
ALERT MEMORANDUM

Ninth Circuit Issues Key Ruling on Pre-Certification Class Communications

February 10, 2026

On January 28, 2026, the Ninth Circuit affirmed the denial of a motion to compel arbitration based on a party's misleading communications to prospective class members, holding that a district court's broad authority under Federal Rule of Civil Procedure 23(d) includes discretion to decline to enforce an arbitration agreement when a party's communications with such class members threaten the fairness of class action proceedings. *Avery v. TEKsystems, Inc.*, No. 24-5810, 2026 WL 218992 (9th Cir. Jan. 28, 2026). The decision affords substantial discretion to courts' regulation of class communications, even prior to certification and expiration of the notice and opt-out period, and counsels in favor of a cautious approach to such communications in order to ensure preservation of rights.¹

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Facts and Procedural History

In January 2022, former recruiters of Defendant TEKsystems, Inc. (“TEK”) filed a class action in state court, alleging that TEK had committed wage and hour violations under California law. TEK removed the case to federal court, and the parties began discovery. Days after class certification briefing had closed, but before the court ruled on certification, TEK implemented a new, mandatory arbitration agreement that included its recruiters. TEK sent two email communications related to the agreement. The first email, sent to all internal employees, highlighted its views on the benefits of arbitration, construed litigation as “wasteful, inefficient,” and primarily beneficial to enrich attorneys, and indicated continued employment with TEK past a specified date would be deemed acceptance of the arbitration agreement. The second email, sent to members of the putative recruiter class, reinforced that continued employment meant agreement to arbitrate and described the option to opt-out of the agreement as being “for the limited purpose” of remaining in the class.

After the class was certified and five days before the notice period closed, TEK filed a motion to compel arbitration. The district court denied the motion, finding FRCP 23(d) gives courts “broad authority to regulate the notice and opt-out process and to impose limitations when a party’s conduct threatens the fairness of the litigation.” The court found this standard was met because TEK’s communications “were misleading and omitted key information.” The court’s concern was magnified in light of the confusing nature of the two emails with respect to information about class members’ rights coupled with the timing of the emails, which were sent out just before end-of-year holidays and were the first communication many class members had received about the case. In the alternative, the district court found that TEK had waived its arbitration rights by waiting eighteen months into the litigation to seek to impose arbitration.

The Ninth Circuit’s Decision

The Ninth Circuit affirmed, citing the Supreme Court’s decision in *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981) in holding that “a district court’s ‘broad authority’ under FRCP 23(d) ‘to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties’ includes the authority to decline to enforce an arbitration agreement.” The court reasoned that:

- A district court’s authority to refuse to enforce an arbitration agreement follows from the powers afforded it by FRCP 23(d) to manage the notice and opt-out processes and impose limitations to address party behavior that may harm the fairness of the litigation. TEK “subverted FRCP 23 by turning this typical Rule 23 opt-out class proceeding into an opt-in proceeding.”
- Federal procedural rules allow a court to impose conditions on all parties, including defendants, in a class action.
- The Federal Arbitration Act policy favoring arbitration is not inconsistent with the holding, as arbitration agreements may be invalidated based on federal procedural rules and are to be treated like any other contract that may be invalidated when it disrupts the class action process.
- TEK’s email communications were misleading, inaccurate, confusing, and disparaging of class actions, which had a “harmful impact on potential class members.”
- Invalidation of the arbitration agreement, rather than mere corrective notice, was necessary to provide adequate relief to class members who entered the agreement due to misleading communications and to ensure the opt-out process was executed consistent with FRCP 23.
- The district court properly ruled on the enforceability of the agreement rather than delegating to an arbitrator because plaintiffs challenged the validity of the entire agreement under FRCP 23(d).

Conclusion

The Ninth Circuit's decision in *Avery* affirms the broad discretion held by district courts exercising their authority to regulate class action proceedings under FRCP 23. Its holding makes clear that this broad discretion is not confined to the period following class certification and expiration of the notice and opt-out period but instead extends back to conduct that may affect the class or class proceedings before the class is finalized. While the decision does not elucidate the exact criteria for appropriate and inappropriate communications, it signals that parties should employ caution when considering communicating with prospective class members at any point of the proceedings.

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