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THE MATRYOSHKA MODEL: UNDERSTANDING THE RELATIONSHIP BETWEEN DELEGATION PROVISIONS AND THE BROADER ARBITRATION AGREEMENTS THAT CONTAIN THEM

*by: Michael P. Bitgood**

I. INTRODUCTION

This Note analyzes a 2021 decision in which a Ninth Circuit panel diverged from its sister circuits on whether an arbitrator may decide the enforceability of an arbitration agreement that excludes the application of federal law in the arbitration proceedings. In *Brice v. Plain Green, LLC* (*Brice I*), the Ninth Circuit panel considered several arbitration agreements that contained delegation provisions.¹ A delegation provision is an additional agreement to arbitrate the validity, enforceability, or scope (collectively, “arbitrability issues”) of a broader arbitration agreement.²

Analyzing the enforceability of the delegation provisions apart from that of the arbitration agreements, the panel compelled the plaintiffs to arbitrate their challenge to the enforceability of the arbitration agreements.³ In doing so, the panel examined the enforceability of the delegation provisions under the prospective-waiver doctrine, which prohibits an arbitration agreement from waiving a litigant’s right to pursue federal statutory remedies in arbitration.⁴ Finding that the delegation provisions did not themselves waive the plaintiffs’ right to pursue federal remedies, regardless of whether the arbitration agreements would have waived that right or not, the panel

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¹ *Brice v. Plain Green, LLC* (*Brice I*), 13 F.4th 823, 825 (9th Cir. 2021), *vacated, and reh’g en banc granted*, 35 F.4th 1219 (9th Cir. 2022).

² See *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010).

³ *Brice I*, 13 F.4th at 825, 827.

⁴ *Id.* at 828–29 (citing *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013)).

held that the delegation provisions were valid and enforceable.⁵ However, the Ninth Circuit vacated the opinion of the panel for a rehearing en banc.⁶ Shortly after, the parties reached a settlement agreement.⁷ Thus, the court dismissed the appeal as moot, leaving the panel's decision vacated without adopting or rejecting its reasoning.⁸

While *Brice I* currently stands vacated, future courts should readopt the panel's approach if faced with a similar case. The Ninth Circuit panel correctly decided *Brice I* because its decision reflected a rigorously accurate application of Supreme Court precedent on the treatment of delegation provisions, properly fitting together the delegation provisions, arbitration agreements, and larger contracts in the case like *matryoshka* dolls (Russian nesting dolls). Likewise, the panel rightly declined to invalidate the delegation provisions in the case under the prospective-waiver doctrine. Regarding public policy, the panel's decision placed delegation provisions on equal footing with other arbitration agreements and exercised appropriate restraint by refusing to extricate the plaintiffs from a disadvantageous agreement that they nevertheless agreed to.

This Note begins with a review of *Brice I*'s factual background and procedural posture, followed by a review of law relevant to the treatment of delegation provisions. Next, it offers an analogical defense of the Ninth Circuit panel's approach in the face of contrary decisions by several of its sister circuits. Finally, this Note closes with an analysis of how the panel considered the specific delegation provisions in *Brice I*.

⁵ *Id.* at 830–31.

⁶ *Brice v. Plain Green, LLC (Brice II)*, 35 F.4th 1219, 1219 (9th Cir. 2022).

⁷ See Notice Concerning Settlement at 1, *Brice v. Plain Green, LLC*, No. 19-15707 (9th Cir. Sept. 2, 2022), ECF No. 98.

⁸ Order at 1, *Brice v. Plain Green, LLC*, No. 19-15707 (9th Cir. Sept. 8, 2022), ECF No. 99.

II. FACTUAL BACKGROUND OF *BRICE I*

Prior to 2021, Kimetra Brice, Earl Browne, and Jill Novorot (collectively, “Plaintiffs”) took out payday loans from either Plain Green, LLC or Great Plains Lending, LLC (collectively, “Tribal Lenders”), companies owned by the Chippewa Cree Tribe and the Otoe-Missouria Tribe, respectively.⁹ The Tribal Lenders were also operated through another company, Think Finance, LLC, which was owned by Haynes Investments, LLC; Sequoia Capital Operations, LLC; and 7HBF No. 2, LTD (collectively, “Investors”).¹⁰ To receive the loans, Plaintiffs signed loan contracts that included both arbitration agreements containing delegation provisions and choice-of-law clauses requiring the exclusive application of tribal law during arbitration.¹¹

After receiving the loans, Plaintiffs sued both the Tribal Lenders and the Investors under the federal Racketeer Influenced and Corrupt Organizations Act (RICO), claiming that the defendants conspired together to charge illegally high interest rates exceeding 400% per annum.¹² However, the Investors moved to have the district court enforce the arbitration agreements and compel arbitration.¹³ Denying the Investors’ motions, the district court held that the arbitration agreements, including the delegation provisions, were unenforceable because the exclusive application of tribal law in arbitration would prospectively waive Plaintiffs’ right to pursue federal statutory remedies under RICO or other federal law.¹⁴

The Investors then appealed to the Ninth Circuit, and a three-judge panel reversed the district court and compelled arbitration.¹⁵ In its opinion, the Ninth Circuit panel first considered

⁹ *Brice I*, 13 F.4th at 825.

¹⁰ *Id.* at 825–26.

¹¹ *Id.* at 825.

¹² *Id.* at 838 (Fletcher, J., dissenting).

¹³ *Id.* at 826 (majority opinion).

¹⁴ *See id.*

¹⁵ *Id.* at 826, 838.

the order of its analysis.¹⁶ Plaintiffs argued that the court should first consider the enforceability of the arbitration agreements in their entirety, including the delegation provisions.¹⁷ Thus, if an entire arbitration agreement were unenforceable, then its delegation provision would likewise be unenforceable.¹⁸ However, the Investors argued that the court should consider each delegation provision separately from its arbitration agreement. According to the Investors, if the delegation provision were enforceable, then the court should enforce it without considering the enforceability of the arbitration agreement.¹⁹ Agreeing with the Investors, the Ninth Circuit panel reasoned that each delegation provision was but one of multiple, severable arbitration agreements contained within each loan contract.²⁰ As a result, the panel severed the delegation provisions from the rest of the arbitration agreements and required Plaintiffs to show that the provisions themselves were unenforceable.²¹

Subsequently, the Ninth Circuit panel analyzed the enforceability of the delegation provisions.²² Invoking the prospective-waiver doctrine, Plaintiffs asserted that the delegation provisions operated together with the loan contracts' choice-of-law clauses to require the exclusive application of tribal law during the arbitration of arbitrability issues.²³ As a result, the Plaintiffs alleged that the delegation provisions would bar them from challenging the arbitration agreements as prospective waivers under federal law, rendering the delegation provisions prospective waivers in themselves.²⁴

¹⁶ *Id.* at 826.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 827 (citing *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 71–72 (2010)).

²¹ *Id.*

²² *Id.* at 828–32.

²³ *See id.* at 828–29.

²⁴ *See id.*

Rejecting Plaintiffs’ contentions, the Ninth Circuit panel noted that the delegation provisions themselves expressly included “all federal, state, or [t]ribal [l]aw claims . . . based on any legal or equitable theory” within the definition of disputes delegated to arbitration.²⁵ Reasoning that the delegation provisions did not mandate the exclusive application of tribal law to the arbitration of arbitrability issues, the panel held that the delegation provisions were not prospective waivers because they did not eliminate Plaintiffs’ right to pursue their federal prospective-waiver arguments during the arbitration of arbitrability issues.²⁶

In the following year, the Ninth Circuit voted to rehear the case en banc, vacating the opinion of the three-judge panel.²⁷ Not long after, the parties reached a settlement agreement,²⁸ and the Ninth Circuit remanded the case to the district court to effectuate the settlement.²⁹ After the district court formalized the settlement agreement, the Ninth Circuit then dismissed the appeal as moot.³⁰

III. REVIEW OF RELEVANT CASE LAW

The Federal Arbitration Act (FAA) governs the enforcement of arbitration agreements and provides that they “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”³¹ Furthermore, the FAA directs a court to order “parties to proceed to arbitration in accordance with the terms of the [arbitration] agreement” once the court is “satisfied that the making of the agreement for arbitration or the failure to comply

²⁵ *Id.* at 829 (internal quotations and emphasis omitted).

²⁶ *Id.* at 829–30.

²⁷ *Brice II*, 35 F.4th 1219 (9th Cir. 2022).

²⁸ See Notice Concerning Settlement, *supra* note 7, at 1.

²⁹ Order, *Brice v. Plain Green, LLC*, No. 19-15707 (9th Cir. Aug. 4, 2022), ECF No. 97.

³⁰ See Order, *supra* note 8, at 1.

³¹ 9 U.S.C. § 2.

therewith is not in issue.”³² Therefore, a court normally decides whether an arbitration agreement is enforceable before compelling arbitration.³³

However, in *Rent-A-Center, West, Inc. v. Jackson*, the Supreme Court affirmed the right of parties to delegate arbitrability issues to the arbitrator.³⁴ *Rent-A-Center* began by reiterating the longstanding principle that an arbitration agreement may be severed from the rest of a contract, allowing an otherwise valid arbitration agreement to be enforced notwithstanding the validity of the overall contract.³⁵ Under this principle, a party seeking to avoid arbitration must show why the arbitration agreement, taken separately, is unenforceable.³⁶

Shifting its focus, the Supreme Court then recognized that a delegation provision—even within an arbitration agreement—constitutes a separate and antecedent agreement to arbitrate arbitrability issues, rendering it severable from the rest of the arbitration agreement.³⁷ Despite his disagreement with the majority, Justice Stevens aptly characterized the Court’s formulation of the relationship between a contract, arbitration agreement, and delegation provision as “something akin to Russian nesting dolls.”³⁸ In other words, a delegation provision fits within but remains separate from an arbitration agreement in the same way that an arbitration agreement fits within but remains separate from an overall contract.³⁹ As a result, the Court held that a litigant must first specifically challenge a delegation provision to avoid arbitration regarding arbitrability issues in

³² *Id.* § 4.

³³ *See id.* §§ 2, 4.

³⁴ *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010).

³⁵ *Id.* at 70–71 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006)).

³⁶ *See id.* at 71.

³⁷ *Id.* at 72.

³⁸ *Id.* at 85 (Stevens, J., dissenting).

³⁹ *See id.* at 72 (majority opinion).

much the same way that an arbitration agreement must first be specifically challenged to avoid arbitration regarding an overall contract.⁴⁰

Until *Brice I*, every federal court but one that applied *Rent-A-Center* in the context of tribal payday loans refused to enforce the lenders' delegation provisions by compelling arbitration.⁴¹ In *Gingras v. Think Finance, Inc.*, the Second Circuit considered the enforceability of a delegation provision in a contract for a payday loan made by a Tribal Lender, namely Plain Green, LLC.⁴² In addition to choice-of-law clauses throughout the contract directing an arbitrator to apply tribal law, the delegation provision itself included claims based on tribal, federal, or state law—along with issues concerning arbitrability—within the definition of disputes delegated to the arbitrator.⁴³ Rapidly dispensing with the delegation provision, the court stated that the plaintiffs convincingly challenged the provision by alleging that it was fraudulent.⁴⁴ Considering this attack to be specific enough to satisfy *Rent-A-Center*'s "specific challenge" requirement, the Second Circuit then refused to enforce the arbitration agreements in question because they waived the plaintiffs' right to bring claims under federal and state law by requiring the exclusive application of tribal law in arbitration.⁴⁵

About a year after *Gingras*, the case of *Williams v. Medley Opportunity Fund II, LP* provided the Third Circuit its own chance to assess the enforceability of delegation provisions in tribal payday loan contracts.⁴⁶ As in *Gingras*, the plaintiffs in *Williams* took out payday loans from a tribally owned lender; the loan contracts' choice-of-law clauses, arbitration agreements, and

⁴⁰ *See id.*

⁴¹ *See Brice I*, 13 F.4th 823, 839 (9th Cir. 2021) (Fletcher, J., dissenting) (collecting cases), *vacated, and reh'g en banc granted*, 35 F.4th 1219 (9th Cir. 2022).

⁴² *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 117 (2d Cir. 2019).

⁴³ *Id.* at 118.

⁴⁴ *Id.* at 126.

⁴⁵ *See id.* at 127.

⁴⁶ *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229, 233, 237 (3d Cir. 2020).

delegation provisions substantively mirrored those of the contracts in *Gingras*.⁴⁷ In its examination of the delegation provisions, the Third Circuit explicitly recognized that it needed to determine the enforceability of the delegation provisions before considering the arbitration agreements.⁴⁸ However, the court determined that a party could satisfy *Rent-A-Center*'s "specific challenge" requirement by making the same arguments against the delegation provision that it used to challenge the enforceability of the arbitration agreement.⁴⁹ Thus, the court accepted that the plaintiffs had sufficiently contested the delegation provisions by asserting that the provisions were unenforceable because the arbitration agreements constituted prospective waivers.⁵⁰ Having dealt with the delegation provisions, the Third Circuit then proceeded to consider the arbitration agreements, holding them unenforceable because they prospectively waived the plaintiffs' right to pursue statutory remedies.⁵¹

Lastly, just one week after *Williams*, the Fourth Circuit decided the same issue in *Gibbs v. Haynes Investments, LLC*.⁵² As in *Gingras* and *Williams*, the plaintiffs in *Gibbs* took payday loans from tribally owned lenders under substantively equivalent terms regarding the choice-of-law clauses, arbitration agreements, and delegation provisions.⁵³ Furthermore, the Fourth Circuit's reasoning largely mirrored that of the Third Circuit in *Williams*, similarly finding that the plaintiffs satisfied *Rent-A-Center*'s "specific challenge" requirement by referencing the delegation provisions in their arguments against the arbitration agreements.⁵⁴ As a result, the court held that

⁴⁷ *Id.* at 233, 235.

⁴⁸ *Id.* at 237.

⁴⁹ *Id.* (quoting *MacDonald v. CashCall, Inc.*, 883 F.3d 220, 226–27 (3d Cir. 2018)).

⁵⁰ *Id.* at 237–38.

⁵¹ *Id.* at 240–41.

⁵² *Gibbs v. Haynes Invs., LLC*, 967 F.3d 332, 335 (4th Cir. 2020).

⁵³ *See id.* at 335–37; *see also Brice I*, 13 F.4th 823, 833 (9th Cir. 2021) (stating that the underlying loan agreements in *Gibbs* were identical to those in *Brice I*), *vacated, and reh'g en banc granted*, 35 F.4th 1219 (9th Cir. 2022).

⁵⁴ *Gibbs*, 967 F.3d at 338.

the loan contracts' choice-of-law clauses violated the prospective-waiver doctrine, rendering the delegation provisions and arbitration agreements unenforceable.⁵⁵

IV. ANALYSIS OF *BRICE I*

A. *Treatment of Delegation Provisions*

In *Brice I*, the Ninth Circuit panel correctly applied *Rent-A-Center* by focusing on the enforceability of the delegation provisions themselves rather than that of the arbitration agreements. To analogize, *Rent-A-Center*'s recognition of a delegation provision as an additional agreement to arbitrate means that a delegation provision is akin to an arbitration agreement in the same way an arbitration agreement is akin to an entire contract. Therefore, if courts must sever an arbitration agreement from the remainder of a contract and evaluate it on its own terms, then it follows that courts should treat delegation provisions analogously.

Hence, *Brice I* correctly diverged from *Gingras*, *Williams*, and *Gibbs*—in which the courts only required the plaintiffs to superficially attack the delegation provisions—because those approaches are not analogous to how a court would treat an arbitration agreement. It would be insufficient to claim that an arbitration agreement is unenforceable for the exact same reasons as the contract that contains it. Rather, parties must show how—regardless of the rest of the contract—those reasons make the arbitration agreement itself unenforceable. However, the courts in *Williams* and *Gibbs* permitted the plaintiffs to challenge the delegation provisions by using arguments that attacked the arbitration agreements generally rather than requiring the plaintiffs to explain how those arguments applied to the delegation provisions specifically. Similarly, the court in *Gingras* allowed the plaintiffs to challenge the delegation provisions by merely alleging that they were fraudulent rather than requiring an explanation as to why they were fraudulent.

⁵⁵ *Id.* at 342.

The Ninth Circuit panel more faithfully applied *Rent-A-Center*'s "specific challenge" requirement by requiring Plaintiffs to explain how the delegation provisions themselves were unenforceable rather than allowing arguments related to the arbitration agreements to bleed into its analysis of the delegation provisions.⁵⁶ As a result, the panel moved beyond simply paying lip service to *Rent-A-Center*'s requirements by treating delegation provisions in the same manner as other arbitration agreements. The panel accomplished this by refusing to impute the choice-of-law clauses from the remainder of the contracts to the delegation provisions, a necessary decision lacking in *Gingras, Williams, and Gibbs*.⁵⁷ If a delegation provision is truly a separate agreement, as *Rent-A-Center* declares, then a provision will not necessarily incorporate the terms of another agreement solely by reason of its inclusion within that agreement. Thus, the panel properly considered whether each delegation provision included its own choice-of-law clause instead of looking elsewhere in the loan contracts.

B. *Application of the Prospective-Waiver Doctrine*

The Ninth Circuit panel also correctly held that the delegation provisions in *Brice I* did not violate the prospective-waiver doctrine because the panel examined the provisions exclusively on their own terms. Considered independently, each delegation provision's definitional inclusion of all federal, state, and tribal law claims logically operates as a choice-of-law clause. This inclusion should operate as a choice-of-law clause because it would be absurd to construe each delegation provision as allowing plaintiffs to bring federal law claims without also implying that the arbitrator may apply enough federal law to consider the arbitrability of those claims.

⁵⁶ See *Brice I*, 13 F.4th at 836.

⁵⁷ See *id.* at 834.

Therefore, the delegation provisions cannot operate as prospective waivers when viewed alone. When read this way, the delegation provisions allow for the application of whatever law is necessary to arbitrate the arbitrability of federal, state, and tribal law claims. While the loan contracts' other choice-of-law clauses may mandate the exclusive application of tribal law to the arbitration of a plaintiff's claims, the delegation provisions do not mandate the same for the arbitration of the arbitrability of those claims.

Despite the rational conclusion that any arbitration of arbitrability issues under the delegation provisions in *Brice I* would invariably result in the invalidation of the arbitration agreements, the Ninth Circuit panel also correctly restrained itself from preemptively invalidating the delegation provisions. While the panel could have contravened the agreement of the parties for the sake of convenience, it chose instead to read the contract in a manner that preserved the spirit of the agreement to arbitrate matters of arbitrability. By compelling arbitration, the panel demonstrated appropriate deference for the parties' right to contract freely and without fear of judicial subversion.

V. CONCLUSION

In conclusion, the Ninth Circuit panel's treatment of delegation provisions adhered faithfully to the Supreme Court's directions in *Rent-A-Center*, and its refusal to apply the prospective-waiver doctrine to the delegation provisions in *Brice I* demonstrated its recognition of the provisions as separate from the arbitration agreements that contain them. *Brice I* also advanced beneficial public policy by elevating the treatment of delegation provisions to equality with that of other arbitration agreements and by deferring to the freedom of contract. In doing so, the Ninth Circuit panel demonstrated a more precise method of analyzing delegation provisions than its sister

circuits had previously employed. As a result, future courts should look back to *Brice I* as a guide and readopt its approach to delegation provisions if faced with similar arbitration agreements.