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Another Nail in the Coffin for Employment Arbitration Agreements: *Gentry* Is Good Law When the FAA Does Not Apply

In *Garrido v. Air Liquide Industrial U.S. L.P.*, a California Court of Appeal determined that the rule set forth in *Gentry v. Superior Court* is still good law—at least in some situations. In *Gentry*, concerned that class action waivers contained within arbitration agreements would "interfere with employees' ability to vindicate unwaivable rights," the California Supreme Court articulated four factors a court should consider when deciding whether to uphold a class action waiver: (1) the modest size of the potential individual recovery; (2) the potential for retaliation against class members; (3) the fact that absent class members might be ill-informed about their rights; and (4) other real world obstacles to the vindication of class members' rights through individual arbitration. Because neither the U.S. Supreme Court nor the California Supreme Court has held otherwise, the California Court of Appeal concluded that the *Gentry* rule remains valid so long as the Federal Arbitration Act ("FAA") does not govern the dispute at issue.

In *Garrido*, the plaintiff ("Garrido") filed a putative class action lawsuit against his former employer, Air Liquide, alleging violations of the Labor Code and the unfair competition statute. Air Liquide moved to compel individual arbitration pursuant to an arbitration agreement governing Garrido's employment. The arbitration agreement precluded Garrido from pursuing class or representative claims and expressly provided that the FAA would govern the agreement and any arbitration proceedings. The trial court denied the motion to compel arbitration pursuant to *Gentry*, determining that the arbitration agreement posed an obstacle to the employee's ability to vindicate statutory rights under the Labor Code.

The California Court of Appeal agreed, first concluding that the FAA did not apply to Garrido's dispute because the statute expressly exempts transportation workers from its scope. Garrido, a truck driver, was a transportation worker within the meaning of the FAA. Thus, despite the arbitration agreement's express invocation of the FAA, the plain terms of the statute superseded the terms of the agreement.

The appellate court then concluded that the arbitration agreement was unenforceable based on the *Gentry* rule. According to the court, the *Gentry* rule was not completely abrogated by recent decisions issued by the U.S. and California Supreme Courts. In *AT&T Mobility LLC v. Concepcion*, the U.S. Supreme Court held

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that a state rule that requires the availability of classwide arbitration interferes with the fundamental attributes of arbitration, and is thus preempted by the FAA. In *Iskanian v. CLS Transportation Los Angeles, LLC*, the California Supreme Court held that *Gentry's* rule did not survive *Concepcion* since its mandate in favor of class proceedings interferes with fundamental rights of arbitration in violation of the FAA.

Both *Concepcion* and *Iskanian* explicitly addressed the enforceability of class action waivers in cases where the FAA applies; neither case considered the viability of *Gentry* in cases *not* governed by the FAA. In the absence of such authority, the *Garrido* court concluded that *Gentry* sets forth valid grounds for refusing to enforce an arbitration agreement as long as the FAA does not apply to the dispute. Applying the *Gentry* rule to the facts of Garrido's case, the court determined that class proceedings would be "a significantly more effective way of allowing employees to vindicate their statutory rights," and therefore the arbitration agreement's prohibition of class proceedings was unenforceable.

Unsurprisingly, a California court has found another way to hinder the enforcement of employment arbitration agreements. In light of *Garrido*, it will likely be more difficult for employers to enforce class waivers against employees in the transportation industry, and against employees whose activities do not implicate interstate commerce. Employers can nonetheless take heart that, in most cases, it is not difficult to establish that a plaintiff's employment and/or arbitration agreement involves interstate or foreign commerce. Given that local businesses often do business with out-of-state vendors, the predominance of the internet as a means of communicating, advertising, and expanding business, and ever-increasing globalization, more and more employees are participants in interstate transactions and are therefore likely subject to the FAA.

Court of Appeal Holds Arbitration Agreement is Enforceable Where the FAA Applies and No Evidence of Unconscionability Exists

In *Performance Team Freight Systems, Inc. v. Aleman*, a California appellate court was unimpressed with the evidence, or lack thereof, used to challenge an arbitration provision. A group of truck drivers who entered into independent contractor agreements with Performance Team Freight Systems, Inc. ("the Company") filed wage claims with the California Labor Commissioner ("Commissioner"). Prior to commencement of the Commissioner's hearings, the Company filed a petition to compel arbitration, citing the broad arbitration provisions contained in the independent contractor agreements.

The court first considered whether the arbitration provisions were governed by the Federal Arbitration Act ("FAA"). If the provisions were governed only by California law and not the FAA, California law would have precluded arbitration. If the FAA applied, however, arbitration would be required. The Commissioner argued that the workers were exempt from the FAA because they were transportation workers who had "contracts of employment" with the Company, placing them within a narrow exception to the FAA. The Commissioner, however, failed to produce evidence that the agreements were contracts of employment. The court concluded that the agreements were *not* contracts of employment because they were characterized as independent contractor agreements. Accordingly, the FAA applied.

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The Commissioner also argued that the arbitration provisions were unconscionable. Once again, however, the Commissioner failed to present evidence to support that assertion. Neither the Commissioner nor the individual workers presented evidence that the workers did not understand the agreements. Absent such evidence, the court could not assume that unconscionability existed. Therefore, the appellate court instructed the trial court to compel arbitration.

This case demonstrates how heavily courts scrutinize arbitration agreements and the evidentiary burdens that both sides face when arbitration provisions are challenged. Employers are advised to have their arbitration agreements reviewed by legal counsel to maximize the likelihood that they will be enforced.

Wisteria Lane Retaliation Claim Revived on Appeal: Desperate Housewife Not Required to Exhaust Administrative Remedies

In *Sheridan v. Touchstone Television Productions, LLC,* a California appellate court held that a plaintiff is not required to exhaust administrative remedies for alleged violations of section 6310 *et seq.* of the California Labor Code ("section 6310"), which prohibits retaliation against employees for complaining about unsafe working conditions. Defendant Touchstone Television Productions, LLC ("Touchstone") hired actress Nicollette Sheridan ("Sheridan") for the hit television series, *Desperate Housewives,* and had the option to renew her contract on an annual basis. During a rehearsal in September 2008, Sheridan attempted to question the show's creator, and he allegedly struck her in response. Sheridan complained to Touchstone about the alleged battery. Thereafter, Touchstone declined to renew her contract for the next season. Sheridan sued her former employer for wrongful termination in violation of public policy, claiming that Touchstone fired her because she complained about the alleged battery.

Sheridan's lawsuit has been a roller coaster of wins, losses, and unexpected turns fit for a television drama. After a mistrial and the granting of Touchstone's motion for directed verdict, Sheridan was permitted to amend her complaint to add a retaliation cause of action pursuant to section 6310.

Touchstone claimed that Sheridan failed to exhaust her administrative remedies by filing a claim with the Labor Commissioner; the trial court agreed. The appellate court, however, reversed the judgment in favor of Touchstone, holding that an individual may, but is not required to, exhaust administrative remedies before filing a lawsuit pursuant to section 6310. Thus, Sheridan's fit-for-prime-time-television legal action against Touchstone continues.

This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Jenna Leyton-Jones, Christine Mueller, Ryan Nell, Lauren Bates, Jennifer Suberlak or Shannon Finley at (858) 755-8500; or Jennifer Weidinger, Tristan Mullis or Andrew Chung at (310) 649-5772.