiffs gave 'the courts of Virginia... "exclusive jurisdiction" over any claims or disputes with AOL' by assenting to the agreement. On appeal, the Ninth Circuit reversed.

Ninth Circuit ruling

The Ninth Circuit found that the reference to the 'courts of Virginia' in the forum selection clause referred to Virginia state courts only, not federal courts located in Virginia. The Ninth Circuit found that the clause's use of the preposition 'of' (rather than 'in') designated 'courts proceeding from, with their origin in, Virginia - i.e., the state courts of Virginia'. The Ninth Circuit also noted that the First, Fifth, and Tenth Circuits have likewise ruled that 'forum selection clauses designating the "courts of" a state...refer to the state courts of the designated state, and not also to the federal courts in the designated state'[2].

The Ninth Circuit then assessed the validity of the forum selection clause under the Supreme Court's ruling in M/S Bremen v. Zapata Off-Shore Co[3]. They noted that, under M/S/ Bremen, '[a] forum selection clause is presumptively valid', and 'the party seeking to avoid a forum selection clause bears a "heavy burden" to establish a ground upon which we will conclude the clause is unenforceable'. Nevertheless, M/S Bremen also established that a forum selection clause is unenforceable 'if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision'[4].

The Ninth Circuit found that the California Court of Appeal had established such a 'public policy...by...judicial decision' in America Online, Inc. v. Superior Court of Alameda County (Mendoza)[5]. In Mendoza, the court held that the same AOL forum selection clause at issue in Doe v. AOL LLC was unenforceable as to Californians, because it violated both California public policy and the anti-waiver provision of California's Consumer Legal Remedies Act (CLRA). The Mendoza court found that California public policy strongly favors consumer class actions, and noted that these class actions are not available in Virginia state courts. It also pointed out that the CLRA guarantees protections to California consumers that are not available under Virginia law, and noted that the CLRA explicitly states that '[a]ny waiver by a consumer of the provisions of [the CLRA] is contrary to public policy

and shall be unenforceable and void'. It therefore ruled that '[e]nforcement of the contractual forum selection and choice of law clauses would be the functional equivalent of a contractual waiver of the consumer protections under the CLRA and, thus, is prohibited under California law'. Applying this ruling in Doe v. AOL, the Ninth Circuit held that, because the forum selection clause would have required the plaintiffs to adjudicate their claims in a jurisdiction where 'a class action remedy' is not available, this clause 'violates California public policy against waivers of class action remedies and rights under the [CLRA]'. Accordingly, it reversed the district court's ruling and remanded for further proceedings.

Ninth Circuit opinion

In a concurring opinion, Judge Carlos Bea argued that the district court should have been ordered to consider on remand 'whether [the plaintiffs] are California consumers protected by California law'. The concurring judge stressed that '[t]he complaint is silent as to the place of the contracting, the place where the contract was negotiated, the place where the contract was performed, the location of the subject matter of the contract, or the residency of the AOL members at the time of their injuries'. He reasoned that the 'sole relevant allegation' - that Doe 1 and Doe 2 were 'residents of California' at the time the complaint was filed - was 'insufficient to establish [that] California law would govern plaintiffs' action'. He also warned that the court's per curium opinion would invite 'a new Gold Rush' of individuals moving to California for the 'sole purpose' of serving as class action representatives and 'clothing [themselves] with the protections of consumer-friendly California public policy'.

In their own concurrence, the other two judges (Senior Judge Dorothy Nelson and Judge Stephen Reinhardt), responded that these fears of 'a new Gold Rush' were overblown, noting that '[n]o such rush has occurred in the past despite the state's policy designed to protect California consumers' right to file class actions'. They also noted that, 'at least for the purposes of the California Consumers Legal Remedies Act, no...distinction [between California residents and consumers] exists under California law'.

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1. Specifically, 18 USC 2702(a).
2. See LFC Lessors, Inc. v. Pac. Sewer Maint. Corp., 739 F.2d 4 (1st Cir. 1984); Dixon v. TSE Int'l Inc., 330 F.3d 396 (5th Cir. 2003); and Am. Soda, LLP v. U.S. Filter Wastewater Group, Inc., 428 F.3d 921 (10th Cir. 2005).
3. 407 U.S. 1, 17 (1972).
4. Id. at 15.
5. 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001).

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