ALERT MEMORANDUM

State and Federal Court Decisions Address Recurring Issues in Consumer Arbitration

July 29, 2025

Three recent court decisions relating to motions to compel arbitration provide insights as to how courts consider issues that commonly arise in the context of consumer arbitration.

On June 30, 2025, the United States District Court for the Southern District of California denied a motion to compel arbitration in *Cody v. Jill Acquisition LLC*, finding that although the Terms of Use containing an arbitration agreement were sufficiently conspicuous on a webpage, the option to check out as a guest failed to provide notice that the consumer would be required to arbitrate.[1]

The following week, on July 7, 2025, the Supreme Court of California held in *Ford Motor Warranty Cases* that a non-signatory to an arbitration agreement could not rely on the doctrine of equitable estoppel to compel arbitration of a signatory's claims, which were insufficiently intertwined with the underlying contract.[2]

On July 10, 2025, the United States Court of Appeals for the Sixth Circuit reversed the denial of a motion to compel arbitration, finding that the district court had failed to develop sufficient factual findings for its conclusion of a waiver of the right to arbitrate.[3]

While none of these decisions represents a departure from existing law, they demonstrate the variety of factors that can impede attempts to compel arbitration, particularly in the consumer context. The decisions also provide helpful guidance on best practices and potential pitfalls for parties to consider when drafting and publishing arbitration agreements for Terms of Use or other "clickwrap" agreements that are common in the consumer context, as well as for how to frame arguments at the motion to compel stage.

NEW YORK

Jeffrey A. Rosenthal
+1 212 225 2086
jrosenthal@cgsh.com

Ari D. MacKinnon
+1 212 225 2243
amackinnon@cgsh.com

Lina Bensman
+1 212 225 2069
lbensman@cgsh.com

Boaz S. Morag
+1 212 225 2894
bmorag@cgsh.com

Katie L. Gonzalez
+1 212 225 2423
jrosenthal@cgsh.com

Andrew Khanarian
+1 212 225 2086
akhanarian@cgsh.com

Peter Carzis
+1 212 225 2086
pcarzis@cgsh.com

WASHINGTON, D.C.

Nowell D. Bamberger
+1 202 974 1752
nbamberger@cgsh.com

Elsbeth Bennett
+1 202 974 1911
ebennett@cgsh.com

BAY AREA

Jennifer Kennedy Park
+1 650 815 4130
jkpark@cgsh.com

[1] *Cody v. Jill Acquisition LLC*, No. 25-CV-937 TWR (KSC), 2025 WL 1822907 (S.D. Cal. June 30, 2025).
[2] *Ford Motor Warranty Cases*, No. S279969, 2025 WL 1830882 (Cal. July 3, 2025).
[3] *In Re Chrysler Pacifica Fire Recall Prods. Liab. Litig.*, No. 24-1137, 2025 WL 1904525 (6th Cir. July 10, 2025).

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Cody v. Jill Acquisition LLC

In *Cody*, the district court considered the sufficiency of a "clickwrap" arbitration agreement to bind e-commerce participants to an agreement to arbitrate, and held that where an online shopper completed online payment as a guest, the context of the transaction did not create sufficient inquiry notice that the customer would be bound by Terms of Use containing an agreement to arbitrate, notwithstanding the fact that the Terms of Use were visually conspicuous on the webpage.[4]

This case arose from a dispute between online shopper Annette Cody ("Plaintiff") and retailer Jill Acquisition LLC, a Delaware corporation selling apparel through the site jjill.com ("Defendant").[5] After Plaintiff filed a putative class action for violations of California consumer protection law, Defendant moved to compel arbitration pursuant to an arbitration agreement contained in Defendant's Terms of Use, which appeared when Plaintiff went to check-out as a guest.[6]

Acknowledging that both parties agreed that Plaintiff "did not have actual notice of Defendant's Terms of Use," the district court's inquiry turned on whether Plaintiff had reasonable inquiry notice of the agreement to arbitrate.[7] In order to establish the existence of an enforceable contract on the basis of an inquiry notice theory, district court acknowledged that there were "two aspects: the visual design of the webpage and the context of the transaction" that could lead an internet user to understand that they had entered into a contractual relationship with an agreement to arbitrate.[8]

First, with respect to the visual design of the webpage, the district court determined that several factors – including the "location of the advisal on the webpage or the font size, color, and contrast (against the page's background)" – play a role in determining whether there is sufficient inquiry notice.[9] Observing that no "bright-line test" exists for "finding that a particular design element is adequate in every circumstance," the district court addressed the sufficiency of Defendant's notice by comparing the visual character of its interface with features of webpages that the Ninth Circuit had previously analyzed.[10] The district court looked to the color and font size of the notice, whether the notice was hyperlinked, and the distance between the notice and the "action button" that consumers click in order to indicate assent to the Terms of Use.[11] Considering these factors, the court reasoned that although the notice appeared in a smaller font size than surrounding elements, it remained legible, was not "placed on a cluttered page or obscured," and appeared reasonably close to the action button.[12] As a result, the notice on the webpage was reasonably conspicuous.[13]

Second, with respect to the context of the transaction, the district court relied on Ninth Circuit precedent, "following California caselaw," that "courts are more likely to conclude that a user anticipating 'some sort of continuing relationship' would expect to be bound by terms, whereas a user 'who simply purchases goods or avails herself of a one-time discount offer' would be less likely to form such an expectation."[14] Applying this principle, the district court acknowledged that Plaintiff had checked out as a guest and did not create an account with jjill.com in completing her transaction.[15] According to the district court, this was sufficient to "distinguish this case from those in which the Ninth Circuit has found that the context of the transaction would put a user on inquiry notice that use of a company's website or services constituted an agreement to its terms and conditions."[16] Because "'most consumers would not expect to be bound by contractual terms' when engaging in a 'trivial' transaction like 'the sale of a single item, such as a pair of socks," the district court found that the "context of

[4] *Cody*, 2025 WL 1822907, at *7.
[5] *Id.* at *1.
[6] *Id.* at *1-3.
[7] *Id.* at *4.
[8] *Id.*
[9] *Id.*
[10] *Id.* at *4-*5 (citation omitted).
[11] *Id.* at *5-*6.
[12] *Id.* at *6-*7.
[13] *Id.*
[14] *Id.* at *7 (citation omitted).
[15] *Id* at *7.
[16] *Id*.

the transaction therefore weighs against concluding that Plaintiff was sufficiently aware that, by placing an order through jjill.com, she would be entering into an agreement including an arbitration provision."[17]

Accordingly, even though the Terms of Use containing the arbitration clause was visually conspicuous, the district court concluded based on the context of the transaction that there was no valid agreement to arbitrate, and the motion to compel was denied.[18]

Ford Motor Warranty Cases

In *Ford*, the California Supreme Court considered whether non-signatories could compel arbitration under a theory of equitable estoppel, and held that where a signatory's claims do not arise from, or are meaningfully intertwined with, the underlying contract containing the arbitration agreement, a non-signatory will be unable to compel the arbitration of those claims.

Ford stemmed from a dispute between purchasers of motor vehicles ("Plaintiffs") and the manufacturer of those vehicles, Ford Motor Company ("Ford"). Plaintiffs purchased their vehicles from various Ford dealerships pursuant to sales contracts providing that any dispute "which arises out of or relates to your credit application, purchase, or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who did not sign this contract)" may be resolved by arbitration "at your or our election."[19] After experiencing transmission issues with their cars, Plaintiffs brought statutory claims against Ford asserting violations of express and implied manufacturer warranties, as well as fraudulent inducement and concealment.[20]

Ford moved to compel arbitration, invoking the arbitration agreement in the sales contract between Plaintiffs and the car dealerships. The California trial court denied Ford's motion to compel, which the California Court of Appeal affirmed.[21] Ford appealed to the California Supreme Court.

The California Supreme Court began its analysis by addressing whether any agreement existed between Plaintiffs and Defendant, characterizing this question as "simple: Plaintiffs and Ford have not agreed to *anything*, much less to arbitrate any dispute between them."[22] The Court likewise rejected Defendant's argument that the sales contract permitted it to compel arbitration as a third party.[23] Although the arbitration agreement applies to disputes arising from "any resulting transaction or relationship (including any such relationship with third parties who did not sign this contract)," the California Supreme Court concluded that only the purchaser or dealer could compel the arbitration of such a dispute.[24]

The California Supreme Court then turned to Defendant's argument that Plaintiffs were equitably estopped from opposing arbitration. Under the doctrine of equitable estoppel, the California Supreme Court determined that parties may not seek to evade arbitration where their claims are "intimately founded in and intertwined with" the terms of the contract containing the agreement to arbitrate.[25] This approach, the Court explained, "rests on a fairness rationale: If plaintiffs have agreed to arbitrate claims arising out of a contract dispute, they may not pursue a lawsuit to vindicate contractual provisions beneficial to them yet avoid an agreement to arbitrate, either by couching their claims as actions unrelated to the contract or by suing a nonsignatory."[26]

Applying that principle to the facts of this case, the California Supreme Court looked to the specific allegations that Plaintiffs made against Ford relating to breach of warranties and fraud. Although Ford had contended that the warranty obligations that formed the basis of Plaintiffs' claims "derive from the sale of goods" and were therefore necessarily "intertwined

[17] *Id.* (quotation omitted).
[18] *Id.* at *8.
[19] *Ford Motor Warranty Cases*, No. S279969, 2025 WL 1830882, at *2 (Cal. July 3, 2025).
[20] *Id.* at *2.
[21] *Id.*
[22] *Id.* at *3 (emphasis in original).
[23] *Id.* at *4.
[24] *Id.*
[25] *Id.* at *5 (quotation omitted).
[26] *Id.* at *6.

with the underlying sales contracts,"[27] the California Supreme Court found that the "[P]laintiffs' warranty and fraud claims do not seek to enforce any contractual term," and any liability derived entirety from statute.[28] Because "Plaintiffs' causes of action against Ford do not depend on or invoke any of the terms of the sales agreements with the dealers, nor can they be construed to seek any benefit from those sales contracts,"[29] the California Supreme Court found that Ford, as a non-signatory, could not invoke the doctrine of equitable estoppel to mandate arbitration of Plaintiffs' claims against it. In so holding, the California Supreme Court also distinguished the relationship between Ford (as manufacturer) and the car dealerships that had entered into the sales contracts with Plaintiffs, noting in prior cases where a non-signatory was found to use equitable estoppel to compel arbitration, "the relationships between the contracting parties and the nonsignatory . . . were much closer," including relationships like parent-subsidiary and contractor-subcontractor.[30]

As a result, the California Supreme Court concluded that Ford, as a non-signatory, could not compel arbitration of Plaintiffs' claims, and affirmed the decisions below.[31]

In Re Chrysler Pacifica Fire Recall Products Liability Litigation

In *In re Chrysler Pacifica Fire Recall Products Liability Litigation*, the Sixth Circuit assessed whether the conduct of a non-signatory to an arbitration agreement waived its ability to compel arbitration when the issue of waiver was raised by the trial court *sua sponte*, and held that the a district court's factual findings are insufficient for a determination of waiver where it fails to meaningfully assess knowledge of an agreement to arbitrate, and the district court was unjustified in that case in considering the waiver issue *sua sponte*.

This proceeding arose from disputes between automobile manufacturer FCA US LLC ("FCA") and 69 purchasers of allegedly deficient Chrysler Pacifica minivans ("Plaintiffs"), which were consolidated into a multi-district suit in Michigan.[32] For several weeks following consolidation, FCA participated in preliminary case proceedings, and moved to dismiss Plaintiffs' complaint for failure to state a claim.[33] While that motion was pending, FCA discovered that 18 of the 69 agreements between Plaintiffs and car dealerships contained arbitration agreements.[34] FCA subsequently moved to compel arbitration as to those 18 Plaintiffs.[35] In opposing the motion to compel, Plaintiffs did not raise waiver as a ground for denial, and "[a]t the hearing, the district court never warned FCA about a potential waiver problem."[36] The court denied the motion, finding *sua sponte* that FCA had waived any right to arbitrate, and FCA filed an appeal.[37]

The Sixth Circuit first addressed FCA's contention that the issue of waiver was delegated to the arbitrator. The Court expressed skepticism as to this argument, citing a presumption favoring judicial resolution of claims that a party waived its right to arbitrate.[38] Acknowledging that the clauses at issue delegated gateway questions concerning "the sales contracts' 'validity,' 'enforceability,' 'scope,' and 'arbitrability'" to the arbitrator, the Court nevertheless reasoned that waiver fell beyond the ambit of this language, as the delegation clause addressed "contract-formation disputes" and "what the arbitration agreement covers," and the "lone reference" to arbitrability failed to overcome the presumption of judicial resolution.[39]

The Sixth Circuit next reviewed whether FCA had waived its right to arbitrate by applying "'ordinary waiver rules' and look[ing] for an 'intentional relinquishment or abandonment of a known right.'"[40] The Court acknowledged that while constructive

[27] *Id.* at *4
[28] *Id.* at *8.
[29] *Id.* at *6.
[30] *Id.* at *8.
[31] *Id.* at *9.
[32] *In Re Chrysler Pacifica*, 2025 WL 1904525, at *1.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.* at *2.
[39] *Id.*
[40] *Id.* at *3 (citation omitted).

knowledge may give rise to a claim of waiver, it "ha[d] never held that a party can waive its arbitration rights without first knowing those rights exist."[41] As a result, the Court reasoned that "the district court could not have found that FCA waived its arbitration rights," because it had failed "to determine that FCA knew or should have known that its arbitration rights existed when it moved to dismiss."[42]

Finally, the Sixth Circuit addressed a "fundamental problem" with the district court's decision, namely that "the district court—not the plaintiffs—raised waiver as a defense to FCA's motion to compel arbitration."[43] Remarking on the nature of "our adversarial system," the Court concluded that the district court "violated the principle of party presentation by raising the waiver issue on its own."[44] Acknowledging that courts are permitted to raise issues *sua sponte* "in exceptional cases" or in order to prevent a "plain miscarriage of justice," the Court found that the case before it was unremarkable, as the Plaintiffs impacted would "merely be required to abide by the terms of the contracts that they voluntarily signed."[45] The Court additionally reasoned that permitting the district court to independently raise waiver in the context of a motion to compel arbitration would prevent efficient dispute resolution by depriving parties of a chance to present evidence of the dispute's arbitrability.[46] Finding that the "district court's decision not only violates the principle of party representation basic to our adversarial system but also contravenes this Court's well-established waiver rules," the Court reversed the denial of the motion to compel and remanded for further proceedings consistent with the opinion.[47]

Takeaways

Although none of these decisions changes the law on motions to compel arbitration, each provides important guidance for parties seeking to effectively enter into and enforce agreements to arbitrate, particularly with respect to consumers.

The district court's decision in *Cody* provides an example of the unexpected pitfalls that may lead to enforceability issues. The district court's opinion explains the various visual aspects of a webpage – including the font color and size, and text placement – that may be required in order to bind consumers to arbitrate in the context of online "clickwrap" agreements. The decision also cautions, however, that even if an agreement to arbitrate is sufficiently conspicuous on a webpage, the context of the transaction may weigh against a finding of enforceability of the arbitration agreement.

The California Supreme Court's decision in *Ford* similarly provides additional clarity on the limits of the doctrine of equitable estoppel in compelling arbitration in cases involving non-signatories. Although *Ford* involves a less-common situation in which a non-signatory seeks to avail itself of an arbitration agreement between two signatories to an agreement, the California Supreme Court's decision demonstrates that it will be important for the non-signatory to tie the subject matter of the dispute directly to the subject matter of the contract, rather than relying on a more atmospheric relationship between claims at issue and the transactions they concern.

Finally, the Sixth Circuit's decision in *Chrysler* underscores the fact-intensive nature of inquiries into waiver of the right to arbitrate. While not specific to the consumer arbitration cases, the Sixth Circuit's conclusion may reflect the need for parties to develop a factual record and the importance of raising all defenses to a motion to compel arbitration before the lower court.

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[41] *Id.* at *3.
[42] *Id.* at *4.
[43] *Id.*
[44] *Id.*
[45] *Id.* at *5.
[46] *Id.*
[47] *Id.* at *6. While the Court would "[n]ormally remand for further fact finding as to waiver "in a situation like this," it "decline[d] to give the district court another opportunity to decide the issue," and remanded "for further proceedings consistent with this opinion." *Id.* at *4-6.