CALIFORNIA
EMPLOYMENT LAW LETTER
Part of your California Employment Law Service

Vol. 28, No. 4
November 20, 2017

ARBITRATION AGREEMENTS

Arbitration agreement deemed unconscionable beyond repair

by Michael Futterman and Jaime Touchstone
Futterman Dupree Dodd Croley Maier LLP

A terminated employee sued for discrimination, retaliation, and wrongful termination. The company asked the court to compel arbitration of the dispute. The trial court denied the request, finding the arbitration agreement to be procedurally and substantively unconscionable, and it refused to sever the offending provisions. The California Court of Appeal affirmed the decision.

Employee files suit

Maya Baxter, an African-American woman, worked for AssetMark Investment Services, Inc., when it was acquired by Genworth North America Corporation. Genworth required Baxter to sign a "Conditions of Employment Acknowledgment" form, by which she agreed to resolve all employment-related disputes via Genworth's Resolve Employee Issue Resolution Program. "Resolve" establishes four "levels" for pursuing dispute resolution, beginning with an employer-controlled process and concluding, if necessary, with mandatory arbitration.

Baxter complained that Genworth improperly evaluated employees on the basis of age, race, and gender and that in response to the complaint, it subjected her to harassment and retaliation. While Baxter was out on an approved medical leave of absence, Genworth terminated her employment, claiming that her position was eliminated because of organizational changes. Baxter alleges that Genworth gave her job to a white male counterpart who was not on medical leave.

Baxter sued Genworth for discrimination, retaliation, and wrongful termination under the California Fair Employment and Housing Act (FEHA) and other statutes. Genworth petitioned to compel Baxter to arbitrate her claims. The trial court denied the petition. Genworth appealed, and the court of appeal affirmed the decision, deeming the "Resolve" program procedurally and substantively unconscionable.

Litmus test for arbitration agreements

Even though California and federal law favor the enforcement of arbitration agreements, courts will invalidate agreements that contain unconscionable terms or are contrary to public policy. Unconscionability refers to an absence of meaningful choice for one party, coupled with terms that are unreasonably favorable to the other party. Unconscionability has procedural and substantive elements, both of which must be present for a court to invalidate an agreement: The more procedurally

oppressive the agreement, the less evidence of substantive unconscionability is required to conclude a particular term is unenforceable, and vice versa.

An employer-employee arbitration agreement not only must be conscionable, but it also must provide for:

(1) Neutral arbitrators;

(2) More than minimal discovery (exchange of evidence);

(3) A written award;

(4) All types of relief available in court; and

(5) No additional costs for the employee beyond what she would incur by bringing the claim in court.

'Resolve' is procedurally unconscionable

Procedural unconscionability focuses on "oppression" or "surprise" due to unequal bargaining power. Preemployment arbitration agreements may be found procedurally unconscionable because they act as a barrier between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration agreement.

In this case, when Genworth acquired Baxter's employer, it presented "Resolve" to Baxter in a take-it-or-leave-it manner. Baxter could either quit her job of five years or agree to the arbitration terms, which were a condition of her continued employment. She had no opportunity to negotiate or make a meaningful choice because she lacked equal bargaining power. Those facts presented a "high degree of oppressiveness" and supported a finding of procedural unconscionability.

'Resolve' is substantively unconscionable

The substantive element of the analysis focuses on overly harsh or one-sided results, with terms that are unreasonably favorable to the more powerful party. In this case, "Resolve" was problematic for several reasons, including its unreasonable limits on discovery and shortened limitation periods.

"Resolve" prohibited employees from obtaining information outside the formal discovery process. This effectively limited a complaining employee's ability to contact other employees who might be witnesses to the disputed events, making the provision grossly unfair. Furthermore, under both federal and California law, an employer may not discriminate against an employee who assists complaining employees in connection with a complaint of unlawful discrimination. Thus, forbidding employees from assisting each other was not only substantively unconscionable, but it also violated established public policy.

"Resolve" also limited the parties' discovery and authorized the arbitrator to increase the number of depositions, interrogatories, and requests for production on a finding of "good and sufficient cause shown." Employment disputes are factually complex, and their outcomes are often determined by the testimony of multiple witnesses and with written information about the disputed employment practice. Seemingly neutral limitations on discovery may be one-sided in effect because an employer already possesses many of the relevant documents and employs many of the relevant witnesses.

In this case, Baxter established that the outcome of her case depended on extensive documentation and many witnesses, requiring her to conduct three to five times the number of depositions allowed under the "Resolve" guidelines. The court concluded that a reasonable arbitrator would likely feel constrained to expand discovery to the extent necessary to permit Baxter to vindicate her rights.

"Resolve" shortened the statute of limitations for filing a claim under the FEHA. In effect, it required employees to file FEHA claims within one year, whereas under generally applicable law, an employee has one year to file a DFEH administrative charge of discrimination or harassment and additional time to file a lawsuit in court. Moreover, "Resolve" required an employee to initiate arbitration shortly after the required mediation, even if an FEHA investigation was pending or if the statute of limitations to file an FEHA lawsuit had not yet run. Indeed, as structured, the "Resolve" statute of limitations could be shorter than one year. Parties to an arbitration agreement may agree to shorten the applicable limitations period for bringing a claim, so long as it still allows the aggrieved party sufficient time to investigate, ascertain damages, and file before the claim is time-barred. In this case, the shortened limitations period did not provide employees with sufficient time to vindicate statutory rights under the FEHA and was therefore substantively unconscionable.

In an attempt to salvage some of the "Resolve" program, Genworth asked the court of appeal to sever the unconscionable terms and enforce the rest of the arbitration agreement. The court refused. The "Resolve" program contained multiple offending provisions, and no single edit could remove its unconscionable taint. The trial court could not rewrite the agreement. *Baxter v. Genworth North America Corporation, et al.* (California Court of Appeal), 1st Appellate District, 10/26/17.

Bottom line

Despite California and federal policy favoring arbitration, the courts are prepared to overturn agreements viewed as unfairly one-sided or that improperly restrict the rights of employees. Companies and their employment counsel should regularly review and update employee arbitration agreements or else risk waging unsuccessful public battles with employees over arbitration.

The authors can be reached at Futterman Dupree Dodd Croley Maier LLP in San Francisco, mfutterman@fddcm.com and jtouchstone@fddcm.com. ✤