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Creating Workable Arbitration Agreements in the Post-Gentry Era

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The California Supreme Court's Gentry v. Superior Court *holding established several new, onerous tests for employers' arbitration agreements that use an "opt-out" process for forming the arbitration agreement, or that seek to limit arbitration to individual cases instead of class actions. Now that* Gentry *has been allowed to stand and may be adopted wholly or partially by other jurisdictions, how should employers adapt to it? With careful attention to several aspects of both the language of the arbitration agreement, and human resources functions supporting the arbitration process, employers can still maintain enforceable, fair "opt-out" arbitration processes that do not include class actions.*

Dashing the hopes of California employers, the United States Supreme Court recently allowed *Gentry v. Superior Court (Circuit City Stores)*[1] to stand, by denying the employer's *certiorari* petition. The California Supreme Court's 4–3 decision had engrafted yet another set of judge-made restrictions upon the use of arbitration agreements in California. Many employer advocates had looked to the Federal Arbitration Act and to the nation's highest court for relief. After the denial of *certiorari*, it appears that some employers have abandoned employment arbitration programs altogether.

Mandatory arbitration programs are beneficial to employers and employees—even in California in the post-*Gentry* era. A properly drafted agreement can provide a fair, cost-effective forum for employees and an alternative preferable to court litigation.

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GENTRY FACTS

In early 1995, Circuit City presented to its employee Associates a dispute resolution program known as the "Associate Issue Resolution Program" (AIRP). A key element of the AIRP was an agreement to arbitrate all employment-related legal disputes. Robert Gentry was employed by Circuit City as a customer service manager. Gentry attended a presentation about the AIRP that included a video presentation and the distribution of extensive written materials describing the AIRP.

Following the video, Gentry signed a receipt, confirming that he watched the video and received copies of the "Associate Issue Resolution Handbook" (the brochure explaining the AIRP), the "Circuit City Dispute Resolution Rules and Procedures," (the terms of the AIRP), and an opt-out form allowing him to reject the agreement within 30 days. The receipt advised Gentry that he should review the materials presented to him, that he could contact Circuit City with any questions he might have, and that he might wish to consult with an attorney to discuss his legal rights. Gentry never returned the opt-out form.

The AIRP required Gentry to "dismiss any civil action brought by him in contravention of the terms of the parties' agreement. . . ." The AIRP also contained a provision forbidding class arbitrations, which provided: "The Arbitrator shall not consolidate claims of different Associates into one proceeding, nor shall the Arbitrator have the power to hear arbitration as a class action. . . ." Along with the opt-out contract formation mechanism of the AIRP, this "class action waiver" provision would become the focus of the decision.

Gentry later filed a class action lawsuit in California state court against Circuit City, seeking damages for overtime wages due to alleged misclassification, and under a theory of conversion. The 1995 version of the AIRP that originally applied to Gentry also contained several limitations on damages, recovery of attorney fees, and the statute of limitations that were less favorable to employees than were provided in the applicable statutes. Neither the AIRP Handbook nor the AIRP Rules specifically identified or explained these disadvantages, and the materials generally promoted arbitration as the "right choice." (The agreement changed in 1998 and 2005.) After two rounds litigating in the appellate court, which ultimately held that the class action waiver was valid, Gentry successfully petitioned the California Supreme Court for review, claiming that:

1. Class action waivers should generally be struck down as exculpatory or against public policy in all wage-hour cases; or

2. The AIRP class action waiver was procedurally and substantively unconscionable under state contract law, along with many of the AIRP's other terms.

THE *GENTRY* COURT'S ANALYSIS

The four justice majority of the California Supreme Court did not rule whether or not the AIRP class action waiver was valid, sending that ultimate issue back to the court of appeal. Importantly, it also did not categorically strike down class action waivers in arbitration agreements covering wage-hour disputes.

Instead, the majority established two separate analyses for class action waivers: (1) essentially creating a new "rights vindication superiority" test rooted in public policy and also (2) modifying the general unconscionability test for employment arbitration agreements to impose a more expansive view of procedural unconscionability. Although these tests make enforcing an "opt out" arbitration agreement more difficult under California law, especially if it contains a class action waiver, they do not invalidate all such agreements.

THE PUBLIC POLICY TEST—"RIGHTS-VINDICATION SUPERIORITY"

In formulating the public policy test, the court majority noted that the overtime statutes guarantee unwaivable rights. The court viewed the right to overtime as vulnerable to *de facto* waiver by an arbitration provision banning class actions, which "would impermissibly interfere with employees' ability to vindicate unwaivable rights and to enforce the overtime laws."[2] The majority hypothesized that low recoveries, the danger of employer retaliation, employee ignorance of legal rights, and the danger of "fragmentary" enforcement of overtime laws made individual employee cases less likely to enforce their overtime rights through individual claims.[3] Despite its apparently dim view of individual arbitrations as a potential overtime claims enforcement mechanism, the majority declined to ban all class arbitration waivers:

> We cannot say categorically that all class arbitration waivers in overtime cases are unenforceable. . . . Not all overtime cases will necessarily lend themselves to class actions, nor will employees invariably request such class actions. Nor in every case will class action or arbitration be demonstrably superior to individual actions.[4]

Instead, the court created a four factor public policy test, based on its perceptions of the impediments faced by individual overtime arbitration, to be applied by trial courts analyzing class action waivers. If, after applying the test, a class arbitration is likely to be significantly more effective in vindicating overtime rights, then the waiver is invalidated:

> Nonetheless, when it is alleged that an employer has systematically denied proper overtime pay to a class of employees and a class

> action is requested notwithstanding an arbitration agreement that contains a class arbitration waiver, the trial court must consider the factors discussed above: *the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' right to overtime pay through individual arbitration*. If it concludes, based on these factors, that a class arbitration is likely to be a *significantly more effective practical means* of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will *likely lead to a less comprehensive enforcement* of overtime laws for the employees alleged to be affected by the employer's violations, it must invalidate the class arbitration waiver. . . .[5]

The court "d[id] not foreclose the possibility" that an individual employer's system could pass scrutiny.[6] However, the employer could not place "formidable practical obstacles" to vindication of overtime rights.[7] The court remanded the public policy determination to the court of appeal for subsequent remand to the trial court.

GENTRY'S NEW VIEW OF PROCEDURAL UNCONSCIONABILITY

The second notable aspect of *Gentry* was its analysis of how the "opt-out" method of contract formation—contract formation by the employee's silence—would be scrutinized under the test for procedural unconscionability. Initially, *Gentry* held that the opt-out method was fully valid to create an arbitration contract in California, as Mr. Gentry's signed receipt of the opt-out acknowledgement, and his failure to opt out within the prescribed deadline, was enough to bind him to the arbitration agreement without requiring him to actually sign it.[8] However, the court held that procedural unconscionability still existed.

In many states, unconscionability is often said to take two forms. Both forms must be present before an arbitration contract can be invalidated as unconscionable and unenforceable: procedural unconscionability and substantive unconscionability.[9] Procedural unconscionability arises from "oppression" (*i.e.*, one sided bargaining) or "surprise" *(i.e.*, the terms are hidden in a contract).[10] The court held that an opt-out process did not automatically negate potential procedural unconscionability but instead that procedural unconscionability appeared in two guises in the AIRP.

The majority attacked Circuit City's roll out of the AIRP to employees as a "highly distorted picture" of the benefits and costs of arbitration. The majority held that "the explanation of the benefits of arbitration in the Associate Issue Resolution Handbook [*i.e.*, explanatory materials] was markedly one-sided." The majority rejected the argument that the

ARIP's admonitions to employees to consult counsel and concerning the lack of a jury trial were sufficient to advise employees of disadvantages of arbitration. Instead, the majority faulted Circuit City for failing to "mention any of the additional significant disadvantages that *this particular arbitration agreement* had compared to litigation."[11] These limits in the AIRP included limits on the statute of limitations, punitive damages, and a provision allowing the arbitrator discretion not to award attorney fees to prevailing plaintiffs for overtime claims. The requirement that an employer affirmatively identify and explain comparative disadvantages of its arbitration program is a new development in the law of procedural unconscionability.

The majority also found "oppression" from the employer's documents advocating the AIRP, even though Mr. Gentry presented no evidence that he himself was pressured in any way into not opting out. The majority held that Circuit City's obvious "preference" that employees join the program in its AIRP Handbook and other promotional materials, "underscored" by the structure of the opt-out mechanism (*i.e.*, the default choice was to be part of the arbitration program), showed that the employer's message to employees was clear.[12] Citing no evidence, the majority simply stated that it was "likely that Circuit City employees felt at least some pressure not to opt out of the arbitration agreement."[13] This was an extension of existing law. No previous holding from the California Supreme Court indicated that a choice is not really a free choice if offered by an employer who expresses a mere preference unaccompanied by any kind of threat or coercion.

Thus, *Gentry* modified the procedural unconscionability test for employment arbitration by assuming that employees need full disclosure of any conceivable comparative disadvantage of the proposed arbitration system. The test also regards mere employer preference for arbitration (if including a class action waiver) as a form of coercion. Lack of affirmative disclosure together with expressed employer preference is enough to now establish procedural unconscionability concerning an arbitration agreement involving a class action waiver in a wage-hour context.

THE DISSENT

Three justices dissented, stating that they could not join "the majority's continuing effort to limit and restrict the terms of private arbitration agreements." These justices noted the procedural features of Circuit City's program designed to ensure employee free choice: the opt-out provision, the statement that the employee should consult his or her attorney, and the disclosure of the rules and procedures for arbitration. As the dissenting justices stated, "There is more than one way courts can show hostility to arbitration as a simple, cheaper and less formal alternative to litigation. They can simply refuse to enforce the parties'

agreement to arbitrate. Or, more subtly, they can alter the arbitral terms to which the parties agreed, and defeat the essential purposes and advantages of arbitration."

GENTRY AS HARBINGER OF EMPLOYMENT ARBITRATION'S FUTURE?

Gentry's impact in California on arbitration agreements is gradually taking shape. *Gentry* primarily concerns the class action waiver provision in the Circuit City agreement. It may have little effect on arbitration agreements that contain no such class action waiver. *Gentry* did not hold that class action waivers are inherently unenforceable, nor did it expressly address whether the waiver was substantively unconscionable. Instead, it remanded the substantive unconscionability issue (the other half of the unconscionability test) to the appeals court. This leaves an important unanswered question, because substantive unconscionability is a necessity to strike out any arbitration term on the ground of unconscionability.

The current California law under *Szetela v. Discover Bank*[14] is that class action waivers in consumer actions are regarded as one-sided, substantively unconscionable provisions. That provides a basis for arguing that class action waivers are substantively unconscionable in employment, or at least, wage-hour cases. On the other hand, the *Gentry* opinion notes that "[t]he presence of a class arbitration waiver in an employee arbitration agreement therefore does not *by itself* indicate a systematic effort to impose arbitration . . . as an inferior forum. . . ."[15] Thus, *Gentry* does not view class action waivers in employment arbitration agreements as inherently unfair. Two appellate cases that have applied *Gentry* have struck down employment arbitration agreement, including on the basis of provisions purporting to allow the arbitrator rather than a court to decide unconscionability.[16]

Outside of California, the full impact of *Gentry* has yet to be felt. However, enterprising attorneys have argued the public policy or unconscionability test of *Gentry* in other jurisdictions.[17] Other state and federal courts have addressed similar waivers and have reached different conclusions. The Seventh Circuit has been publicly critical of the entire approach of the California Supreme Court to evaluating arbitration agreements.[18]

IS INDIVIDUAL ARBITRATION OF EMPLOYMENT CASES EFFECTIVELY DEAD?

So, does *Gentry* signal the impending death of individual arbitration as an alternative to class employment litigation? The answer is "no." *Gentry* is simply the extension of the California courts' increasing regulation of mandatory employment arbitration, as applied to the class action

waiver and the "opt out" mechanism of arbitration contract formation. Employers may have wished for a different result in *Gentry* (or at least for a simpler, clearer test). However, an employer that is truly committed to arbitration as a dispute resolution process, and that informs employees fully about its arbitration program, will find that these standards act at worst as an impediment to arbitration, and preclude individual arbitration of only a few types of wage-hour class actions where a plaintiff can actually show that class litigation is significantly more effective in vindicating rights. Moreover, *Gentry* conclusively validated the opt-out method of contract formation, and thus is another authority allowing employers to institute arbitration programs.

After *Gentry*, the benefits of arbitration for both employers and employees still remain. For larger employers that can institute and maintain comprehensive arbitration programs, and for employees, individual arbitration is still cheaper and more effective at resolving disputes than sending each and every one into the court system.

Arbitration can resolve disputes at a fraction of the cost and time involved in a court proceeding. Again taking California for an example, most state court cases are governed by statutory requirements designed to ensure relatively rapid case processing. Yet more than one third of such cases take more than a year to resolve.[19] Complex employment cases, especially major class actions, can easily take between two to four years until a disposition is reached.[20] In contrast, arbitration proceeds more quickly. The American Arbitration Association average as of a few years ago was 8.6 months from claim filing to hearing.[21]

Litigation in California and many other states is slow moving for various reasons. Discovery in litigation can drag on for months and discovery disputes cannot be decided quickly. Delay is accentuated by the high cost of formal discovery, which often can devolve into "fishing expeditions" of great expense to the corporate defendant, by the length of time before a summary judgment motion can possibly be heard (105 days in California), and by the cost of multiple in-person court proceedings and appearances in a typical case. For example, the average California state judge is assigned over 4,600 regular civil cases per year and makes over 3,500 dispositions of them per year.[22] All of this contributes to the unreasonably high cost of litigation in California and states like it that have complex rules and crowded dockets. Even straightforward employment law disputes can languish in the courts.

Besides the procedural delays, the opportunity costs and hours of labor the employers' staff spends on the litigation, rather than on productive matters, increase the cost further. The extended uncertainty that hangs over the company and the employee during an unresolved case are not pleasant facts of litigation, either.

Finally, both parties may logically prefer an arbitrator who is likely an expert in the area of employment law and far more likely to rely upon

legal rules than personal experience, intuition, bias, or the other vagaries that flow into the "black box" decision making of the jury system. Specifically from the employer perspective, arbitration can also offer a decision maker who is less susceptible to an emotional desire to "punish the employer" for whatever reason. In this vein, huge jury trial liability figures resulting from alleged wage and hour violations are a real possibility, such as the *Savaglio v. Wal-Mart*[23] jury verdict of $172 million and the nearly $160 million total liability that resulted from the *Bell v. Farmers Insurance Exchange* verdict.[24] Million dollar plus verdicts in individual employment cases are not uncommon.[25] Arbitration can offer employers a significantly better forum for resolving most employment disputes, in terms of time, expense, informality, and subject matter expertise, compared to the state and federal judicial system.[26]

DRAFTING AND IMPLEMENTING AN ENFORCEABLE INDIVIDUAL ARBITRATION PROGRAM AFTER *GENTRY*

Employers who wish to use an arbitration agreement in California must either review the current agreement to make sure it complies with the still developing California rules, or draft one from scratch. Drafting a valid provision is a relatively straightforward task, but missteps can be costly. Few things are more disagreeable for an employer than to litigate a petition to compel arbitration, requiring significant time and resources, and then ultimately be told by a judge that the arbitration agreement is unenforceable. Thus, an extensive review by counsel is always recommended.

The mechanics of drafting a program are something that an employer can accomplish with the help of counsel. But the employer itself must decide several key policy questions before creating any of the arbitration documents or language. In the post-*Gentry* era, the following are important policy or drafting issues to consider when drafting arbitration programs, especially if a class action waiver is included:

- *Predispute versus postdispute arbitration agreements:* The vast majority of employers prefer predispute arbitration agreements. Most plaintiffs' counsel are unlikely to enter into a postdispute arbitration agreement, either as a matter of principle or simply in the hope that a jury will award far greater damages.

- *Avoiding one-sided provisions to avoid substantive unconscionability:* Substantive unconscionability differs from state to state, but courts routinely characterize substantively unconscionable provisions as "one sided." Many types of provisions have been challenged as substantively unconscionable. However, one commonly found substantively unconscionable provision is the arbitration coverage provision itself. Arbitration

coverage, if it extends to employee claims at all, should also typically extend to all the kinds of disputes that could be brought by the employer as well. Therefore, aside from provisions allowing parties to obtain a preliminary injunction in aid of arbitration, an employer should not "carve out" certain causes of action (*e.g.*, trade secrets type actions) for resolution through litigation, while requiring employee claims in their entirety to be arbitrated. Avoid provisions that shorten the statute of limitations or that limit remedies available.

- *Informing employees of the differences between the arbitration program and court procedures, without overbearing advocacy of the arbitration program:* These are both important elements of *Gentry*'s analysis where a class action waiver is included. During the "roll-out phase" of the individual arbitration program, each significant difference between the arbitration program and the "default" rules for civil litigation should be highlighted to employees considering the program. This would include the class action waiver. The discussion of arbitration versus litigation should be even-handed, without the employer taking a strong advocacy position. This comparison is probably not required for programs that lack a class action waiver.

- *Drafting to satisfy other public policy tests:* Different jurisdictions have different tests, but the groundbreaking case setting forth the basic standards in California (which duplicated standards in some other jurisdictions) is the California Supreme Court's earlier decision in *Armendariz v. Foundation Psychcare Servics.*[27] The five minimum requirements of *Armendariz* are: a neutral arbitrator; no limits on statutory remedies; a written arbitration decision to permit judicial review; adequate (although not unlimited) discovery; and the employer bearing any type of arbitration cost except costs that an employee would have to bear in the judicial forum (*i.e.*, a modest filing fee).

Arbitral discovery does not have to be co-extensive with the discovery statutes under this standard. It is unsettled just how much discovery is enough as a bright line rule. However, restricting depositions to a very low number, restricting interrogatories/document requests to the ten to 20 range, and allowing an arbitrator to increase discovery limits only if "absolutely necessary" are restrictions that may be struck down.[28] An employer should not create an arbitration procedure, like typical union contract arbitration agreements, where discovery is very limited and the return of discovery requests occurs at the hearing itself.

A defective cost-sharing provision, if it stands alone, can often be saved by severing the clause from the agreement. Luckily for employ-

ers, silence on costs in an agreement will be interpreted by courts as conformance with the rule.[29]

- *Avoid forced employee participation that will provoke claims of unconscionability:* Many employers prefer to make arbitration agreements a condition of employment, but that gives away part of the defense to unconscionability. Some courts will invalidate a mandatory arbitration provision even if there are only a few substantively unconscionable provisions in the agreement. The easiest way an employer can avoid accusations of "surprise" is to make clear that a document is a binding arbitration agreement, and by using attention-getting devices (underscoring, large size/color font, or graphics) to help point that out.

- *Method of agreement and notice to employees of the program:* Opt-out agreements, versus traditional affirmatively signed agreements, may increase employee participation. However, opt-out agreements without acknowledgement of both receipt and the "rules for opting out" (if any) will create potentially cumbersome fact issues for litigation. This is an area where counsel needs to be involved.

- *Weighing the desirability of class arbitration or a class action waiver:* Deciding to implement an arbitration agreement may very well lead to class action arbitrations if the class action waiver is struck out. The informality of arbitral procedures (even those of the American Arbitration Association, which has extensive class arbitration procedures), coupled with the willingness of arbitrators to admit in evidence on an informal basis, can mean that a class will be certified more easily than in state or federal court. It can also mean that a high value aggregate claim will be decided on the merits with essentially no formal evidentiary standards, and no right to appeal. For this reason, many employers use a mandatory provision with no class action waiver.

- *Informing employees of their employment law rights generally and their ability to enforce them in arbitration:* This is an important factor under *Gentry*, but an employer can reasonably satisfy it the employer takes steps to distribute the various government-authored notices of legal employment rights, any of its own explanatory materials, and obtain acknowledgments of the same.

- *Considering a preliminary internal step prior to arbitration:* Employers frequently have some sort of formal or informal

internal dispute resolution system, and it makes sense to incorporate this system at least as a gateway that employers expect employees to pass before entering into formal arbitration. Employers should be advised, however, that there is no legal mechanism to compel compliance with informal pre-arbitration steps.

- *Implementing anti-retaliation mechanisms:* This is another important factor under *Gentry.* An employer should have a process that eliminates or at least surfaces and successfully resolves complaints of retaliation by employees who use the arbitration system. "Customer satisfaction" surveys from employees who used the arbitration program is one way to show evidence that no retaliation is occurring.

- *Selecting the service provider:* The number of employment specialists on the arbitration provider's panel needs to be examined, so that true, neutral employment law specialists are available.

- *Creating an organization to run the arbitration system:* Employers who create permanent internal positions to monitor and manage the internal side of the arbitration system will be far better prepared than those that rely only on the arbitration provider's case managers. Internal personnel also assist in getting witnesses and documents in a rapid-fire arbitration proceeding geared up for hearing.

- *Preparing your business for challenges to the arbitration program:* The unfortunate truth is that the majority of California and many other plaintiffs' attorneys are going to challenge an arbitration agreement. Even though an arbitration agreement may be enforceable in the end, they are frequently challenged in California and other popularly-frequented employment jurisdictions, and there are litigation costs involved. Obtaining some enforcement victories can create helpful leverage to cause plaintiffs' attorneys to stipulate to arbitration in other cases.

CONCLUSION

The narrow, 4–3 ruling in *Gentry* was disappointing, as was the United States Supreme Court's decision not to review the case. Nevertheless, the *Gentry* holding does not vitiate arbitration agreements for individual employment claims—and it suggests that even arbitration agreements with class action waivers may be enforced if the employer carefully drafts and implements the program.

NOTES

1. 42 Cal. 4th 443 (2007).

2. *Gentry*, 42 Cal. 4th at 457.

3. Recent scholarship has cast doubt on *Gentry*'s implicit assumption that individual arbitration awards are lower than the amounts class members typically receive in wage-hour claims, and thus cannot serve as an effective deterrent against employer misconduct. *See* Samuel Estreicher and Kristina Yost, *Measuring the Value of Class and Collective Action Settlements: A Preliminary Assessment*, New York University Public Law and Legal Theory Working Papers (Paper 66, 2007) (noting that median individual portions of class settlements are lower than median individual arbitration awards, for both civil rights and non-civil rights employment cases) (available at *http://lsr.nellco.org/nyu/plltwp/papers/66*).

4. *Gentry*, 42 Cal. 4th at 462.

5. *Id.* at 463 (emphasis added).

6. *Id.* at 464.

7. *Id.* at 464.

8. *Id.* at 467–468.

9. *See, e.g.*, Armendariz v. Foundation Health PsychCare Services, Inc., 24 Cal. 4th 83 (2000)*;* Little v. Auto Stiegler, 29 Cal. 4th 1064 (2003).

10. *Id.* at 1071.

11. *Gentry*, 42 Cal. 4th at 470–471 (emphasis in original).

12. *Id.* at 472.

13. *Id.*

14. 97 Cal. App. 4th 1094, 1101–1102 (2002).

15. *Gentry* at 466 (internal quotes omitted; emphasis added).

16. *See* Murphy v. Check N Go, 156 Cal. App. 4th 138, 144 (2007); Ontiveros v. DHL Express, 164 Cal. App. 4th 494 (2008).

17. *See, e.g.* Skirchak v. Dynamics Research Corp., 508 F.3d 49, 62 (1st Cir. 2007).

18. Oblix, Inc. v. Winiecki, 374 F.3d 488 (7th Cir. 2004) (holding that *Armendariz, supra*, is preempted by the Federal Arbitration Act, 9 U.S.C. § 2).

19. *See* Judicial Council of California, 2005–2006 Court Statistics Reports, *http://www.courtinfo.ca.gov/reference/3_stats.htm (*visited July 18, 2008), Table 6, p. 49.

20. David Sherwyn, Samuel Estreicher, and Michael Heise, "Assessing the Case for Employment Arbitration: A New Path for Empirical Research," 57 *Stanford L. Rev.*, 1557, 1572–1573 (April 2005) (citing mean times before trial for nationwide state court discrimination cases of 818 days, or about 2.25 years). Class actions in California can go even longer. In the notable *Bell v. Farmers Insurance Exchange* case, the complaint was filed on October 2, 1996, *see* 115 Cal. App. 4th 715, the verdict was reached on July 10, 2001, *see* 137 Cal. App. 4th 835, and the final appeal was decided on March 15, 2006, nearly ten years later. *Id.*

21. Sherwyn, *et al.*, *supra* note 20, at 1572–1573.

22. Judicial Council, Court Statistics, *supra* note 19, Table 2, at 43 (2005—06 year).

23. Alameda Superior Court, Case No. C-835687.

24. *See* 137 Cal. App. 4th 835 (2006) (balance of judgment as of August 2004 was $158,663,784.85).

25. *See, e.g.*, Gober v. Ralphs Grocery Co., 137 Cal. App. 4th 204 (2006) (discussing sexual harassment case where two plaintiffs received remittitur awards of $1.6 million and $3.2 million respectively; for other plaintiffs with compensatory damage awards of $50,000 to $70,000, punitive damages were reduced by court from $5 million apiece to 6:1 ratio under constitutional challenge).

26. Arbitration does not always provide a faster and less expensive process, so the company should carefully think through this particular issue. Although the cost savings from arbitration are often substantial, in some cases arbitration can cost just as much as, if not more than, litigation, especially if the arbitration agreement needs to be enforced. In jurisdictions such as California, any arbitration agreement covering statutory employment claims must have "adequate" discovery. Although the agreement does not have to provide as much discovery as the state civil discovery statutes will allow, overly aggressive streamlining of arbitration discovery leads to a substantial risk of being unable to enforce the arbitration agreement. Preparation of an arbitration case in an accelerated time frame may also increase month-to-month costs for an arbitration, even if it decreases total case expense. Finally, a rapidly processed arbitration case will need corresponding commitment from the company's internal counsel, management, and human resources teams to quickly develop facts, seek and turn over discovery, and make themselves available as witnesses. Thus, the arbitration cost savings and increased speed can be a double-edged sword.

27. 24 Cal. 4th 83 (2000).

28. *See, e.g., Ontiveros, supra*; Fitz v. NCR Corp., 118 Cal. App. 4th 702 (2004); Mercuro v. Superior Court, 96 Cal. App. 4th 167(2002).

29. *Armendariz*, 83 Cal. 4th at 120.

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