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FOCUS & FORUM • Jul. 31, 2007

Individual Arbitration

FOCUS COLUMN

By Harry I. Johnson III

The California Supreme Court is deciding whether employers and employees can agree in advance to resolve disputes in arbitration exclusively on an individual basis, in *Gentry v. Superior Court* (Circuit City), S141502 (Cal., argued and submitted June 5, 2007). To put it in other words, can employers and employees contractually waive any class action in an arbitration agreement?

Dennis Moss' Forum column of June 29, 2007 ("Barring Class Action") argued that a class action in a wage-and-hour case is an inherent right as "protected, concerted activity" under federal law and therefore also under the California Labor Code. Moss concluded that the advocates arguing before the California Supreme Court should have emphasized or conceded this point. The column was an engaging read, but it missed the key legal policy issue and misstated existing law. In fact, justice is well-served through individual employee arbitrations, and there is no legal support for a federal labor law "right" to a class action or for translating that "right" into a basis for undermining arbitration contract provisions.

Arbitration vs. Class Action

The law guarantees procedural due process in arbitration concerning statutory employment law claims, including wage-and-hour claims. See *Armendariz v. Foundation Psychcare Systems,* 20 Cal. 4th 83 (2000). The key legal-policy issue in *Gentry* is whether a class action is a necessary, unwaivable procedure for justice to be served in an employment dispute. Stated otherwise, are individual-by-individual arbitrations not up to the task of delivering just results for employees in wage-and-hour claims? Moss' column never addresses this issue. His argument is limited to arguing why class actions may be superior to individual litigation for these claims.

However, a fair comparison of class litigation with individual arbitration in this state shows that arbitration is generally the better method of dispute resolution for individual employee claims. The *Armendariz* standards call for a neutral decision maker, written arbitral decision, adequate discovery, full statutory remedies and the employer's payment of an employee's arbitration-specific expenses. Such a forum is simply a better vehicle to achieve broad-based justice in employment, especially for small claims. As just one example, an individual arbitration typically moves faster than a class action in federal or state court by avoiding the voluminous motion practice of complex litigation. Thus, an individual employee with a just cause secures meaningful relief and attorney fees much quicker than in a class action.

Given arbitration's virtues, the courts and the National Labor Relations Board have long seen it as "the preferred method of resolving labor-management disputes." For example, *Local Union No. 7*, 291 N.L.R.B. 89 (1988). The United States Supreme Court has applied that policy to statutory rights, as well. See *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth Inc.,* 473 U.S. 614 (1985). California followed in *Armendariz*, holding that arbitration is an acceptable mechanism to resolve employment disputes fairly.

Notably, various anti-arbitration advocates originally argued in *Armendariz* that arbitration for individual employees was an inherently flawed forum for resolving their statutory employment claims and thus should be rejected entirely. But the California Supreme Court rightly refused, citing *Mitsubishi* and holding that, as long as an arbitration forum is adequate under the *Armendariz* guidelines, it is entirely acceptable and enforceable in this state. The prior column presents no reason why individual arbitrations, complying with *Armendariz*, are unsuitable for redressing wage-and-hour claims.

Defining Protection

The second problem with the prior column is the assertion that federal labor law, incorporated by California Labor Code Section 923, protects filing a class action as "protected, concerted activity." This argument both misstates what federal law really is and overlooks federal pre-emption doctrine in its assumption that the state Labor Code and state contract rules could simply replicate federal law.

Moss cites *Harco Trucking LLC,* 344 N.L.R.B. 56 (2005), as the sole direct support for the proposition that maintaining a wage-and-hour class action in a California court is "protected, concerted activity" under federal law. This assertion ignores long-standing National Labor Relations Board rules on precedent. *Harco Trucking* cannot be precedential for this proposition because, although the administrative law judge in *Harco* made this finding, the finding was not challenged by exception on appeal to the board. Instead, the employer's "sole defense" before the board was based on the status of its corporate existence, not whether filing a class action was protected, concerted activity. An administrative law judge's finding that is adopted by the board and to which no exceptions are filed is not precedent for any other case, as the board has long held. See *Anniston Yarn Mills Inc.*, 103 N.L.R.B. 1495 (1953); see also, for example, *Watsonville Newspapers LLC*, 327 N.L.R.B. 957 1999) ("no exceptions were filed to the portion of the administrative law judge's decision in that case that the judge here relied on, and that decision is therefore of no precedential value on that point."); *Colgate-Palmolive Co.*, 323 N.L.R.B. 515 (1997) ("It is a well-established practice of the Board to adopt an administrative law judge's findings to which no exceptions are filed. Findings adopted under such circumstances are not, however, considered precedent for any other case."); *ESI Inc.*, 296 N.L.R.B. 1319 (1989).

Finally, what if Moss were right that filing a wage-and-hour class action might be "protected, concerted activity" under the National Labor Relations Act? That still would not allow a state court to invalidate an arbitration agreement on that basis. Only the National Labor Relations Board would have the authority to decide the "protected, concerted activity" question. The federal pre-emption doctrine precludes state courts from addressing conduct that is actually or even "arguably" prohibited under the National Labor Relations Act - conduct that falls within the responsibility of the board. *Rodriguez v. Yellow Cab Co-op. Inc.*, 206 Cal.App.3d 668 (1988) (where a state-law claim was pre-empted because it might have resulted in the regulation of conduct arguably within the jurisdiction of the board); *Machinists Automotive Trades Dist. Lodge No. 190 v. Peterbilt Motors Co.,* 220 Cal.App.3d 1402 (1990). Thus, a state contract law doctrine that renders a class-action waiver void because it undermines "protected, concerted activity" would be pre-empted. In fact, the same premise asserted by Moss - a state court can and should void a contract provision because it violated the National Labor Relations Act - has been addressed and rejected by the Court of Appeal. *Mechanical Contractors Association v. Greater Bay Area Association*, 66 Cal.App.4th 672 (1998), review denied (Dec. 16, 1998), certiorari denied, 526 U.S. 1114 (1999). Thus, one would hope that the California Supreme Court would steer clear of interfering with federal jurisdiction in this fashion.

In the end, it is more than a stretch to conclude that filing a class action is "protected, concerted activity" under federal law, which would then overturn arbitration agreement provisions under state law. Moss' argument provides no support for preventing employers and employees from freely agreeing to individual-specific arbitration. The prior column appears simply to be the old wine of anti-arbitration bias in a new bottle.

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