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CLASS CONFLICT

By Douglas N. Silverstein and Alexandra M. Steinberg

Last month, the 2nd District Court of Appeal published a decision upholding an employee's class action waiver in arbitration with his employer. *Konig v. U-Haul Company of California*, 2006 DJDAR 16494 (Dec. 19). The California Supreme Court had already granted review of a remarkably similar case decided by the 2nd District, *Gentry v. Superior Court,* 135 Cal.App.4th 944 (2006)(rev. granted, April 26, 2006). In *Konig*, the feisty appellate court capitalized on the opportunity to, at least temporarily, trump the grant of review and once again make its rule in *Gentry* the rule in the 2nd District.

But before the ink dries on the *Konig* decision's "filed" stamp, the Supreme Court will probably take the case up for review and decide, once and for all, that prospective class action waivers in employment arbitrations are unenforceable.

Does Size Matter?

In *Gentry* and *Konig*, the 2nd District interpreted *Discover Bank v. Super. Ct.*, 36 Cal.4th 148 (2005), to require that each putative class member's claim be "predictably small" for a class action waiver to be invalidated in an employment case. In *Konig*, it took that reasoning a leap further, going into painstaking detail to show that wage and hour claims can add up to amounts that it would not consider to be "predictably small." Further, it put the burden on plaintiff to limit the class's recovery by establishing, without the benefit of conducting discovery, that the class members' claims are all small.

Surely the California Supreme Court did not intend such illogical results. In fact, in *Discover Bank* the court emphasized that the class action mechanism is not just based upon the amount at stake for each class member; rather, the courts must consider whether denial of the class action would permit the defendant to benefit from its wrongful conduct and continue it with impunity.

Non-Waivable Remedies

In *Gentry* and *Konig*, the 2nd District overlooked an important point made by the California Supreme Court: *Discover Bank* did not involve claims under either the Consumer Legal Remedies Act (which contains an antiwaiver provision) or "any other California statute as to which a class action remedy is essential." Importantly, the court cited to *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83 (2000), as an example of where a class action remedy is essential. *Armendariz* did not deal with a class action at all, but rather dealt with the minimum standards necessary for arbitration of employees' statutory rights.

Konig and *Gentry*, on the other hand, both involve statutory employment claims that must adhere to the minimum fairness standards set forth in *Armendariz*. Class action waivers fail to adhere to the *Armendariz* requirements because they are exculpatory and by their very nature deprive employees of their legal remedies. Moreover, wage and hour class actions typically involve non-waivable minimum labor standards that provide yet another basis why the main procedural device for vindicating such claims — the class action — cannot be waived. *Barrentine v. Arkansas Best Freight System*, 450 U.S. 728 (1981)

(minimum labor standards are non-negotiable and non-waivable); *Zavala v. Scott Brothers Dairy, Inc.,* 143 Cal.App.4th 585 (2006) (same under California law).

Waivers Are Exculpatory

The California Supreme Court has condemned class action waivers that "may have the effect of allowing an unscrupulous wrongdoer to retain the benefits of its wrongful conduct." *Keating v. Super. Ct.*, 31 Cal.3d 584 (1982). Employment agreements whose objective, even indirectly, is to exculpate the employer are unenforceable as against public policy under Civil Code Section 1668 . Further, under *Armendariz*, a law established for a public reason cannot be contravened by a private agreement. Employment laws by their very nature are for a public reason, and thus they may not be waived.

Through class action waivers, employers insulate themselves from punishment for violations of their employees' statutory rights by denying the employees an effective method of redress. *Discover Bank*. The decisions in the non-citable Gentry and now Konig cases would make size of utmost importance in a class action, when what the Supreme Court really intended with *Discover Bank* was to ensure that a defendant would not avoid redress for its wrongful conduct.

In *Discover Bank*, the court found the class action waiver to be unconscionable not just because the amount of the claim was small, but rather because "the class action is often the only effective way to halt and redress such exploitation."

Employment class actions have different factors that likewise make class action waivers exculpatory. Employees have powerful disincentives against bringing individual actions against their employers that have nothing to do with the size of their claims. Employees face the risk of being fired and losing their income and means of support. In the context of undocumented workers, they are entitled to their wages (Labor Code Section 171.5), but they may not bring an individual action for fear of deportation and separation from their families. *Discover Bank* allows for class action waivers to be invalidated as exculpatory for non-monetary reasons. Class action prohibitions always work as exculpatory clauses and will therefore always be void as against public policy.

Unconscionability

One difference between *Konig* and *Gentry* is that in *Gentry*, the court found that there was no procedural unconscionability because the arbitration agreement contained an opt-out provision. Given that there are other grounds upon which the California Supreme Court will likely strike down class action waivers in employment, it is unlikely that it will rule upon the issue of whether opt-out provisions vitiate any procedural unconscionability. However, to the extent it reaches the issue, the court should hold that an opt-out provision does not vitiate procedural unconscionability.

Arbitration agreements containing such provisions are often fraught with many other infirmities. In the employment context, even assuming that employees are fully aware of and understands both the class action waiver and the opt-out procedure, they may not exercise that option for fear of angering their employers. The opt-out procedures themselves may be defective, and the vastly different bargaining power of the parties is procedurally unconscionable.

While procedural unconscionability is only one of the two prongs, the exculpatory nature of class action waivers renders them substantively unconscionable in addition to providing an independent basis for not enforcing them.

Right to Concerted Activity

One significant issue that was not reached in *Discover Bank*, *Gentry* or *Konig* is that class action waivers should be ruled unenforceable because they violate both state and federal laws protecting employees' rights to engage in concerted activity. *Discover Bank* touched briefly upon this where it recognized that antiwaiver statutes such as the one contained in the Consumer legal Remedies Act render class action waivers unenforceable.

Like the CLRA, the Labor Code makes class actions unwaivable. Section 923 states that it is the public policy of this state that employees shall be free from the interference, restraint, or coercion of employers in concerted activities for the purpose of mutual aid or protection. The statute is not limited to collective bargaining of union contracts, although those are covered by the statute as well. Similarly, concerted activity is protected by the National Labor Relations Act, 29 U.S.C. Section 157.

Class action waivers are directly targeted at the concerted activity of employees who engage in the mutual aid of their fellow employee class members, and thus such waivers violate the public policies embodied in the Labor Code and the NLRA. See *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (pursuing legal remedies in court is a form of protected concerted activity). Because class action waivers violate public policy, they are unenforceable under those statues as well as under Civil Code Section1668.

The Future

The high court will almost certainly grant review in *Konig*. And when it does, it will have another opportunity to decide the issue of arbitration class action waivers and rule, once and for all, that they are unenforceable in the employment context.

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