UNCONSCIONABLE ARBITRATION CLAUSES: BE CAREFUL WHAT YOU INCLUDE

By Joel M. Grossman

Many employers lawfully require all employees, as a condition of employment, to arbitrate any disputes arising out of the employment relationship. Typically, such arbitration agreements include claims for wrongful termination, discrimination or harassment, wage and hour violations and the like, but they exclude workers' compensation claims. By definition, the arbitration agreement forces the employees to give up a jury trial, although in many cases the employer agrees to pay the full cost of the arbitration. More recently, employers have added a clause by which employees waive the right to sue collectively in a class action, a controversial provision that will be the subject of a future post.

Can an employee who has been forced to agree to arbitrate claims ever get out of that agreement and bring an action in court before a judge and jury? The answer is yes, in the limited circumstance that a court holds the arbitration agreement to be unconscionable. What does that unwieldy word mean? It means simply that a court has determined that a contract is so overly harsh or one-sided that it cannot be enforced. Courts look to both procedural unconscionability—how the contract was formed—and substantive unconscionability—the actual terms of the contract—to determine if it should be enforced.

Agreements to arbitrate, which employers impose as a condition of employment, are surely to some extent contracts of adhesion, and procedurally unconscionable, since the employee is offered the arbitration agreement on a "take it or leave it" basis. However, courts will still enforce the agreement as long as the actual terms of the agreement are not too one-sided. As stated by the California Supreme Court in the leading case on enforceability of mandatory arbitration contracts in employment, there is a sliding scale: "In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa" (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000)).

What provisions have been found so oppressive or one-sided as to render an arbitration agreement procedurally or substantively unconscionable? At least one court has said that a contract that references which rules will govern the arbitration, such as the American Arbitration Association Rules, but does not actually set forth the rules in the agreement is procedurally unconscionable (*Trivedi v. Curexo Technology Corp.* (2010)). But other courts have rejected that conclusion (See, e.g., *Peng v. First Republic Bank* (2013)).

Courts have also held that an arbitration agreement is substantively unconscionable if it denies the employees benefits conferred by statute. For example, in *Samaniego v. Empire Today, LLC (*2012), the California Court of Appeal declined to enforce an arbitration agreement that included a six-month statute of limitations. In *Samaniego*, the plaintiff sought damages for statutory wage and hour violations, which by statute carry a three-year limitation period. The Court held that it would be unconscionable to deprive employees of their statutory rights, including the statute of limitations, and replace those statutory rights with a much shorter limitations period. The Court also held that the one-way fee shifting in the arbitration agreement—the prevailing employer could recover its attorneys fees from the employee, but if the employee prevailed, he/she could not recover attorneys fees from the employer—also rendered the contract unenforceable.

Similarly, in *Ajamian v. CantorCO2e, L.P.* (2012), the California Court of Appeal was confronted with an arbitration agreement that precluded the arbitrator from awarding punitive damages, even though the statute at issue expressly provided that punitive damages could be available. As in *Samaniego*, the Court held that an arbitration agreement that purports to deny remedies available by statute is substantively unconscionable and will not be enforced.

Very recently another California Court of Appeal held that a car wash could not enforce the arbitration agreement between itself and Hispanic workers who did not speak or read English, unless all substantial provisions of the agreement were provided to the employees in Spanish (*Carmona v. Lincoln Millennium Car Wash* (2014)). This absence of all terms

in a language that employees could understand rendered the agreement procedurally unconscionable. In addition, the agreement appeared to bind only the employees to arbitrate any claims they might have against the car wash, but in the agreement drafted by the car wash, it gave itself the choice of court or arbitration. This lack of mutuality rendered the agreement substantively unconscionable.

In sum, as a general rule, arbitration agreements that an employer imposes as a condition of employment are not per se unconscionable merely because the employees are not in a position to bargain over the terms of the agreement and must accept it or find other work. However, as shown from the small sampling of cases described above, if the employer inserts one-sided terms that are so harsh as to shock the conscience of a reviewing court, the agreement is unenforceable, and the employees may proceed in court. ■

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