Client Alert

April 1, 2016

California Supreme Court Upholds Arbitration Agreements That Mutually Exclude Applications for Temporary Restraining Orders and Preliminary Injunctions

By Niles Pierson

On Monday, March 28, 2016, the California Supreme Court affirmed the decision of the Second Appellate District holding that an arbitration agreement in an employment contract is not substantively unconscionable simply because it excludes applications for provisional relief. The California Supreme Court's opinion in *Baltazar v. Forever 21*, No. S208345, 2016 WL 1176599 (Cal. Mar. 28, 2016) comes more than three years after the original appellate decision was issued, which was back in December 2012. *See Baltazar v. Forever 21, Inc.*, 212 Cal. App. 4th 221, 150 Cal. Rptr. 3d 845 (2012). The recent decision overrules an inconsistent older case decided by the First Appellate District, *Trivedi v. Curexo Technology Corp.* 189 Cal.App.4th 387, 116 Cal.Rptr.3d 804 (2010). The *Baltazar* opinion also clarifies that other provisions in an employment contract that are designed to protect the employer's confidentiality will not likely render the contract's arbitration provisions unconscionable.

In *Baltazar*, the plaintiff put forward three arguments in support of her claim that the arbitration clause in question was substantively unconscionable. First, the arbitration clause expressly exempted applications to a court for a provisional remedy, specifically citing to California Code of Civil Procedure § 1281.8. Second, in describing the sorts of actions that would be subject to the arbitration provision, the contract included a non-exhaustive list that happened only to describe actions likely to be brought by employees. Third, the contract required that the parties take steps to protect the employer's proprietary information during arbitration proceedings.

In support of her first point, the plaintiff relied heavily on the *Trivedi* opinion. The court in *Trivedi* held that exempting applications for provisional remedies – such as temporary restraining orders and preliminary injunctions – renders an arbitration agreement unconscionable because employers are more likely than employees to seek those types of remedies.

In rejecting *Trivedi*, the Supreme Court noted that, as in *Trivedi*, the arbitration clause in *Baltazar* applied to *all* causes of action brought by *either* the employer or the employee and only excluded applications for provisional relief by either side. In doing so, the arbitration clauses involved in *Trivedi* and *Baltazar* did nothing more than to reiterate the existing law as enacted under § 1281.8(b), which states:

> A party to an arbitration agreement may file in the court in the county in which an arbitration proceeding is pending, or if an arbitration proceeding has not commenced, in any proper court, an application for a provisional remedy in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without provisional relief.

Despite Baltazar's failure to present empirical data to support her claim that employers are more likely to seek provisional relief than employees, the Court assumed *arguendo* that such was the case. Nevertheless, the Court concluded that since the arbitration provision simply reiterates the existing law, it "merely confirms, rather than expands, rights available to the parties under that code section." The Court then announced the rule that "an arbitration agreement is not substantively unconscionable simply because it confirms the parties' ability to invoke statutory rights." The Court reasoned that simply stating the law "does not place [an employee] at an unfair disadvantage."

To bolster her claim that the arbitration clause lacked mutuality, the plaintiff then raised her second and third points. Regarding the second point, the Court found that the contract's language made clear that *all* claims were subject to the arbitration clause, despite the fact that the enumerated examples listed only causes of action available to employees. Importantly, the list of claims clearly indicated that it was non-exhaustive by stating that the relevant claims "include but are not limited to" those enumerated. With respect to her second point, the Court stated summarily "[a]greements to protect sensitive information are a regular feature of modern litigation, and they carry with them no inherent unfairness."

The upshot for employers is that they may rest assured that existing arbitration provisions that exclude applications for provisional relief need not be revised as may have seemed necessary after *Trivedi*. Furthermore, employers need not worry that their efforts to ensure the confidentiality of arbitration proceedings will preclude them from enforcing arbitration provisions. Still, the case serves as a reminder that when crafting employment agreements, employers must be wary of making the arbitration provisions one-sided, lest they may find themselves in court despite efforts to avoid precisely that outcome.

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