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Calif. Case Brings Guidance On Post-Dispute Arbitration Pacts

By **Margaret Maraschino** (May 10, 2018, 12:28 PM EDT)

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Last month, an employer failed in its efforts to compel arbitration of the claims of members of a certified class of employees under an arbitration provision that the company, Inter-Coast International Training Inc., introduced after a wage and hour class action was filed by a former employee, Anthony Nguyen. In an unpublished decision in Nguyen v. Inter-Coast International Training, a three-judge panel for California's Second Appellate District affirmed the trial court's ruling that Inter-Coast's introduction of a mandatory post-litigation arbitration agreement through a handbook revision was unconscionable and unenforceable.[1] The opinion, however, provided valuable guidance to employers that may wish to introduce post-dispute arbitration agreements while seeking to avoid a similar unconscionability finding.

Nguyen was a former employee who sued Inter-Coast, alleging various wage and hour claims on behalf of himself and other current and former employees. Prior to the litigation, Inter-Coast had no arbitration program, so neither Nguyen nor any other putative class members had executed an arbitration agreement with Inter-Coast. After the suit was filed, Inter-Coast updated its handbook to include an arbitration provision, which 62 members of the putative class executed. Later, as the litigation progressed, there were several subsequent revisions to the handbook and, as a result, an additional 106 putative class members agreed to the arbitration provision. Eventually just over half of the putative class members had executed the provision. After a class and various subclasses were certified, the company then moved to compel those who had signed the agreement to arbitrate any disputes arising from the action. In opposing that motion, the plaintiff argued that the arbitration provision was unconscionable and should not be enforced.

The trial court agreed, ruling that there was procedural unconscionability because the agreement was adhesive and was introduced within the handbook in a manner that was "not adequately highlighted or separated from the rest of the" text. The court objected that the print was a small, single-space font, without its own heading. Making the agreement "unnecessarily difficult to read" the trial court found added "an element of surprise." Turning to substantive unconscionability, the trial court found the agreement was "one-sided and unfair" because Inter-Coast did not inform employees that they were "potentially giving up their existing rights to participate in the instant class action." The appellate court noted that Inter-Coast "failed to respond to these arguments" when they were raised at the trial court.

On appeal, Inter-Coast objected to the finding of procedural unconscionability, arguing that it had

presented evidence (a declaration from Inter-Coast's president) attesting that the arbitration agreements were voluntary. The court noted that there was "limited evidence pertaining to the circumstances surrounding the execution of the agreements" from either party but held that the trial court was entitled to credit the plaintiff's evidence (two employee declarations describing company meetings in which employees were "instructed to sign" the revised handbooks) over the company's submission. The court agreed that the text size and format presented the agreement in a "surprising" way, saying that it was not "separate and apart from any other provision in the employee handbook" and was a "lengthy block of small, single-spaced text" on the "final pages of an 11-page handbook" with "[n]o style elements, such as a heading, indentations or emphasized text" to differentiate or emphasize the provision.

Inter-Coast also disputed substantive unconscionability and the notion that employees were unaware that the agreement would affect the pending class action. It noted that many of the arbitration agreements were signed after notices of the litigation had been sent out and after the plaintiff's counsel had engaged in "extensive contacts with the putative class." In a case-specific twist, the court noted that this lack of clarity was Inter-Coast's fault because it had represented to the trial court in its motion to compel that all of the arbitration agreements were signed in 2012 (i.e., before those events had occurred) without clarifying that some were signed later. The court noted, however, that, even if employees knew of the suit, the language of the arbitration provision said that it applied to resolve "all disputes which may arise out of the employment context," which was not "backward-looking." The court believed that language could be reasonably understood "to apply only to disputes that 'may arise' in the future rather than to disputes that already had arisen and remained ongoing." It thus held that Inter-Coast "did not apprise the employees at the time of signing these agreements that their rights in the [current] class action could be affected thereby" and that this rendered the agreement "unfair, one-sided and substantively unconscionable."

In reaching its conclusion, the court faulted the cases cited by both parties, noting that they were "equally unsupportive" of their positions regarding the unconscionability of post-dispute agreements with putative class members. The plaintiffs relied on a nonbinding, unpublished federal case, which was neither binding nor "persuasive." Inter-Coast cited only two cases for the proposition that "obtaining post-litigation releases and/or [arbitration agreements] is not a basis to [sic] finding unconscionability." The court held that neither actually ruled on this issue. Inter-Coast does not appear to have cited case law, such as the California Supreme Court's rulings in Armendariz or Gentry, both of which acknowledge that employers and employees may enter post-dispute arbitration agreements with allegedly aggrieved employees.[2]

Nor did Inter-Coast cite to cases such as Hendershot v. Ready to Roll, in which a published appellate decision addressed post-dispute arbitration agreements that were obtained by most members of a putative wage and hour class after the case was filed.[3] While the Hendershot court reversed the denial of certification based on the numerosity analysis, it did not suggest that the post-dispute agreements were inappropriate and specifically noted that the company would have "the option of moving to compel arbitration as to putative class members should the class be certified." It also held that the existence of the arbitration agreements provided affirmative defenses which should be considered in "the determination of whether the class representatives here can adequately represent members who have signed releases and arbitration agreements, or whether those representatives' claims and defenses are typical of those of the class." Finally, Inter-Coast does not appear to have relied upon any case law upholding other forms of post-dispute, precertification agreements with members of a putative class such as the releases given by many members of a putative class, which were upheld in Chindarah v. Pick-Up Stix.[4]

To avoid the issues present in Nguyen, an employer would be well-served by proactively establishing an arbitration program prior to the filing of a class action. If Inter-Coast had an existing arbitration agreement, it could have avoided the substantive unconscionability argument presented in this case. To the extent an employer lacks a predispute agreement, however, there is authority authorizing post-dispute, precertification agreements between employers and members of putative wage and hour classes. Companies who wish to enter such agreements should take the following guidance from Nguyen:

- To address potential concerns about "unfair surprise," consider providing a stand-alone arbitration agreement — rather than incorporating the provision within a handbook revision. Also consider methods of formatting the agreement (e.g., font size, headings, bolded language or indentations) that will make it difficult to suggest that the arbitration provision is difficult to see or read.

- To confront potential concerns regarding adhesiveness and differing accounts about the "circumstances of execution" of the agreement, consider ways to make the fact that the agreement is voluntary facially apparent, including within the agreement. Rather than managers obtaining signatures at staff meetings, perhaps distribute the agreement for e-signature and require the employee to scroll through the terms before e-signing. Or consider mailing the agreement to employees and providing notice that it will apply unless (during a reasonable interval) the employee follows instructions to opt-out.

- To address potential concerns about the substantive issues the Nguyen court identified, draft the agreement so that it clearly encompasses already-pending claims and informs employees that such claims will be subject to the arbitration agreement. Rather than say the agreement will resolve "all disputes which may arise" as Inter-Coast did, consider language that the agreement will apply more broadly, including "all claims now in existence, including any currently pending claims."[5]

- To the extent that arbitration agreements are sought from employees early in the case before they receive notice of the pending case, consider identifying all pending class actions or even the name of the pending case and stating specifically that the agreement will apply to (and require arbitration of) any claims arising from such litigation.

By following the above guidance, employers may avoid the unconscionability finding that prevented Inter-Coast from enforcing its post-dispute arbitration agreements. Employers who succeed in obtaining enforceable agreements may also consider raising the agreements in opposing class certification. While Inter-Coast appears to have raised the effect the agreements would have on the numerosity factor, this did not persuade the trial court, likely because, as Hendershot suggests, this issue goes more directly to the typicality and adequacy requirements as a class representative who has not signed an arbitration agreement is not subject to one of the key affirmative defenses many putative class members would face. Many courts have held that the existence of arbitration agreements applicable to class members but not the putative class representative is a barrier to certification. [6]

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[1] Nguyen v. Inter-Coast International Training Inc., No. B270305, 2018 WL 1887347 (Cal. Ct. App. April 20, 2018).

[2] Armendariz v. Found. Health Psychcare Servs. Inc., 24 Cal. 4th 83, 112 (2000) (employers are free to "negotiate post-dispute arbitration agreements" with employees); Gentry v. Superior Court, 42 Cal. 4th 443, 467 (2007) ("nothing in this opinion, nor in any subsequent trial court ruling, precludes [an employee] from entering into an individual post-dispute arbitration agreement with" his/her employer).

[3] Hendershot v. Ready to Roll Transportation Inc., 228 Cal. App. 4th 1213, 1223, 1224, n.7. (2014).

[4] Chindarah v. Pick-Up Stix Inc., 171 Cal. App. 4th 796, 803-04 (2009).

[5] See, e.g., In re Verisign Inc., Derivative Litig., 531 F. Supp. 2d 1173, 1224 (N.D. Cal. 2007) (courts have allowed broadly worded arbitration agreements "to apply retroactively to transactions that occurred prior to the execution" of the agreement").

[6] See, e.g., Conde v. Open Door Mktg. LLC, 223 F. Supp. 3d 949, 959 (N.D. Cal. 2017) (collecting cases finding "no typicality and adequacy where the named plaintiff was not subject to an arbitration agreement" to which "other putative class members were bound").