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October 13, 2020

Small claims court as escape hatch for mass arb defendants? Not so fast, says L.A. judge

In a case that has important implications for companies facing mass arbitration demands from their customers, Los Angeles Superior Court Judge Terry Green ruled last week that Intuit cannot halt arbitration with nearly 10,000 customers who allege the financial software company steered them into paying for tax preparation services after they attempted to use a free version of Turbo Tax. Intuit, invoking an American Arbitration Association rule that allows either side to push claims out of arbitration and into small claims court, had asked the judge to enjoin its customers' AAA cases – which will require the company to pay $30 million in AAA fees. Judge Green denied the motion, ruling that under the language of **Intuit's** consumer contract, only its customers can opt for small claims court. And even if the contract allowed **Intuit** to push the cases into small claims court, Judge Green ruled, the consumers' additional claim under federal antitrust law precluded **Intuit** from invoking the AAA rule.

I'll get to the specifics of the ruling, which is at least a temporary setback for **Intuit** and other companies that saw AAA's small claims court rule as an escape hatch from mass arbitration demands. But I want first to share a point Judge Green made toward the end of the opinion. **Intuit**, he said, is simply reaping the consequences of its own decision to force its customers to arbitrate their claims individually.

"**Intuit** is a bit like the dog that caught the car," Judge Green wrote. "It got the consumers' claims out of litigation and into arbitration, then realized that this was a large class and that resolving the claims individually would be hopelessly expensive. The question presented to the court here is whether Intuit has a viable way out of its own box. And the answer is no."

Companies like Intuit, he said, rushed to impose arbitration because they wanted protection from class actions brought on behalf of consumers who wouldn't both to bring their own small-dollar claims. But class actions, he said, can be as much of a boon for defendants as for plaintiffs, at least when plaintiffs defy expectations and demand arbitration by the thousands.

"Intuit … traded a giant incoming meteor for a landslide of pebbles," Judge Green wrote. "Being buried by a landslide is hardly preferable to being squashed by a meteor."

Intuit is represented by Wilmer Cutler Pickering Hale and Dorr. An Intuit spokesman said in an email response to my query about Judge Green's ruling that the company "has a long-standing commitment to free tax preparation, including more than 70 million completely free tax returns filed over the last 6 years...TurboTax prominently and transparently discloses the price of its paid products and is at all times clear and fair with its customers."

The mass arbitration dispute has a quite complex history, as Judge Green recounted. Some **Intuit** customers originally attempted to bring a class action alleging they were duped into buying **Intuit** tax prep products when they tried to use free services. **Intuit** moved to compel arbitration in federal court in San Francisco. The company lost in the trial court but, in August, won a ruling (2020 WL 4601254) from the 9th U.S. Circuit Court of Appeals, which concluded that **Intuit** customers were bound to the arbitration clause.

While that case was under way, plaintiffs' lawyers from Keller Lenkner began filing individual arbitration demands for thousands of **Intuit** consumers. **Intuit** protested to AAA officials, arguing that Keller Lenkner was filing "boilerplate" and "frivolous" arbitration claims in an attempt to jack up the arbitration fees required from **Intuit**. **Intuit**, like other companies targeted in Keller Lenkner mass arbitration campaigns, claimed the plaintiffs' firm was trying to leverage the threat of fees into a global settlement.

But unlike companies facing an avalanche of wage-and-hour claims, **Intuit** had a potential silver bullet. AAA's rules for consumer arbitration (but not employment arbitration) include a provision that allows either side to opt for small claims court instead of arbitration as long as damages demands don't exceed small claims court caps. By invoking the small claims court rule, Intuit hoped to avoid paying tens of millions of dollars in AAA fees – and to force customers to make a case without their own counsel, since plaintiffs can't rely on lawyers in small claims court.

Keller Lenkner, which denies filing unwarranted claims, countered that **Intuit's** contract advised consumers that they have a right to opt for small claims court but did not say that **Intuit** could elect to do so.

AAA determined that it would be up to arbitrators in individual cases to decide whether **Intuit** could invoke the small claims court rule. **Intuit**, AAA said, would have to pay the requisite fees in all of the cases in order to find out. (AAA did say that once the fees were paid, **Intuit** and its customers could stipulate to have a single arbitrator decide the small claims court issue for all of the cases.)

Intuit was under pressure from a recently-enacted California law that calls for potentially harsh penalties, including default judgment, on companies that refuse to pay arbitration fees after arbitrators determine the fees are required. So in June, the company sued Keller Lenkner's clients in Los Angeles Superior Court, seeking a declaration that it was entitled to push them into small claims court. Intuit also asked for a ruling that the California law punishing arbitration deadbeats was preempted by the Federal Arbitration Act.

Keller Lenkner promptly amended its clients' AAA arbitration demands to include an antitrust claim under the Sherman Act, accusing Intuit of conspiring to inflate prices for tax prep services. AAA's rules allow cases to be moved to small claims court only when those courts have jurisdiction. Small claims courts don't have the power to decide federal antitrust allegations (or any demands for injunctions). By adding the Sherman Act claim, Keller Lenkner appeared to be shoring up its argument that its clients' cases could not be transferred to small claims court.

Intuit accused Keller Lenkner of forum-shopping. The two sides took a detour to federal court in San Francisco, where Keller Lenkner argued that it's up to the federal judiciary to decide the arbitrability of cases with a Sherman Act claim. Last month, U.S. District Judge Charles Breyer deferred (2020 WL 5434503) to Intuit's previously-filed suit before Judge Green. Judge Breyer said Keller Lenkner's surprise addition of Sherman Act demands was "apparent forum shopping." But he also said the antitrust allegations were "colorable" and "non-frivolous."

In last week's ruling, Judge Green agreed with both of Keller Lenkner's arguments against an injunction barring the AAA arbitrations. AAA rules, he said, allow parties to modify the arbitration service's general rules via their contracts. Intuit's contract specifies that consumers have a right to opt for small claims court but does not give Intuit that option. Therefore, according to Judge Green, the contract supersedes the AAA rule permitting either side to push cases to small claims court. (I'm streamlining mercilessly, but you get the gist.) And even if Keller Lenkner added the Sherman Act claims as a forum-shopping tactic, the judge said, a federal court has found the allegations to be non-frivolous and they're clearly not a matter for small claims court.

Judge Green ruled that Intuit's preemption case on the California law to enforce payment of arbitration fees is not ripe because the company is not yet facing penalties for failing to pay. The judge refused to stay his ruling, noting that it will be up to the state appellate court to decide whether to grant a stay. I have no doubt that **Intuit** will appeal.

Keller Lenkner's Travis Lenkner sent me an email statement on the decision: "We're pleased that the court rejected **Intuit's** sham bid for an injunction to protect it from its own arbitration clause. As the court ruled, **Intuit** has no chance of prevailing on its arguments. None. We look forward to arbitrating our clients' claims."

It's possible that **Intuit** itself may have already realized the hard truth of Judge Green's admonishment about class actions benefitting defendants as well as plaintiffs. On Oct. 1, Keller Lenkner filed a declaratory judgment complaint in Los Angeles Superior Court, asserting that it believes Intuit is negotiating a class action settlement of the claims its clients have brought in arbitration. "Though Intuit has spent the past year successfully compelling its customers' consumer fraud class-action claims to individual arbitration, Intuit now seeks to reverse course and enter into a class-wide settlement," the complaint said. "The reason for that about-face is clear: Now that Intuit faces claims from more than a handful of its customers, it has decided that it would rather resolve those customers' claims in court, via a class-action settlement, than abide by its own agreement and proceed with the individual arbitrations it promised."

Lenkner declined to comment on the new complaint. Intuit didn't respond to my query about it.

(Reporting by Alison Frankel)

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Language: EN

Other Indexing: (Keller Lenkner) (Keller Lenkner; Wilmer Cutler Pickering Hale; Travis Lenkner; Terry Green; Dorr; Charles Breyer)

Keywords: arbitration; tax; products; antitrust; ClassActions; ClassActions

Word Count: 1520

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