Class Arbitration Prohibited If Not Authorized In Agreement

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A California appeals court recently held that a former security officer's wage-and-hour class action suit must be submitted to arbitration on an individual basis and that class arbitration is prohibited unless expressly noted in the arbitration agreement.

In Jesus Reyes v. Liberman Broadcasting, Inc., the California Court of Appeal, Second Appellate District, reversed the lower court's denial of the employer's motion to compel arbitration based on the arbitration agreement Reyes signed before working for Liberman Broadcasting, Inc. (LBI). In this arbitration agreement, Reyes agreed to arbitrate any disputes with LBI "arising out of, relating to or in any way associated with" Reyes' employment with LBI as a security officer. Reyes worked at LBI from April to September 2009. In May 2010, Reyes filed a wage-and-hour class action.

Initially, LBI answered the complaint and did not seek to compel arbitration. More than a year into the litigation, in July 2011, LBI filed a motion to compel arbitration. The lower court denied LBI's motion, stating that the company waived its right to arbitration by its "failure to properly and timely assert it." LBI then appealed.

The Second District Court of Appeal held that LBI did not waive its right to compel arbitration. In reaching this conclusion, the three-judge panel analyzed the following factors in determining that no waiver of right to arbitrate occurred:

1. Whether LBI's actions were inconsistent with the right to arbitrate

2. Whether the "litigation machinery [had] been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate

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3. Whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay

4. Whether a defendant seeking arbitration filed a counterclaim without asking a stay of the proceedings;

5. “Whether important intervening steps…had taken place”

6. Whether the delay “affected, misled, or prejudiced” the opposing party

Of import was the first factor – whether LBI’s actions were inconsistent with the right to arbitrate. In examining this factor, the court found that the arbitration agreement, while silent, did not authorize class arbitration. According to the court, “arbitration agreements silent on the issue of class arbitration nevertheless have the same effect of precluding class arbitration so long as there is no evidence that the parties agreed to class arbitration.”

In reaching this conclusion, the court discussed the application of the U.S. Supreme Court’s 2011 decision in *AT&T Mobility v. Concepcion*, which held that the Federal Arbitration Act preempted state laws that invalidated class action arbitration waivers. Specifically, the court analyzed whether *Concepcion* decision overruled or otherwise limited a state court case, *Gentry v. Superior Court*, which imposed class arbitration on the parties if the moving party could meet certain factors. The *Reyes* court declined to rule whether *Gentry* remained good law; however, it found that Reyes failed to meet the four factors to demonstrate the arbitration agreement was unenforceable.

Reyes adds weight to the argument that *Concepcion* must be read to permit arbitration of employment disputes even when the arbitration provision prohibits class arbitration. However, as we have noted before, some courts in California remain hostile to the arbitration of employment claims, particularly when the arbitration agreements waive class claims. In California, the issue ultimately will be decided by the state Supreme Court, although no case presently presents that issue. Moreover, the NLRB continues to attack class arbitration waivers and just filed a brief in support of the position with the Fifth Circuit. More to come.