

JUDICIAL

Federal

Ninth Circuit Court of Appeals Holds in *Lim v. TForce* that Trial Court Correctly Determined Unconscionable Provisions in Arbitration Agreement

In *Lim v. TForce*, the Ninth Circuit Court of Appeals upheld a trial court’s denial of Transforce Logistic’s (“TForce”) motion to compel arbitration, holding that the delegation clause and arbitration provision were procedurally and substantively unconscionable under California law.

In deciding whether to compel arbitration under the Federal Arbitration Act (“FAA”), the court’s inquiry was limited to two “gateway” issues: whether a valid agreement to arbitrate existed and, if it did, whether the agreement encompassed the dispute at issue. In this instance, both gateway issues were expressly delegated to the arbitrator. As the court was addressing an agreement that clearly delegated questions of arbitrability to the arbitrator, the primary inquiry was therefore simply to focus on whether the delegation clause itself is unconscionable.

In order to establish unconscionability, the party opposing arbitration must demonstrate both procedural and substantive unconscionability.

Procedural unconscionability focuses on “oppression or surprise due to unequal bargaining power.” The trial court found that Lim received the contract on the day it was to be executed, that material terms (including the delegation clause) were pre-printed, and that there was no opportunity for negotiation of any of the contractual terms. Moreover, the delegation clause was presented in the middle of 31 numbered paragraphs with nothing in the text calling Lim’s attention to the clause. Importantly, Lim believed that if he wanted to continue delivering for the Red Cross, he needed to sign the contract. Viewing the evidence as a whole, the Court of Appeals held that the trial court correctly determined that procedural unconscionability existed with respect to the delegation clause because the circumstances left Lim without an ability to negotiate, and instead forced him to make a “take-it-or-leave-it” decision.

Substantive unconscionability examines the fairness of a contract’s terms and is concerned not simply with finding a “bad bargain,” but rather with identifying terms that are unreasonably favorable to the more powerful party. Here, the contract required Lim to arbitrate his claims in Dallas, Texas, and split

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arbitration fees evenly between the parties unless a showing of substantial financial hardship was shown. Meanwhile, the court noted, Lim resided in Southern California and could not afford to travel to Dallas and leave his daughter and his work for a significant period of time. The fee-splitting provision would also impermissibly impose on Lim an expense unique to arbitration. As a result, the trial court was also held to have correctly concluded that the provision was substantively unconscionable under California law.

TForce argued that it would waive the provisions at issue by paying all of the administrative costs of arbitration, not enforcing the venue clause, and arbitrating the claims in Southern California. Despite this attempted concession, the appellate court noted that a later willingness to alter the arbitration provision did not change the fact that the arbitration agreement, as written, was unconscionable and contrary to public policy. To conclude otherwise would incentivize drafters to overreach based on the assumption they could simply waive unconscionable terms if/when later forced to do so. As the California Supreme Court has previously noted, an arbitration agreement “permeated by unconscionability” should not be enforced.

As a result, the trial court’s decision to not sever the contract’s unconscionable terms and to decline to enforce the arbitration provision was upheld. In light of this ruling, California employers that utilize arbitration agreements should review applicable terms of their agreements and ensure that policies do not overreach, lest they be subject to similar levels of scrutiny and criticism.

California

California Court of Appeal Again Holds PAGA Claims Cannot Be Impacted by Arbitration Agreements in *Herrera et al. v. Doctors Medical Center of Modesto, Inc.*

In *Herrera et al. v. Doctors Medical Center of Modesto, Inc.*, the California Court of Appeal affirmed an order denying an employer’s motion to compel arbitration of Labor Code claims brought by former employees under the Private Attorneys General Act of 2004 (“PAGA”).

Plaintiffs were employed as registered nurses with the Doctors Medical Center in Modesto. The medical center purchased equipment and supplies from out of state and was therefore engaged in interstate commerce. Its registered nurses were unionized and covered by a collective bargaining agreement, which included a clause requiring arbitration of all employment-related claims, to be conducted in accordance with the Federal Arbitration Act (“FAA”). The arbitration clause expressly excluded class claims, limiting available relief to actions brought on an individual basis.

To meet its burden to compel arbitration of the plaintiffs’ claims, the employer needed to show that the arbitration clause: (1) covered the PAGA claims; and (2) was enforceable as to those claims.

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Regarding the first element, the trial court took as assumed that the arbitration clause encompassed the employees' California Labor Code claims arising under PAGA, which included claims for alleged failures to pay wages, provide meal and rest breaks, and reimburse necessary business expenses, among others. The arbitration clause specifically covered: "any and all claims and disputes that are related in any way to my employment or the termination of my employment." However, it excluded claims brought "in a class, collective, representative or group action."

Moving forward from the preliminary assumption that the broad arbitration clause intended to cover the employees' PAGA claims, the court turned to the question of enforceability. The court emphasized that the true party in interest in the employees' claims—the state—was *not* party to the arbitration agreements in question. Further, the former employees signed the arbitration agreements *before* they became authorized representatives of the state. Under those circumstances, the court held that the arbitration clauses could not be enforced to compel arbitration of the plaintiffs' PAGA claims.

The court further rejected the employer's argument that, under the doctrine of federal preemption, the FAA applied to preempt contrary California law that would otherwise prevent arbitration of PAGA claims. The court held that the FAA does not preempt the California law elucidated in this case—that a former employee who is authorized to pursue representative PAGA claims cannot be compelled to arbitrate those claims based on a pre-dispute arbitration agreement. Accordingly, the PAGA claims fell outside the scope of the FAA, and federal preemption did not require compelling arbitration of the claims.

The *Herrera* ruling affirms prior California decisions disfavoring compelled arbitration of PAGA claims. The crux of the court's opinion is that, by bringing claims under PAGA, employee plaintiffs act as agents of the state, and their arbitration agreements therefore cannot be enforced against the state as a non-party to the agreements. The court's decision does not limit the applicability of arbitration agreements for other claims, including traditional class actions, which employers can still successfully limit through appropriately crafted agreements.

EMPLOYMENT TEAM NEWS

Five Employment Team Attorneys Recognized by Best Lawyers® 2022

Pettit Kohn Ingrassia Lutz & Dolin is proud to announce that San Diego shareholders Thomas Ingrassia and Jennifer Lutz have been recognized by *Best Lawyers*® in the 2022 listing of *The Best Lawyers in America*. Additionally, shareholders Ryan Nell and Shannon Finley and associate Christine Dixon have been recognized by *Best Lawyers*® in the 2022 listing of *Best Lawyers: Ones to Watch*. They have each been selected as leading attorneys in their areas of practice. We are also excited to announce that this year, Thomas Ingrassia was recognized as "Lawyer of the Year" in San Diego for Employment Law – Management. The "Lawyer of the Year" honor is awarded to individual lawyers with the highest overall peer feedback, with only one lawyer recognized for each specialty and location.

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Thomas Ingrassia has been recognized in *Best Lawyers in America* for his work in Employment Law – Management and Labor and Employment Litigation. This year, Tom was honored as “Lawyer of the Year” in San Diego for Employment Law – Management, a practice area in which he has earned recognition by *Best Lawyers* since 2013. Tom is co-chair of the firm’s employment and labor group and has also achieved an AV Preeminent rating, Martindale-Hubbell’s highest rating for professional excellence and ethical standards. He has been selected for inclusion in the San Diego *Super Lawyers*® list every year since 2008 and has repeatedly been recognized as one of *Super Lawyers*’ Top 50 attorneys in San Diego. Additionally, he was included in the *San Diego Business Journal*’s 2020 list of “Leaders in Law.”

Jennifer Lutz has been recognized by *Best Lawyers* for her work in both Employment Law – Management and for her work in Labor and Employment Litigation. Ms. Lutz is a founding shareholder and co-chair of the firm’s employment and labor group. She is a speaker and author on issues such as wage and hour law, employee privacy, and leaves of absence, and also provides advice and training to employers on a full range of employment law issues. Ms. Lutz has been recognized by San Diego *Super Lawyers*® each year since 2011 and was included in the 2020 Top 25 Women Lawyers in San Diego. Additionally, she was recently included in the *San Diego Business Journal*’s 2021 list of “Women of Influence in Law.”

Ryan Nell has been recognized for his work in Labor and Employment Law – Management. Mr. Nell is a shareholder in the firm’s employment and labor group and represents California employers in both counseling and comprehensive litigation support. He speaks regularly on a wide range of topics aimed at assisting and guiding California employers in the avoidance of legal trouble. His work in employment counseling and litigation defense has also led to his recognition as a Rising Star by *San Diego Super Lawyers*®.

Shannon Finley has been recognized for her work in Litigation – Labor and Employment. Ms. Finley is a shareholder in the firm’s employment and labor group. She provides comprehensive litigation support to California employers as well as guidance to advise on best practices to avoid lawsuits before they arise. She is a speaker and author on issues including best hiring practices, wage and hour law, discrimination, and leaves of absence. She was recognized as a Rising Star by *San Diego Super Lawyers*® and received the C. Hugh Friedman New Lawyer Award from Lawyers Club San Diego for her leadership and professionalism in the San Diego legal community. She was also recognized by the *San Diego Business Journal* in their 2020 “Leaders in Law” list and 2021 “Women of Influence in Law” list. Ms. Finley currently serves on the Lawyers Club of San Diego Board of Directors as Vice President of Policy and Membership.

Christine Dixon has been recognized for her work in Litigation – Labor and Employment as well as Commercial Litigation. Ms. Dixon represents large and small corporate clients and handles a wide range of employment matters focusing on the defense of employers in all aspects of employment litigation. In addition, Ms. Dixon also handles retail litigation and general liability matters. Christine has been recognized as one of San Diego *Super Lawyers*® Rising Stars in 2021 and was also honored as San Diego Defense Lawyers’ Outstanding New Lawyer in 2015.

Ms. Dixon currently serves on the San Diego Defense Lawyers Board of Directors as Vice President.

Best Lawyers annually highlights the top legal talent across the globe and *Best Lawyers: Ones to Watch* highlights the topmost promising attorneys. Recognition is widely regarded by both clients and legal professionals as a significant honor. Selection to this listing is a testament to the attorneys' superior abilities, legal professionalism, high integrity, and outstanding regard in which they are held by their peers. Pettit Kohn Ingrassia Lutz & Dolin congratulates Mr. Ingrassia, Ms. Lutz, Mr. Nell, Ms. Finley, and Ms. Dixon on this honorable recognition.

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This is Pettit Kohn Ingrassia Lutz & Dolin PC's employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Ryan Nell, Shannon Finley, Rio Schwarting, Christopher Reilly, Tina Robinson, Zachary Rankin, Christine Robles, Brian Jun, or Christine Dixon at (858) 755-8500; or Grant Waterkotte, Tristan Mullis, Andrew Chung, Jennifer Weidinger, Rachel Albert, Sevada Hakopian, or Catherine Brackett at (310) 649-5772.

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