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PERSPECTIVE

Ruling should give employers pause with arbitration agreements

By Hilary Weddell

The 4th District Court of Appeal recently issued its decision in *Carbajal v. CWPSC Inc.*, 2016 DJDAR 2015 (Feb. 26, 2016), invalidating an employment arbitration agreement due to a number of provisions the court considered problematic. The *Carbajal* decision may signal that the tide is again changing in California, and courts may be more likely to refuse to enforce employment arbitration agreements on the basis of procedural or substantive unconscionability.

For many years, courts in California routinely found employment arbitration agreements to be unconscionable. In more recent years, however, courts have looked upon such agreements more favorably, in large part due to two key decisions — *AT&T Mobility LLC v. Concepcion*, 563 U.S. 321 (2011), and *Iskanian v. CLS Transp. Los Angeles LLC*, 59 Cal. 4th 348 (2014) — which expressed a public policy in favor of arbitration. The *Carbajal* case may be an indication that another shift is upon us, where courts will again closely scrutinize provisions in employment arbitration agreements.

The *Carbajal* court examined an arbitration agreement in an employment agreement between a college student — Martha Carbajal — and a residential painting service for homeowners — CWPSC. Carbajal was solicited by CWPSC while she was a student at UC San Diego, and was accepted into CWPSC's "intern program." During her interview with CWPSC, Carbajal was asked to sign the employment agreement, which contained a binding arbitration clause. No one explained the agreement to Carbajal, nor was she given an opportunity to negotiate its terms.

After approximately six months of work, Carbajal terminated her employment with CWPSC and filed a class action asserting a number of wage and hour claims. When Carbajal refused to submit her complaint to binding arbitration, CWPSC petitioned the court to enforce the parties' arbitration agreement. Carbajal opposed CWPSC's motion by arguing that, among other things, the arbitration agreement was unconscionable. The trial court agreed with Carbajal and refused to compel the parties to arbitrate.

The unconscionability doctrine is concerned with the absence of meaningful choice on the part of one of the parties and contract terms that are unreasonably favorable to the other party. The doctrine has both a procedural and a substantive element, and both must be present, though not necessarily to the same degree. The procedural element focuses on the manner in which the contract was negotiated and the parties' circumstances at that time. The substantive element focuses on whether the terms of the agreement are one-sided and will have an overly harsh effect on the disadvantaged party.

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In *Carbajal*, the Court of Appeal affirmed the trial court's decision invalidating the arbitration agreement on the grounds that it was unconscionable. The court found the arbitration agreement was procedurally unconscionable because, like many employment agreements, the contract was one of adhesion, meaning it was a "take it or leave it" agreement that was imposed on Carbajal as a term of her employment without an opportunity to negotiate its terms. The agreement was a standard, preprinted form that Carbajal was required to sign if she wanted to work for CWPSC. The court highlighted the fact that because Carbajal was one of many college students seeking a job with CWPSC, she did not have any bargaining power. Carbajal claimed that she was asked to sign the agreement during her interview, and said no one explained the agreement's terms to her. Finally, the court found the provision of the agreement stating the rules of the American Arbitration Association (AAA) would govern the arbitration process was procedurally unconscionable because it did not identify which specific AAA rules would apply, did not state where Carbajal could find those rules, and Carbajal was not given adequate opportunity to review any rules. As a result, the court found that the arbitration agreement had a "moderate level" of procedural unconscionability.

The court declared the arbitration agreement also had a "moderate level" of substantive unconscionability due to a number of blatantly one-sided terms. It found the agreement's unilateral injunctive relief clause, which allowed CWPSC to seek injunctive relief in court but required Carbajal to arbitrate all her claims, was substantively unconscionable. The injunctive relief carve-out not only gave CWPSC broader relief than authorized under the code, but also allowed CWPSC to seek injunctive relief without having to post a bond. Lastly, the court explained that the provision waiving Carbajal's statutory right to recover her attorney fees if she prevailed on her Labor Code claim was substantively unconscionable because it deprived her of rights to which she was entitled.

Ultimately, the court found that the moderate level of both procedural and substantive unconscionability resulted in an arbitration agreement that "was permeated with unconscionability." Thus, the Court of Appeal upheld the lower court's decision invalidating the agreement as a whole, rather than severing the offending provisions and enforcing the remainder of the arbitration agreement.

While it is yet to be seen whether *Carbajal* is a signal that another change is upon us, the decision nevertheless highlights important considerations for employers drafting employment arbitration agreements:

(1) Because most employment arbitration agreements are contracts of adhesion — employees are required to sign the agreement as a condition of employment without an opportunity for bargaining — employers should take care to ensure the individual provisions contained therein are mutually fair and carefully drafted.

(2) Identify the specific rules that will govern the arbitration (i.e., American Arbitration Association Employment Arbitration Rules) and state where employees can view the rules.

(3) All restrictions and benefits in the agreement should be mutual. Particularly avoid including unilateral terms that restrict only the employee or provide benefits only to the employer.

(4) Do not include provisions attempting to revoke the employee's statutory rights or remedies, such as the right to recover attorney fees.

(5) Provide employees with sufficient time to review the agreement and seek the advice of counsel.

Whatever the future may hold for employment arbitration agreements in California, employers should take care in drafting such agreements. Each provision in the agreement should be reviewed for enforceability, so as to avoid potential invalidation of the entire agreement.

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