GRUBE BROWN & GEIDT LLP

SAN FRANCISCO
601 Montgomery Street, Suite 1150
San Francisco, CA 94111
tel: 415.603.5000 | fax: 415.840.7210

LOS ANGELES
633 West 5th Street, Suite 3330
Los Angeles, CA 90071
tel: 213.358.2810 | fax: 213.358.2820

California Supreme Court Affirms Enforcement of Reasonably Drafted Mandatory Arbitration Agreements

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By Elizabeth (Lisa) Brown.

In the latest of the California Supreme Court's decisions addressing arbitration agreements in the employment context, the Court in *Baltazar v. Forever 21, Inc*., Case No. S208345, sided with the employer and clarified the state of the law in California regarding substantive unconscionability.

Factual Summary

Plaintiff Maribel Baltazar applied for a job at Forever 21. During that process, Forever 21 presented Baltazar with an 11-page employment application. Pages 8 and 9 of the application consisted of an arbitration agreement. While Baltazar initially declined to sign the arbitration agreement, a Forever 21 employee told her "sign it or no job." Baltazar signed the agreement.

After resigning from Forever 21 approximately a year later, Baltazar filed a complaint in California state court, alleging harassment, discrimination and retaliation. Forever 21 moved to compel arbitration. Baltazar opposed the motion, arguing that the arbitration agreement was both procedurally and substantively unconscionable. Trial court agreed with Baltazar. The Court of Appeal reversed, finding that while procedural unconscionability existed, there was no substantive unconscionability. The California Supreme Court affirmed.

California Supreme Court Decision

Baltazar challenged the arbitration agreement on multiple grounds. Invalidating the agreement, the trial court first found that the agreement was a contract of adhesion, written on a pre-printed form and offered on a take-it-or-leave-it basis. Second, the trial court found that the agreement was substantively unconscionable because it "(1) list[ed] only employee claims as illustrative examples of the types of disputes to which it apples, (2) [gave] forever 21 the right to protect trade secrets and other confidential information, and (3) [required] arbitration even if a court finds the agreement to be unenforceable insofar as it requires arbitration under model rules of the American Arbitration Association ("AAA")." Court of Appeal reversed, finding no substantive unconscionability. In so holding, the Court of Appeal expressly disagreed with a 2010 decision handed down by another court of appeal in *Trivedi v. Curexo Technology Corp.*, 189 Cal. App. 4th 387 (2010) – a decision that has plagued employers in their efforts to compel arbitration for the last 5 years.

The California Supreme Court's ruling is straightforward. After re-affirming the basic principle that an agreement to arbitrate must be both procedurally and substantively unconscionable to be invalidated and that the courts examine unconscionability on a sliding scale, it found procedural but not substantive unconscionability to exist.

With respect to procedural unconscionability, the Court agreed with the Court of Appeal and the trial court that the manner of execution – i.e. as a mandatory provision in an employment application – rendered Forever 21's arbitration agreement procedurally unconscionable. However, it declined to assign a particularly high degree of unconscionability because it found that nothing in the agreement carried an element of surprise. In doing so, it rejected Baltazar's argument that failure to provide a copy of the AAA rules injected an undue element of surprise. Simply failing to attach the AAA rules, where such failure does not "artfully" hide an important term, will not increase a degree of procedural unconscionability. In so ruling, the Court distinguished Baltazar's claim from *Trivedi*, where failure to attach the rules actually impacted the unconscionability determination because it was the terms of the rules themselves that were being challenged.

With respect to substantive unconscionability, the Court analyzed Baltazar's three distinct arguments and found no merits to any of them. First, the Court found that having a clause which allows either party to seek a temporary restraining order or preliminary injunctive relief in the superior court was not one-sided or unconscionable even if the employer was more likely to use such remedies. The clause here, said the Court, did "no more than recite the procedural protections already secured by section 1281.8(b) [of the California Arbitration Act], which expressly permits parties to an arbitration to seek preliminary injunctive relief during the pendency of the arbitration. … [A]n arbitration agreement is not substantively unconscionable simply because it confirms the parties' ability to invoke undisputed statutory rights."[1] In so holding, the Supreme Court expressly disapproved of *Trivedi*.

Second, the Court rejected Baltazar's claim that the agreement was not unfairly one-sided because it listed "only employee claims as examples of the types of claims that are subject to arbitration." The illustrative examples did nothing to affect the substance of the agreement, which encompassed all – not just employee's – employment-related claims. "The examples do not alter the substantive scope of the agreement, nor do they render the agreement sufficiently unfair as to make its enforcement unconscionable."

Third, the Court found that the language requiring "all necessary steps [to be] taken to protect from public disclosure [of Forever 21's] trade secrets and proprietary and confidential information" did not render it unconscionable. Baltazar argued that lack of definition of "all necessary steps" and of "proprietary and confidential information" meant that the employee must agree to whatever demands the employer presents to protect such confidentiality – implying that it could restrict the use of information during an arbitration proceeding. The Court disagreed: "The agreement does not restrict the use of such information in the proceeding, nor does it pretermit any determination of whether a particular piece of information is a trade secret or otherwise qualifies as proprietary and confidential. Agreements to protect sensitive information are a regular feature of modern litigation, and they carry with them no inherent unfairness." Furthermore, the Court pointed out that Baltazar was equally able to seek comparable protection for her personal information during arbitration.

Conclusion

The Baltazar decision clarifies that facially-neutral provisions in an arbitration agreement, such as injunctive remedies or confidentiality, will not rise to the level of substantive unconscionability just because in practice they may benefit employers more than employees. It further confirms

[1] The parties below had disputed whether the California Arbitration Act or the Federal Arbitration Act governed the agreement. Because the Court of Appeals ruling that it was the CAA was not appealed, the Supreme Court assumed, without deciding, that the CAA governed. It is unclear (albeit unlikely) whether the unconscionability question would have resolved differently had the FAA governed.

that employers likely need not attach bulky arbitration rules to their agreements. However, it reaffirms the line of cases that views "take it or leave it" arbitration agreements as procedurally unconscionable, thereby increasing the risk to any employer who uses mandatory arbitration agreements. In the wake of Baltazar, it is important for employers to review their agreements to confirm that they provide for facially-mutual benefits. Moreover, employers should consider implementing non-mandatory agreements to minimize the risk that a court would find procedural unconscionability.

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Elizabeth (Lisa) Brown
Telephone: (415) 603-5002
Email: lisabrown@gbgllp.com