EMPLOYER'S PROCEDURAL MODIFICATIONS TO ARBITRATION PROCESS RENDERS ARBITRATION PROVISION UNENFORCEABLE

As we have noted previously, the United States Supreme Court has repeatedly reaffirmed the validity of provisions in employment contracts requiring the employer and the employee to arbitrate disputes arising out of the employment relationship[1]. Arbitration provisions in employment contracts are generally attacked on either one of two grounds: (1) the employee never agreed to the provision; or (2) the arbitration provision itself is unconscionable[2]. A recent opinion issued by California's First Appellate District is an example of how an employer's modifications to standard pre-arbitration procedures with respect to filing deadlines and discovery can limit the employee's rights to the point where the arbitration provision itself becomes unenforceable. The case is ***Baxter v. Genworth North American Corp.,*** 2017 WL 4837702 (Cal.Ct. App. A144744, October 26, 2017).

The plaintiff in *Baxter* was hired by AssetMark Investment Services, Inc. in 2001. Five years later, Genworth North American Corporation (Genworth) acquired AssetMark. Genworth's employment contracts included an agreement under which employees, as a condition of employment, agreed to subject their employment disputes to Genworth's alternative dispute resolution program. The program was a four step process, in which the final step was to submit the dispute to arbitration. The arbitration process included the following limitations:

- Employees and their attorneys were prohibited from contacting other employees with respect to the dispute, and/or obtaining information outside of the formal discovery process
- Employees were limited to ten (10) interrogatories, five (5) document requests, and two (2) depositions of no more than eight (8) hours each (the arbitrator could grant additional discovery "upon a showing of good cause")
- Employees were required to demand arbitration within thirty (30) days of the end of the third step of the resolution process, which could conceivably reduce the time for the employee to request and obtain a FEHA investigation
- The arbitration was required to be conducted within 120 days of appointment of the arbitrator, limiting the employee's opportunity to conduct discovery
- The arbitration was limited to two (2) days, subject to the arbitrator's discretion to extend the hearing.

Genworth terminated the plaintiff's employment in May 2013 when it eliminated her position. Plaintiff sued, alleging race discrimination, associational discrimination, and wrongful termination. Genworth moved to compel arbitration in accordance with plaintiff's employment contract. The trial court (Contra Costa

[1] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) (ADEA claim).

[2] Because the Federal Arbitration Act requires courts to "place arbitration contracts on equal footing with all other contracts" (*Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)), unconscionability as a defense to contract applies equally to arbitration provisions.

Superior Court) denied Genworth's motion and refused to enforce the arbitration provision on the grounds that the provision was procedurally and substantively unconscionable. On appeal, the Court upheld the trial court order.

Procedural Unconscionability – Courts apply this concept where they find that the parties have unequal bargaining power and the provision is imposed on a "take it or leave it" basis. The Court cited case law holding that pre-employment arbitration contracts create "economic pressure" because "few employees are in a position to refuse a job because of an arbitration agreement"[3]. [Of course, this is true of most employment contracts, where the employer's needs require standardized terms and conditions of employment and few employers are in a position to custom tailor their contracts to the needs of each individual prospective employee.] Based on the fact that the plaintiff lacked equal bargaining power with Genworth, the Court found a "high degree of oppressiveness" supporting a holding of procedural unconscionability.

Substantive Unconscionability – Courts apply this concept when they find that the provisions of the contract are "overly harsh," "unduly oppressive" or "so one-sided as to shock the conscience." The general standard is that the contract must be "unreasonably favorable to the more powerful party"[4]. In *Baxter*, the Court found that the employer's modifications to the general arbitration procedures made the process unreasonably one sided in Genworth's favor. The Court also declined the option of simply removing or restricting the unconscionable provisions, holding that the presence of multiple unconscionable provisions made this remedy inapplicable.

EMPLOYER'S TAKEAWAY – Although some high profile California employers (such as Uber) are removing arbitration clauses from their employment contracts, these clauses still have value in terms of limiting litigation costs. The key is to make sure that the clause and its provisions will withstand judicial scrutiny.

Most third party ADR providers such as JAMS or the American Arbitration Association have established, vetted procedures for the conduct of arbitrations which usually withstand subsequent judicial review. Given the inherent and unavoidable inequality of bargaining power between employers and employees with respect to arbitration agreements, employers should be reluctant to tamper with or modify standard arbitration procedures. Any deviation from the norm which appears to limit or restrict the rights of employees will likely be viewed by California courts as "unconscionable" and could cause the entire arbitration clause to be stricken.

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[3] Citing *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 115 (2000).
[4] *Sonic-Calabasas A, Inc. v. Moreno*, 57Cal.4th 1109, 1145 (2013).