

**Client Alert**

January 23, 2009

**Forum Selection Clauses: What a Difference an "Of" Makes****Areas of Interest****Consumer Litigation & Class Actions****Supreme Court & Appellate****United States**

In a ruling that may be of interest to any company that includes forum-selection clauses in its agreements—especially in agreements with consumers—the US Court of Appeals for the Ninth Circuit recently ruled that a clause selecting the "courts of Virginia" meant the parties agreed to litigate only in Virginia *state* courts, not its federal courts. *Doe 1 v. AOL LLC*, No. 15323 (9th Cir. Jan. 16, 2009). Because class actions are unavailable in Virginia state courts, the Ninth Circuit held that the forum-selection clause was ineffective as to consumers who are California residents at the time the

complaint was filed and who sue on behalf of a putative class under California's Consumer Legal Remedies Act (CLRA). The Ninth Circuit did not disturb the lower court's ruling that the forum-selection clause could be enforced against a plaintiff from New York.

The appeal arose out of a lawsuit that followed AOL's alleged brief unintended disclosure of thousands of its users' personal information—including Internet search inquiries, credit card numbers, social security numbers, and other data—on a publicly accessible web site. Two California plaintiffs and one New York plaintiff filed a class-action lawsuit in the US District Court for the Northern District of California, alleging that AOL's disclosure violated federal and California law. Based on the forum-selection clause, AOL persuaded the district court to dismiss the case without prejudice to its being refiled in state or federal court in Virginia. On appeal, the plaintiffs argued that the forum-selection clause limits them to state court in Virginia, where class actions are not available. Because, under their interpretation, the clause would preclude them from proceeding on a class-wide basis, they argued the clause is unenforceable because, plaintiffs contended, it violates California public policy generally favoring consumer class actions.

The Ninth Circuit ruled for plaintiffs in a *per curiam* decision. The court focused on AOL's use of the preposition "of" rather than "in" in the forum-selection clause—i.e., "courts *of* Virginia" rather than "courts *in* Virginia." Relying on *Black's Law Dictionary's* definition of the word "of" and opinions from other circuits interpreting similar forum-selection clauses, the court concluded that the clause designated only Virginia state courts.

In light of that interpretation, the court then concluded that the forum-selection clause could not be applied to the California plaintiffs. Under federal law, a forum-selection clause is invalid if it contravenes a strong public policy of the forum in which the suit was brought. The Ninth Circuit pointed to the California Court of Appeal's decision in *America Online, Inc. v. Superior Court*, 90 Cal. App. 4th 1 (Ct. App. 2001), holding that a similar forum-selection clause in an AOL customer agreement, which likewise required California residents asserting claims under the CLRA to bring suit in Virginia state courts, ran afoul of California's public policy favoring consumer class actions—a policy reflected in the CLRA itself. In a concurring opinion joined by a second member of the Ninth Circuit's three-judge panel (and which therefore would appear to be controlling law), Judge Nelson added that a plaintiff may invoke this California public policy so long as he or she is a California resident "at the time the complaint is filed." The third member of the panel, Judge Bea, would have required plaintiffs to demonstrate a greater connection to California before invoking California's public policies to invalidate the forum-selection clause.

The Ninth Circuit's holding in *Doe 1* should serve as a caution to companies that include forum-selection clauses in their agreements, especially consumer agreements. To begin with, unless a company seeks to limit the forum for disputes to state court, it should be concerned with any provision that specifies the forum as "the courts of" a particular state. Instead, companies should consider forum-selection clauses that expressly state that suit may be brought in federal or state court of the chosen state.

The Ninth Circuit's holding also is important for companies that use forum-selection or choice-of-law clauses and face the possibility of lawsuits in California. Whether a plaintiff is entitled to invoke California's pro-class-action public policies is often a closely fought battle in conflict-of-law disputes. *Doe 1* strongly suggests that out-of-state plaintiffs cannot do so.

For inquiries related to this alert, please contact the authors, Joseph W. Goodman at [jgoodman@mayerbrown.com](mailto:jgoodman@mayerbrown.com) and John Nadolenco at [jnadolenco@mayerbrown.com](mailto:jnadolenco@mayerbrown.com).

Learn more about Mayer Brown's [Consumer Litigation & Class Actions](#) practice or contact John Nadolenco at [jnadolenco@mayerbrown.com](mailto:jnadolenco@mayerbrown.com) or Lucia Nale at [lnale@mayerbrown.com](mailto:lnale@mayerbrown.com).

Learn more about Mayer Brown's [Supreme Court & Appellate](#) practice or contact Lauren Goldman at [lrgoldman@mayerbrown.com](mailto:lrgoldman@mayerbrown.com) or David Gossett at [dgossett@mayerbrown.com](mailto:dgossett@mayerbrown.com).

Visit us at [www.mayerbrown.com](http://www.mayerbrown.com).

---

If you are not currently on our mailing list and would like to be, please email [contact.edits@mayerbrown.com](mailto:contact.edits@mayerbrown.com) with your contact information.

Mayer Brown is a global legal services organization comprising legal practices that are separate entities (the "Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP, a limited liability partnership established in the United States; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales; and JSM, a Hong Kong partnership, and its associated entities in Asia. The Mayer Brown Practices are known as Mayer Brown JSM in Asia. "Mayer Brown" and the "Mayer Brown" logo are the trademarks of the individual Mayer Brown Practices in their respective jurisdictions.

© 2009. Mayer Brown LLP, Mayer Brown International LLP, and/or JSM. All rights reserved. This publication provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek legal advice before taking any action with respect to the matters discussed herein.