PUBLISHED IN THE DAILY JOURNAL
December 29, 2009

CLASS ARBITRATION AFTER GENTRY

PERSPECTIVE
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Court decided *Gentry v. Superior Court*, 42 Cal.4th 443 (2007), which ostensibly opened the door to arbitrations in employment class action. While proponents of class action arbitration rejoiced when the*Gentry* opinion was issued, the floodgates of class action arbitrations never opened. In all likelihood, that is because questions remain regarding the procedures, scope and implications of class action arbitrations.

In *Gentry*, a Circuit City employee filed a class action seeking overtime pay for himself and other similarly situated employees who were misclassified as managers and executive employees, and that misclassification deprived them of overtime pay under California law. Circuit City moved to compel arbitration, based upon an employment packet that contained both an arbitration agreement and a class arbitration waiver. The California Supreme Court ruled that the class action waiver was unenforceable. Specifically, the court laid out a multi-factor test to determine whether waivers in employment agreements are enforceable. The critical consideration in deciding whether class action arbitration waivers are enforceable is whether class arbitration is "likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration." When applied to employment arbitrations, *Gentry* makes it clear that class action arbitration waivers are, with limited exception, voidable. Accordingly, with the proliferation of arbitration clauses in employment agreements, one would expect that there would be a proliferation of class action arbitration following *Gentry*.

So why have there been so few class action arbitrations since *Gentry*? One possible reason is that employers reflexively avoid class action arbitrations. It is equally likely that there are several important procedural considerations and issues that need to be resolved before class action arbitrations can become a common tool for litigating employment and other claims.

First, litigants must ask themselves whether all due process rights are fully protected in class arbitrations. While due process is ordinarily not a consideration when dealing with arbitrations that are brought on an individual basis, putative class members' due process rights appear to be implicated in arbitration. *See Keating v. Superior Court*, 645 P.2d 1192 (Cal. 1982) and *Bazzle v. Green Tree Financial Corp.*, 569 S.E.2d 349 (S.C. 2002). Arbitration providers such as the American Arbitration Association and JAMS have set forth supplemental rules governing class arbitrations, which specifically provide procedures for notice of class certification and proposed settlements to unnamed class members. However, although the AAA rules are modeled after Federal Rule of Civil Procedure 23, there are certain procedural safeguards that are not present in the AAA rules.

One question is whether the AAA rules require that the class representative be adequate, as required under Rule 23. While the rules set forth by the AAA require that representative parties and class counsel "fairly and adequately protect the interest of the class," the rules omit further procedural criteria and standards that are provided by Rule 23. Another due process requirement is that a fair and impartial decision maker conduct the arbitration. The AAA allows parties to participate in the selection of the arbitrator, but in a class action arbitration, the arbitrator is selected *before* class certification because it is the arbitrator's job to certify the class. As a result, putative class members have no role in the selection of arbitrators.

From a due process perspective, can a putative class member be unilaterally bound by an arbitrator's determination when the class member had no role in the selection of the arbitrator? Under the AAA Rules, judicial review exists only with respect to the following rulings: the enforceability of the class action arbitration contractual provision; and the arbitrator's ruling on class certification.

Even if judicial review is sought by one of the parties, the standard of review in an arbitration is demonstrably lower than in court actions. The Federal Arbitration Act provides that the court may vacate an award only in very limited circumstances, one of them being "where arbitrators exceeded their powers." Courts have adopted a "manifest disregard of the law" exception under which a procedurally proper arbitration award may be vacated. To demonstrate a manifest disregard of the law, the moving party must show that the arbitrator understood and correctly stated the law, but disregarded it. That standard is demonstrably lower than the appellate review available in state and federal courts. Strategically, parties must carefully consider whether they want to give up the full protections of an appellate review that all determinations by the arbitrator fully comply with applicable law.

It is quite likely that the foregoing issues may be addressed, from a purely due process perspective, by giving putative class members the right to opt out of the class action. However, because due process does not generally require that class notice be actually received by class members, it is quite likely that individuals who never received notice of a class action might argue that they are not bound by an arbitrator's decision in connection with the certification of a class action. This will probably remain an open issue until a disgruntled putative class member who never received actual notice of the class action arbitration brings a challenge.

There are also questions as to whether or not the class action remedy is suitable in many cases where there are multiple versions of the class action arbitration provision. In fact, under the AAA rules, each class member must have signed an arbitration agreement containing an arbitration clause that is "substantially similar" as the class representative and other members of the class.

In cases where there are multiple defendants, questions will arise as to whether claims are amenable to class action arbitration because some of the defendants might not be parties to the agreement that contains the arbitration provision. In the absence of an agreement by all of the parties to proceed by way of arbitration, it is likely that such actions will simultaneously proceed against some defendants in arbitration and against other defendants in court. The possibility of two-front litigation battles has often prompted defendants to refuse to enforce class action arbitration provisions.

Finally, there is a growing unwillingness on the part of some arbitration associations to be involved in any consumer arbitrations. On July 24, 2009, for instance, the National Arbitration Forum refused to accept any new consumer arbitrations. While the AAA and JAMS are accepting consumer class action, it is likely that designated arbitration forums might not be willing to conduct class action arbitrations - even if the parties are willing to do so.

Thus, while *Gentry* seemed to open the door to employment class action arbitration, the existing uncertainties associated with the entire class action arbitration process have effectively curtailed the widespread use of arbitration in employment class actions. Until these issues are resolved, the impact of *Gentry* will probably be limited to the voiding of employment arbitration provisions - rather than the expansion of arbitrations in class action employment disputes.

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