



OUR INSIGHTS

California Supreme Court Issues Pro-Arbitration Agreement Decision

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On March 28, 2016, the Supreme Court of California issued another ruling on the enforceability of arbitration agreements. In *Baltazar v. Forever 21, Inc.* (S208345), the court considered the enforceability of an arbitration agreement authorizing the parties to seek provisional relief in a judicial action while still remaining in court for the remainder of the dispute to arbitration. According to the court, the clause carving out provisional relief from the arbitration obligation “which does no more than restate existing law . . . does not render the arbitration agreement unconscionable.” Moreover, the court reiterated that an arbitration agreement remains enforceable even if it only lists claims that would likely be brought by an employee and does not list claims that would be brought by an employer. The decision provides much needed clarity and flexibility to employers implementing arbitration agreements in California.

Background

In 2007, Maribel Baltazar completed an employment application to work at a warehouse for Forever 21, a retail merchandiser. The application included an arbitration agreement, which Baltazar signed. The agreement required the parties to arbitrate claims or actions arising out of or related to hiring, employment, remuneration, or separation.

In 2011, Baltazar resigned from her job and later sued Forever 21 for harassment, discrimination, and wrongful termination. Forever 21 filed a motion to compel arbitration, which Baltazar opposed, arguing the agreement was unconscionable.

The trial court found that the agreement was unconscionable. On appeal, a California Court of Appeal found that the agreement was procedurally unconscionable but not substantively unconscionable. The California Supreme Court agreed to hear the case and affirmed the decision of the Court of Appeal.

The Supreme Court’s Decision

Baltazar presented one claim of procedural unconscionability and three claims of substantive unconscionability.

Procedural Unconscionability

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Baltazar asserted that Forever 21 provided the agreement to her upon her hire, telling her that she had to sign it or Forever 21 would not hire her. Baltazar asserted that the level of procedural unconscionability was particularly high, however, because the arbitration agreement stated that any arbitration would be governed by the American Arbitration Association's (AAA) rules, but did not attach the rules to the arbitration agreement. The facts of this case raise an issue as to whether an employer must attach the arbitration rules that govern an agreement to the agreement, or whether incorporating them by reference is enough to avoid procedural unconscionability.

Rather than squarely decide this issue, the Supreme Court of California noted the cases that invalidated agreements that did not have the rules attached to them and stated that Baltazar's position "might have force if her unconscionability challenge concerned some element of the AAA rules of which she had been unaware when she signed the arbitration agreement." Because, however, her substantive unconscionability challenges were related to the arbitration agreement itself, and not the AAA rules, the employer's failure to attach the rules had no impact on the court's consideration of whether the agreement was substantively unconscionable.

Substantive Unconscionability

(1) Provisional Relief

The parties' agreement permitted them to bring a judicial action to seek provisional relief (such as a temporary restraining order or preliminary injunctive relief) in addition to arbitration. According to Baltazar, this provision unfairly favored Forever 21 because an employer is, Baltazar claimed, more likely than its employees to seek provisional relief. While accepting, *arguendo*, that an employer is more likely to seek provisional relief than an employee, the court rejected prior decisions that held that such a limited carve-out provision rendered the agreement substantively unconscionable. In arriving at this conclusion, the court relied upon California Code of Civil Procedure section 1281.8(b), "which expressly permits parties to an arbitration to seek preliminary injunctive relief during the pendency of the arbitration." Because the statute provides for a provisional relief carve out, the court held that it was not substantively unconscionable. According to the court, "the clause merely confirms, rather than expands, rights available to the parties under that code section."

(2) One-Sided: Only Employee's Claims Listed

Baltazar noted that examples of disputes that are subject to arbitration under the agreement "*include but are not limited to*" claims for wages, contract breaches, discrimination, retaliation, harassment, and others. Based on this language, Baltazar argued that the arbitration agreement was unfairly one-sided because it listed only claims that would be brought by employees as examples of the types of claims that are subject to arbitration—leaving "in doubt whether the kinds of claims employers typically bring are also subject to arbitration."

The court again sided with Forever 21. According to the court, the agreement required the parties to arbitrate all employment-related claims and thus that the agreement "clearly covers claims an employer might bring as well as those an employee might bring." The examples of claims provided in the agreement, the court noted, do not "render the agreement sufficiently unfair as to make its enforcement unconscionable."

(3) One-Sided: Trade Secrets Provision

Baltazar next points to a provision in the agreement that required both parties to agree that during arbitration "all

necessary steps will be taken” to protect from disclosure the company’s trade secrets and proprietary and confidential information. According to Baltazar, by failing to define “all necessary steps” and “proprietary and confidential information,” “the agreement unfairly demands that employees take whatever steps the employer deems ‘necessary’ to protect whatever information the employer claims to be ‘proprietary and confidential’”—making the agreement unduly one-sided.

The court, once again, disagreed. According to the court, “[n]othing in the agreement indicates that an employee must accede to any and all demands Forever 21 might make for the protection of confidential and proprietary information.” Agreements to protect sensitive information, the court found, “are a regular feature of modern litigation, and they carry with them no inherent unfairness.”

Thus, the Supreme Court of California concluded that the arbitration agreement was not unconscionable and was enforceable.

Key Takeaways

Baltazar provides important guidance to employers seeking to implement arbitration agreements with their employees, but have concerns about potentially waiving their rights to seek provisional relief in court. In exigent situations, there may not be time to convene an arbitrator before suffering irreparable harm. Before *Baltazar*, there was a line of cases that seemed to indicate that carving out claims for provisional relief might undermine the enforceability of the entire arbitration agreement. *Baltazar* indicates that a narrowly drafted carve-out may be enforceable. However, *Baltazar* also indicates that the Supreme Court of California will continue to look very carefully at arbitration agreements, necessitating careful and prudent drafting.

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