The Revival Of Badie Arbitration Suits In Consumer Finance

By **Lauren Erker, Sarah Davis and James McGuire** (March 18, 2025)

Bilateral arbitration is under increasing attack.

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While businesses evaluate whether and how to update their arbitration clauses in light of the U.S. Court of Appeals for the Ninth Circuit's October decision in Heckman v. Live Nation Entertainment, wherein the Ninth Circuit found that the Federal Arbitration Act did not apply to, or protect, the mass arbitration model set forth in the arbitration agreement at issue,[1] we write to remind them of another thorn in enforcing arbitration agreements: an almost 30-year-old decision from a California state appeals court in Badie v. Bank of America, and its progeny.

Although Badie is actually quite limited and fact-specific, plaintiffs across the country have nonetheless recently revived Badie to challenge the first requirement in determining whether arbitration is required under the Federal Arbitration Act: an agreement to arbitrate.[2]

At a high level, plaintiffs with form adhesion agreements that have changed over time argue that arbitration cannot be compelled because they never agreed to add arbitration provisions.

Here is an analysis of recent Badie challenges and steps parties can take before litigation to enforce their arbitration agreements and avoid a Badie roadblock.

The Badie Decision

In 1992, Bank of America sent a change-of-terms notice with billing statements to notify customers of the addition of an alternative dispute resolution, or ADR, provision to its then-current credit card account agreement.[3]

Prior to the addition of the ADR provision, the account agreement did not have any provision regarding the method or forum for resolving disputes.[4] It did, however, have a change-in-terms provision that stated that the bank "may change any term" and would provide any notice required by law.[5]

Several account holders sought to enjoin the addition of the ADR provision.

The Court of Appeal of the State of California, First Appellate District, sided with the plaintiffs, finding that following the procedure in the change-in-terms provision was not enough.[6]

The court reasoned that the bank's ability to modify the account agreements "depend[ed], as a threshold matter, on the meaning and scope of the change of terms provision itself."[7] The court then wove together several rationales to conclude that the modification was invalid.

First, the court explained that unilaterally adding a new contract term not contemplated by the initial agreement violated the implied covenant of good faith and fair dealing.

Second, the court found that bank customers did not consent to the addition of the ADR provision when they agreed to the account agreement's unilateral change-in-terms provision. The court focused on the meaning of the word "terms" in the change-in-terms provision and concluded that it was ambiguous.[8]

After receiving evidence from both sides, the court found the provision limited the kind of changes the bank could make to specific terms already contemplated by the agreement.[9]

Third, the court concluded that the bank's customers did not make the required unambiguous and unequivocal waiver of the right to a jury trial.

Recent Developments

Given the multifaceted reasoning in the Badie decision, courts have focused on different strands of the First Appellate District's rationale to evaluate challenges to the addition of ADR provisions. Examples of these varied approaches are showcased in recent decisions analyzing Badie.

Notice and Consent

Courts have taken different approaches as to what type of notice and consent is sufficient to add an ADR term. Indeed, the U.S. District Court for the Northern District of California and California's Third Appellate District came to two different decisions interpreting the same agreement, albeit on different records.[10]

In Needleman v. Golden 1 Credit Union, the Northern District of California in 2020 found that the credit union's arbitration agreement was enforceable when the plaintiff had agreed to receive notices, including change in terms, and statements electronically. The defendant had submitted evidence of the agreement, the email sent to the plaintiff informing them they had a new statement, and what the plaintiff would have seen if they had logged on to view their statement.

Notably, the email did not mention the change in terms or the addition of the arbitration provision, and was "functionally identical" to prior notices that did not have a change-in-terms insert, the court found.[11]

The Needleman court acknowledged that the Superior Court of the State of California, County of Sacramento, in 2022's Burgardt v. Golden 1 Credit Union, had found the same agreement unenforceable, but found that the superior court did not give enough weight to the fact that the account holder had explicitly agreed to receive such notices electronically and in this manner.

As such, the Needleman court found that the plaintiff had constructive notice of the amendment and consented by failing to opt out of the agreement within the allotted time to do so.[12]

In Burgardt, California's Third Appellate District affirmed the decision the Needleman court distinguished and found the agreement — on the record before it — unenforceable.

Distinguishing Needleman, the Burgardt court noted that here the credit union did not submit the plaintiff's agreement to receive electronic disclosures — it had just submitted a declaration to that effect — and did not submit an account agreement that had been transmitted nonelectronically that contained a change-in-terms provision.

Without such evidence, the court, relying on Badie, held that the bank failed to show that the plaintiff had sufficient notice that an arbitration provision could be added in that manner, or otherwise, to the agreement, and affirmed the denial of the motion to compel.

Given the different opinions on sufficient notice in Needleman and Burgardt, it may make sense to highlight the addition of an ADR provision in any change-in-terms notice provided to customers.

The cases also illustrate the importance of creating a strong record that shows the addition of the provision was consistent with the terms of the underlying agreement or agreements.

Implied Covenant of Good Faith and Fair Dealing

Whether courts rely on Badie to invalidate the addition of an ADR provision based on a supposed violation of the implied covenant is largely dependent on the original contract language and whether there is a meaningful opportunity to opt out.

In Sevier County Schools Federal Credit Union v. Branch Banking & Trust Co., in the U.S. Court of Appeals for the Sixth Circuit in 2021, the bank defendant sought to compel arbitration of the plaintiffs' claims that the bank breached a predecessor's promise to maintain the annual interest rate on a savings account at 6.5%.

The Sixth Circuit first concluded that the defendant's addition of the arbitration agreement was not reasonable because as in Badie, arbitration was not mentioned in the original agreement, and there was no opt-out opportunity — customers had to accept the arbitration provision or close their high-yield savings accounts.[13]

And requiring a customer to close an account to opt out would "obviate the very essence of the Plaintiffs' accounts — the promise of a perpetual 6.5% annual interest rate."[14]

The court next concluded that the bank's addition of the arbitration provision 12 years after the plaintiffs opened their accounts — when their original contract did not have an ADR provision of any kind and was two pages long — would violate the implied covenant, as in Badie.[15]

In so holding, the Sixth Circuit explicitly rejected the argument that the plaintiffs could be deemed to have accepted the ADR provision by maintaining their savings account for 17 years after the addition of the ADR provision, but that rationale depended heavily on the fact that the bank also maintained the interest rate guarantee over the same period.[16]

In Cornell v. Desert Financial Credit Union, the U.S. District Court for the District of Arizona in 2023 rejected the application of Badie.

First, unlike in Badie, the plaintiff had the opportunity to opt out without having to close her account.[17]

Second, the addition of the arbitration provision did not undermine the original benefit to the plaintiff of the agreement, which was the provision of checking and savings

accounts.[18]

Third, there was no concern about a prospective waiver of the right to a jury trial because Arizona law permits such a waiver in civil cases.[19]

Fourth, the fact that the addition of the arbitration provision was prospective and not retroactive further weighed against a finding of bad faith.[20]

These cases teach that providing an opportunity to opt out that does not require account closure — or deprivation of the primary benefit of the account — should lessen, if not obviate, arguments that the addition of an ADR provision violates the implied covenant.

Change-in-Terms Provision

Multiple courts have also focused on the scope of the change-in-terms provision when determining whether to invalidate or enforce arbitration agreements and, some, but not all, have adopted Badie's narrow view of the words "change" and "terms."

The Indiana Supreme Court in Decker v. Star Financial Group Inc. in 2023 determined that the phrase "[w]e may change any term in this agreement" did not permit the bank to add an arbitration agreement because the account agreement did not mention arbitration, class actions or dispute resolution.[21]

The Kansas Court of Appeals in Duling v. Mid American Credit Union in 2022 came to the same conclusion that the addition of a completely new term was not a change, but then considered whether the change-in-terms notice was sufficient to be an offer of modification.[22] It concluded it was not.

The offer letter was not clear about the opt-out deadline, and therefore the arbitration provision was "unenforceable because its opt-out provisions [were] too vague and indefinite for [the court] to find that [the plaintiff] assented to the new arbitration agreement by continuing to use her account."[23]

The Wisconsin Court of Appeals came to the same conclusion in Pruett v. WESTconsin Credit Union in 2023, finding that the bank could not unilaterally add a new term that was not contemplated by an account agreement, and that the opt-out procedures and deadlines were not clear enough to effect a modification.[24]

The court went further by finding that the bank did not act in good faith when it sought to make the arbitration provision retroactive to claims that had already arisen.[25]

In contrast, the North Carolina Court of Appeals in Canteen v. Charlotte Metro Credit Union in 2022 found that including a "governing law" provision with a forum selection clause was sufficient to put the customer on notice that the credit union could change the forum for settling disputes, including before an arbitrator.[26]

Notably, even the courts that found the change-in-terms provision insufficient to permit unilateral addition of a term not contemplated by the initial agreement found, or suggested, that the agreement could nonetheless still be modified to include an ADR provision if the bank or credit union provided sufficient notice and clear instructions on how to opt out.

Conclusion

Badie's main concern is surprising a consumer with a new provision that takes away the right to litigate any disputes in court.

The different outcomes in the cases discussed above can largely be reconciled by considering whether that concern was resolved with clear proof of the consumer's agreement to the new term or a clear path to opt out of the new term.

Each situation is unique, but examples of strategies that drafters should consider when seeking to add an arbitration provision to an existing agreement include the following.

- Amend the agreement's change-in-terms provision to permit the addition of new terms before amending the agreement to add an arbitration agreement.
- When providing notice of a new arbitration agreement, alert customers of the right to close their accounts if they do not agree to arbitration or provide the right to opt out of the arbitration agreement. The latter option offers better protection if a customer litigates arbitration, but the opt-out requirements must be easy to understand and unambiguous.
- Make clear that the scope of the arbitration agreement does not extend to claims already asserted or disputes already raised.
- Parties that intend to rely on consumers' continued use of an account as consent to the addition of the arbitration provision should ensure that they send out clear notice of the addition of the provision. Of course, asking consumers to provide explicit consent to the arbitration agreement would obviate Badie challenges but presents its own challenges.

Badie concerns are only one subset of many issues, e.g., how to address mass arbitration or claims for public injunctive relief, a company should consider when determining if and how to add or amend an arbitration provision.

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Disclosure: The firm filed a petition for review in the *California Supreme Court* ***on behalf of Golden 1 in the Burgardt v. Golden 1 Credit Union case mentioned in the article. While at another firm, McGuire contributed to the filing of a petition for review in the California Supreme Court on behalf of Bank of America in Badie v. Bank of America following the Court of Appeal's decision.***

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[1] Heckman v. Live Nation Entm't Inc., 120 F.4th 670, 689 (9th Cir. 2024).

[2] See 9 U.S.C. § 2.

[3] Badie, 67 Cal. App. 4th at 785.

[4] Id. at 787.

[5] Id. at 786-87.

[6] Id. at 791.

[7] Id.

[8] Id. at 798-99.

[9] Id. at 799.

[10] Needleman v. Golden 1 Credit Union, 474 F. Supp. 3d 1097 (N.D. Cal. 2020); Burgardt v. Golden 1 Credit Union, No. C092637, 2022 WL 440842 (Cal. Ct. App. 2022).

[11] Needleman, 474 F. Supp. 3d at 1102.

[12] Id. at 1105-06.

[13] Servier, 990 F.3d 470.

[14] Id. at 480.

[15] Id. at 481.

[16] Id.

[17] Cornell, 684 F. Supp. 3d at 977.

[18] Id. at 978.

[19] Id. at 978-79.

[20] Id. at 979.

[21] Decker v. Star Fin. Grp. Inc., 204 N.E.3d 918 (Ind. 2023).

[22] Duling v. Mid Am. Credit Union, 530 P.3d 737 (Kan. Ct. App. 2022).

[23] Id. at 750.

[24] Pruett v. WESTconsin Credit Union, 998 N.W.2d 529, 543-44, 547-48 (Wis. Ct. App. 2023).

[25] Id. at 545-47.

[26] Canteen v. Charlotte Metro Credit Union, 881 S.E.2d 753 (N.C. App. 2022), aff'd, 900 S.E.2d 890 (N.C. 2024).