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California Supreme Court's decision in *Discover Bank v. Superior Court* leaves an opportunity for employers seeking to use and enforce class action and class arbitration waiver clauses in employment-related arbitration agreements.

The California Supreme Court Leaves a Window of Opportunity for Class Action Waiver Clauses in Employment Arbitration Agreements

By Henry Lederman and Lisa Chagala

On June 27, 2005, the California Supreme Court issued a long-awaited decision in *Discover Bank v. Superior Court*, Case No. S113725, and held that, "at least under some circumstances," class action and class arbitration waiver clauses in consumer contracts are not enforceable. Although *Discover Bank* may not represent the best of all possible results for employers, the California Supreme Court left open a window of opportunity for the use and enforcement of class action and class arbitration waiver clauses in the employment context.

The Facts of *Discover Bank v. Superior Court*

In *Discover Bank v. Superior Court*, a credit card holder filed a class action in California against Discover Bank, alleging that the bank breached the cardholder agreement by imposing a late fee of $29 on payments that were received on the payment due date, but after the bank's undisclosed 1:00 p.m. "cut off" time. Discover Bank moved to compel arbitration on an individual basis and to dismiss the class action, arguing that the arbitration provision in the cardholder agreement expressly prohibited class arbitration and class actions. The arbitration agreement contained a choice of law clause stating that Delaware law governed. In response, the plaintiff argued that the class action/arbitration waiver clause, as stated in the cardholder agreement, was unconscionable and, therefore, unenforceable under California law.

In striking down the class action/arbitration waiver clause, the California Supreme Court relied heavily on the fact that the potential dollar recovery for an individual plaintiff in that case was so small that it was impractical for an individual plaintiff to file suit, leaving the unlawful conduct unremedied and uncorrected. The court explained that through class action or class arbitration, numerous small individual recoveries could be aggregated to create an economically viable claim against the wrongdoer. In the words of the court, a defendant should not be permitted to "retain the benefits of its wrongful conduct and to continue that conduct with impunity."

The court further noted that the class action/arbitration waiver clause in the cardholder agreement also exhibited one-sidedness and oppressiveness, as the cardholder was deemed to accept the waiver clause if he or she did not close the credit card account. Furthermore, the court noted that the waiver clause was not likely to negatively impact Discover Bank, as there were few (if any) instances in which Discover Bank would seek to file a class action or class arbitration against an individual cardholder.

The *Discover Bank* opinion may have implications nationwide. Justice Baxter, concurring in part and dissenting part, noted that because the majority decided to ignore the choice of law provision in the arbitration agreement, California could now become a magnet for class actions that would under other state laws not be permitted.

The California Supreme Court Provides Favorable Language for Employers

Although the *Discover Bank* decision limits the permissible scope of class waiver clauses in the context of certain consumer agreements, the language of the California Supreme Court's decision provides opportunity for employers seeking to use and enforce class action/arbitration waiver clauses.

In *Discover Bank v. Superior Court*, the California Supreme Court curtailed the reach of its holding by stating that "not… all class action waivers are necessarily unconscionable…" and that "[c]lass action and arbitration waivers are not, in the abstract, exculpatory clauses." In doing so, the court seemingly confirmed that some class action/arbitration waivers are, indeed, enforceable. The court strongly suggested that the types of cases where class action/arbitration waiver clauses may be enforceable are those cases where the individual claim at issue is valuable enough to warrant investment by an individual plaintiff and a plaintiff's attorney.

The California Supreme Court went so far as to address class action/arbitration waiver clauses in the context of employment discrimination cases. Focusing on age discrimination lawsuits, the court pointed out that "large individual awards are commonplace" for such claims and that "[u]nder California law, classwide arbitration is only justified when 'gross unfairness would result from the denial of opportunity to proceed on a classwide basis.'" As such, the court strongly suggested that discrimination claims of significant dollar value may be subject to a class action/class arbitration waiver clause.

A typical employment discrimination lawsuit (such as a claim of discriminatory failure to hire or promote or a harassment claim) is often significant enough to attract the attention and efforts of an individual plaintiff and plaintiff's attorney and, as such, is arguably subject to a class action/class arbitration waiver clause. Thus, an arbitral class action waiver clause may be enforceable in a case in which, for example, a plaintiff purporting to represent a protected class underrepresented in management ranks seeks class action status. Under California and federal employment discrimination laws, that single plaintiff may have a claim for back-pay, front-pay, emotional distress, punitive damage and attorneys' fees and costs. Arguably, it would not be "grossly unfair" to require that plaintiff to arbitrate his or her case on an individual basis only, as the arbitral process would provide the plaintiff with a full opportunity to vindicate his or her claim of discrimination.

Extension of Favorable Language to Wage and Hour Claims

Although not addressed in the decision, the court's logic also possibly supports the enforceability of a class action/arbitration waiver clause in the context of wage and hour claims. In many cases, an individual wage and hour claim may be of lesser dollar value than a typical individual discrimination claim, but wage and hour actions are normally well above the $29 claim at issue in *Discover Bank*, particularly given the significance of waiting time penalties, interest and attorneys' fees. As such, employers may argue that a class action/class arbitration waiver clause is enforceable with respect to such claims, as the absence of class action arbitration would not be license to engage in wage and hour violations "with impunity," as was feared by the court in *Discover Bank*.

A Possible Opportunity

The California Supreme Court has provided employers an opportunity to continue to argue for enforcement of class action/class arbitration waiver clauses in the employment context. Employers who have not done so already are urged to consider the merits of adopting a class action and class waiver clause as part of their employment-related arbitration agreements. While the validity of such clauses have not yet been conclusively resolved, the California Supreme Court's decision in *Discover Bank* suggests that they may continue to be a viable option.

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