March 23, 2009

California Appellate Court Again Strikes Down Class-Arbitration Waiver in Employment Agreement

Areas of Interest

- **Supreme Court & Appellate**
- **Employment**
- **Consumer Litigation & Class Actions**
- **United States**

On March 17, yet another California appellate court held that an employer could not enforce an employee's agreement to arbitrate employment disputes on an individual basis. The plaintiff in *Sanchez v. Western Pizza Enters., Inc.*, No. B203961, had filed a putative class-action lawsuit alleging that his employer did not adequately reimburse employees for driving expenses incurred in the performance of job duties; as a result, the plaintiff claimed, employees were paid less than the legal minimum wage. The decision is of interest to employers that use arbitration agreements with their California employees and, more broadly, to all businesses operating in California that use arbitration agreements.

In *Sanchez*, the Second District Court of Appeal relied heavily on *Gentry v. Superior Court*, 42 Cal.4th 443 (2007), in which the California Supreme Court held that class-arbitration waivers are unenforceable as a matter of California public policy when they would "undermine the vindication of unwaivable statutory rights"—in *Gentry*, the right to overtime pay under the California Labor Code. As one of a series of recent cases interpreting and applying *Gentry*, *Sanchez* is significant in several ways.

First, the *Sanchez* court concluded that a trial court's determination that a "class arbitration waiver is unenforceable under…*Gentry*" is reviewed for abuse of discretion because it "depends largely on consideration of the efficiencies and practicalities of permitting group action in the particular case." Second, the *Sanchez* court concluded that an employee's California statutory rights to be reimbursed for job expenses and to receive minimum wages are "unwaivable." The court held that the class waiver in Sanchez's arbitration agreement was unenforceable under the factors identified in *Gentry* for determining whether "a class arbitration waiver impermissibly interferes with unwaivable statutory rights." In particular, the court found that "any individual recovery of the difference between the amounts paid for reimbursement of delivery expenses and the amounts actually incurred is likely to be modest," as was "any individual recovery for the alleged failure to pay minimum wage as a result." In addition, as in *Gentry*, the court found that employees' possible fear of retaliation could deter them from suing their employer. Also, the court concluded that Sanchez had "presented evidence that most of the drivers are immigrants with limited English language skills who are likely to be unaware of their legal rights." The court held that, in light of its consideration of the first three *Gentry* factors, it did not have to consider the fourth factor—"other real world obstacles to the vindication of class members' rights…through individual arbitration."

Third, by contrast with the same court's recent decision in *Franco v. Athens Disposal Co., Inc.*, No. B203317, the *Sanchez* court separated its analysis of "unwaivable statutory rights" and public policy from its discussion of unconscionability. Under the latter analysis, the *Sanchez* court held that the entire arbitration agreement was unenforceable. The court acknowledged that the arbitration agreement did not distort the "presentation of the benefits of arbitration to the degree that was present in *Gentry*," and furthermore, that it did not limit the limitations periods, punitive damages, or availability of other

remedies. In addition, the contract expressly stated that arbitration "is not a mandatory condition of employment."

Nevertheless, the court found a degree of procedural unconscionability for two reasons. First, the court speculated that "the inequality in bargaining power between the low-wage employees and their employer makes it likely that the employees felt at least some pressure to sign the arbitration agreement." Second, the court noted that, although "the arbitration agreement suggests that there are multiple arbitrators to cho[o]se from," in reality "the designated arbitration provider includes only one arbitrator." As a result, the court concluded, "the arbitrator selection process [is] illusory and creates a significant risk" that the employer will be a "'repeat player' before the same arbitrator" and will therefore "reap a significant advantage." Having found both the class arbitration waiver and arbitrator selection clause substantively unconscionable, the court declined to sever the two clauses because "these provisions considered together indicate an effort to impose on an employee a forum with distinct advantages for the employer."

Sanchez makes clear that state courts in California are continuing to refuse to enforce class-arbitration waivers in employment agreements. Thus, employers that wish to use arbitration agreements in California should carefully consider both their litigation strategy in light of *Sanchez* (and *Gentry*) and examine both the substance and presentation of the arbitration clauses in their contracts.
For more information about the topics raised in this Client Alert, please contact Donald M. Falk, Rita Lomio, John Nadolenco, and Archis A. Parasharami.

Learn more about our Supreme Court & Appellate, Employment and Consumer Litigation & Class Actions practices.

Visit us at www.mayerbrown.com.