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Circuit City Meets the California Labor Commissioner: Does the FAA Preempt Administrative Claims?

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COMMENTS

CIRCUIT CITY MEETS THE CALIFORNIA LABOR COMMISSIONER: DOES THE FAA PREEMPT ADMINISTRATIVE CLAIMS?

I. INTRODUCTION

Carlos' was a day laborer, standing on a busy street corner in southern California. When a man pulled up in his car and asked him if he wanted work as a janitor, he quickly agreed and jumped in. The day job turned into something more permanent: Carlos worked for that employer for three years. However, the employer never paid him overtime, despite the fact that Carlos regularly worked nine and ten-hour days. After Carlos was laid off, he heard that he could file a claim with the California Labor Commission for the overtime pay he should have received. He filed the claim, and appeared for a pre-hearing conference at the Labor Commission. At the conference, the Deputy Commissioner informed the employer that he had violated the California Labor Code by not paying overtime, and that if he went forward to a hearing, he risked being ordered to pay the full amount of back wages due plus statutory penalties and interest. The employer consulted with his attorney and after several rounds of negotiation, he and Carlos agreed to a settlement. Carlos received a check for $9,000. The entire process had taken only three months and had cost Carlos nothing but his time. His statutory rights were enforced, and both he and the employer could move on with their lives. The employer was now on notice regarding his statutory obligation to pay overtime, and while he had to pay Carlos and his own attorney, the costs were minimal when compared to a court proceeding.

1. Carlos is not his real name, but his story is based on an actual case brought before the California Labor Commission in 2003.
2. In many communities of southern California, Hispanic men wait on street corners to be picked up for day labor. Employers drive up, let them know what they need, and one or more men hop into the car.
3. Both parties may represent themselves or have counsel. Division of Labor Standards Enforcement, Policies and Procedures for Wage Claim Processing, at www.dir.ca.gov/dlse/Policies.htm (last revised May 2001). In many cases, the workers are represented by public interest organizations such as Legal Aid Society, California Rural Legal Assistance, or the Employee Rights Center. Employers typically have private counsel. Telephone Interview with Michael Jackman, Counsel, California Labor Commission (Aug. 4, 2003).
When non-union workers in California have a dispute with their employer over wages, hours or related issues, the Department of Labor Standards Enforcement (DLSE) (also referred to as the Labor Commission) provides a powerful resource to protect their rights under the California Labor Code. After receiving a claim from a worker, the Labor Commission holds a pre-hearing conference, in an attempt to settle the dispute informally. If the parties cannot reach a settlement, they proceed to an administrative hearing, where a Deputy Labor Commissioner determines the validity of the worker's claim. If the Commissioner finds the employer liable for Labor Code violations, he can award back pay, penalties and interest to the employee. Workers can also bring certain discrimination claims to the Labor Commission and the agency will investigate those claims and issue a decision. In both cases, decisions of the Labor Commission are binding, subject to appeal in Superior Court, and if the employer does not comply with a finding against him, the Labor Commissioner can proceed to court to have it enforced.

What if Carlos had signed an employment agreement with a mandatory arbitration clause? Would he still have been able to pursue his claim before the Labor Commission? Should he be able to? Many employers today require new employees to sign mandatory arbitration clauses as a condition of employment, in order to avoid the costs of litigation. Does a worker who signs such an agreement waive his right to take a claim, not just to court, but...
to the Labor Commission as well? This Comment explores these questions in light of recent Supreme Court decisions regarding arbitration clauses in employment contracts. This is an especially contentious and unsettled area of law in California. This Comment examines recent California cases and developing legal theories bearing on the right of workers to take statutory claims to the Labor Commissioner (or to court) when they have signed arbitration agreements with their employer. The Comment argues that while employers are often defeated in their attempts to compel workers to arbitrate, the process is time-consuming, costly and unpredictable; resulting in wasteful litigation and uncertainty for employers and workers alike.

Part II describes the background of the current debate, including a brief history of the Federal Arbitration Act (FAA), and Supreme Court decisions that have expanded its scope in recent years to cover statutory employment claims brought by most employees. Part II also summarizes the arguments made by the proponents and opponents of arbitration clauses in employment contracts.

Part III discusses the law as it has developed in California since two watershed U.S. Supreme Court decisions: Circuit City v. Adams and EEOC v. Waffle House. This part explores the California (and Ninth Circuit) courts’ approach to arbitration clauses in employment contracts. It focuses on the California Supreme Court’s guidelines for evaluating arbitration clauses, laid down in Armendariz v. Foundation Health Psychcare Services, Inc. and the case law that applied those guidelines. It discusses the position of the California Labor Commissioner on its jurisdiction where an arbitration clause exists. In addition to Labor Commission cases, Part III looks at the fate of statutory employment claims in the California courts as well.

Part IV argues that because of the unsettled nature of the law in California, workers’ rights to pursue a claim with the Labor Commissioner or in court are decided on a case-by-case basis. As a result, both employers and employees are uncertain as to the scope of an arbitration clause. This leads to increased litigation and a weakening of the effectiveness of workers’ statutory rights. These outcomes undermine important policy goals of efficiency, consistency and fairness in the legal system. This is particularly true when workers are prevented from taking claims to the Labor Commission, which provides an efficient, low cost method of dispute resolution. Part IV discusses a new legal theory being developed by Labor Commission attorneys, which attempts to resolve the current dilemma by arguing for a new interpretation of the scope of the FAA: that the FAA does not cover administrative proceedings.

Part V concludes with a discussion of possible solutions to the problem, including the Labor Commission attorneys' approach. This part assesses the promise and limitations of their argument, as well as other possibilities. Ultimately, the Comment concludes that the FAA should not preempt administrative claims by workers, but that without Congressional action, a satisfactory solution is unlikely.

II. BACKGROUND

In recent years, increasing numbers of employers have made use of mandatory arbitration clauses in job applications and employment contracts. They are mandatory in the sense that they must be signed as a condition of employment, and if a dispute arises between employer and employee it must be resolved by binding arbitration, rather than in court. Arbitration is a faster and less formal process than litigation. The parties are not required to adhere to procedural and evidentiary rules, and judicial review is quite limited. To understand the increase in mandatory arbitration clauses in employment contracts, it is necessary to look at the history of arbitration in the United States, focusing in particular on the FAA.

A. The Federal Arbitration Act

In 1925, Congress passed the Federal Arbitration Act, which gave arbitration agreements the same legal standing as any contract. Merchants and trade associations since colonial times had used arbitration, because it provided a relatively fast, informal, private and inexpensive means of dispute resolution. However, English and American common law had always been hostile to arbitration, and Congress intended to change that. Its goal was to create a "liberal federal policy favoring arbitration agreements." The FAA states that "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transac-

17. See supra note 12.
18. Mandatory arbitration can be distinguished from voluntary arbitration, in which, once a dispute arises, the parties can mutually agree to arbitration. Voluntary arbitration is beyond the scope of this Comment, except to note that many of the critics of mandatory arbitration advocate voluntary arbitration as an alternative. See Michael Rubin, Point Counterpoint: Voluntary ADR is Preferable to Mandatory Arbitration Agreements Which are Sure to Result in More Litigation, California Bar Journal, http://www.calbar.ca.gov/calbar/2cbj/01may/page10-1.htm (May 2001).
20. Id.
22. Id. at 1237.
23. Id. at 1238 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).
tion . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity." Section 3 of the FAA provides that when parties have a written arbitration agreement, one of the parties can stay a judicial proceeding over a dispute covered by that agreement.

For decades after the enactment of the FAA, the Supreme Court interpreted it narrowly. It was held to apply only to admiralty cases or commerce cases brought in federal court based on federal question or diversity jurisdiction. In addition, the Court was hostile to the FAA in cases where federal statutes were involved. However, in the 1980s, "the FAA was virtually rewritten by the Supreme Court, ushering in a new era in arbitration law." In a series of cases, the Court held that: 1) the FAA applies in state as well as federal courts and preempts conflicting state law; 2) the FAA establishes a presumption of arbitrability, i.e., "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration;" and 3) the FAA applies to statutory claims.

Employment disputes frequently involve statutory claims, especially civil rights claims. Despite its general approval of arbitration for statutory claims after 1985, however, the Court granted special protection to claims brought under Title VII of the Civil Rights Act of 1964 (Title VII). A few years earlier, the Court had unanimously held in Alexander v. Gardner-Denver Co., that anti-discrimination policy is of such high priority that "there can be no prospective waiver of an employee's rights under Title VII." The Court reasoned that arbitrators "effectuate the intent of the parties rather than the requirements of enacted legislation."
that arbitration produces a less complete record, does not employ the usual rules of evidence or civil procedure, and does not require arbitrators to give reasons for an award.\(^{37}\)

In surprising contrast to this strong stand against arbitration of employment discrimination claims in 1974, in 1991 the Supreme Court ruled in *Gilmer v. Interstate/Johnson Lane Corp.*,\(^{38}\) that an employee could be forced to arbitrate an age discrimination claim under the Age Discrimination in Employment Act.\(^{39}\) In *Gilmer*, the court distinguished *Gardner-Denver* because the latter involved a collective bargaining agreement.\(^{40}\) The Court went further, however, stating that *Gardner-Denver* reflected "[t]he view that arbitration was inferior to the judicial process for resolving statutory claims ... [a view that] has been undermined by our recent arbitration decisions."\(^{41}\) The Court concluded, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."\(^{42}\)

The tide had turned. Not only did the Court endorse mandatory arbitration of statutory claims, it was now willing to extend its approval to civil rights claims arising out of employment disputes. The *Gilmer* decision was narrow in its effect, however. The arbitration clause at issue was not in an employment contract, but part of an application to register with the New York Stock Exchange, which Gilmer was required by his employer to fill out.\(^{43}\) The Court did not rule on the broader question of whether the FAA applied to employment contracts generally.\(^{44}\)

Why would the Court have to answer such a question? As discussed below, the question was created in 1925, in the wording of the FAA itself. It was only in 1991, however, that the question came to the forefront. Because employment disputes so often involve statutory—and especially civil rights—claims, and because the *Gilmer* Court had broadly embraced arbitration of statutory claims, it became important to know whether the FAA cov-

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37. *Id.* at 57-58.
39. 29 U.S.C.A. §§ 621-634 (West 2002 & Supp. 2003). It is of interest to note that the Court in 1991 had only four members who had participated in the *Gardner-Denver* decision (Justices Rehnquist, Marshall, Blackmun and White). The other members were new (Justices Souter, Scalia, Stevens, Kennedy and O'Connor) and for the most part more conservative than the justices they replaced. Supreme Court Historical Society, *Timeline of the Justices*, at http://www.supremecourthistory.org/02_history/subs_timeline/02_a.html (last visited Feb. 19, 2004); Supreme Court Historical Society, *The Current Court*, at http://www.supremecourthistory.org/02history/subs_current/02_b.html (last visited Feb. 19, 2004).
41. *Id.* at 34 n.5.
42. *Id.* at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).
43. *Id.* at 23.
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ered employment contracts. Unfortunately, the text of the FAA contains no clear answer to the question.\footnote{Id. at 81-82.}

\section*{B. The Question of Employment Contracts in the FAA}

The FAA excludes some employment contracts from its coverage, but does not make clear which ones. Excluded are "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."\footnote{9 U.S.C.A. § 1 (West 1999 & Supp. 2003) (emphasis added).} Just who are these other workers? The statute does not tell us. This ambiguity has led to considerable conflict in the courts in the wake of the \textit{Gilmer} decision.

Why should employment contracts be different than any others? Those who argue that employment contracts should be excluded from the FAA point out that arbitration developed as an arrangement between merchants to settle their disputes.\footnote{Martin H. Malin, \textit{Privatizing Justice—But by How Much? Questions \textit{Gilmer} Did Not Answer}, 16 OHIO ST. J. ON DISP. RESOL. 589, 595 (2001).} Commercial arbitration agreements are voluntarily "arrived at after arms length bargaining and a determination by each party that the agreement is in its best interests."\footnote{Jiang, \textit{supra} note 24, at 273.} In contrast, unequal bargaining power permeates the employment relationship.\footnote{Id.} When a job is at stake, an agreement to arbitrate is not the result of a bargained-for exchange. The employee needs the job and is unlikely to challenge or even question the clause.\footnote{Jiang, \textit{supra} note 24, at 596.} Moreover, the employee has little knowledge of the likelihood that he may end up in a dispute with his new employer.\footnote{Id.}

The terms of the arbitration agreement are designed and controlled by the employer, and are imposed unilaterally on the employee.\footnote{Malin, \textit{supra} note 48, at 599-600.} Employers may also benefit as "repeat players" in the arbitration process, where they may have undue influence with the arbitrators who benefit from their continuing business.\footnote{Id. at 598. An exception is the case of a highly paid executive, who is able to negotiate the terms of his employment, including an agreement to arbitrate. Id. The vast majority of employees, however, hold no such bargaining power.} Limits on discovery may hinder the employee in building a case against his employer, and even if he prevails in arbitration, the remedies available to him may be more limited than those provided by statute.\footnote{Lisa Bingham, \textit{On Repeat Players, Adhesive Contracts and the Use of Statistics in Judicial Review of Employment Arbitration Awards}, 29 MCGEORGE L. REV. 223, 224 (1998).} For example, he may not be able to win punitive damages, attorney fees, or reinstatement.\footnote{Id. at 599-600.}
Arbitrators are not bound to follow case precedent or statutes, and have "wide latitude in their interpretation of laws." Thus, the employee may lose, even though he has the law on his side. If he loses, it is highly unlikely that he will succeed in having the ruling vacated by a judge. The FAA requires corruption, fraud, or misconduct in the arbitration process in order for a court to vacate an arbitration award. Most courts have held that mere errors of law are not sufficient to vacate an award. Instead, there must be "manifest disregard of law," which generally requires a finding that the arbitrator "deliberately disregarded what [he] knew to be the law." This standard is especially difficult to achieve because arbitrators are generally not required to provide written explanations of their opinions.

Because of these problems, many commentators have argued that employment agreements should not be subject to the FAA, and employees should retain full access to the courts to resolve employment disputes. However, others argue that arbitration agreements are advantageous to employees. For example, one commentator points out that in a litigation-based system, the only employees who reap lucrative jury verdicts or settlements are those with high enough salaries to attract competent attorneys and to withstand the costs and risks of a lawsuit. He argues that arbitration provides "accessible justice for average claimants... who will benefit [from] lower costs... [and] a prompt resolution more suitable for claims by incumbent employees or even former employees truly desiring reinstatement." Others note that in arbitration there is generally no summary judgment, so the employee will always be sure to have his case heard on the merits. The debate goes on, but in the meantime the Supreme Court stepped

56. Jiang, supra note 24, at 273.
58. Steven J. Ware, Default Rules from Mandatory Rules: Privatizing Law Through Arbitration, 83 MINN. L. REV. 703, 724 (1999). See Moncharsh v. Heily & Blase, 832 P.2d 899, 904, 919 (1992) ("[W]ith narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law.... Further, the existence of an error of law apparent on the face of the award that causes substantial injustice does not provide grounds for judicial review.").
59. Ware, supra note 58, at 721.
60. Russell D. Feingold, Mandatory Arbitration: What Process is Due?, 39 HARV. J. ON LEGIS. 281 (2002). Senator Feingold (D-Wis.) and Representative Dennis Kucinich (D-Ohio) have separately authored (unsuccessful) legislation to amend the FAA to exempt all employment contracts. Id. at 293-94. Compare Marshall, supra note 44, at 107 (advocating that Congress provide protection from employer retaliation to employees covered by arbitration agreements who seek to arbitrate a statutory claim) with David S. Schwartz, Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration, 1997 Wis. L. REV. 33 (calling on the courts to stop enforcing arbitration contracts in employment) and Jiang, supra note 24, at 276-77 (advocating a heightened standard of judicial scrutiny in civil rights employment cases).
up to the plate in 2001, and decided what the FAA meant by its exclusion of "any other class of workers engaged in foreign or interstate commerce."  

C. Circuit City Stores v. Adams

By 2001, all of the federal courts of appeal had interpreted the FAA’s statement of exclusion in narrow terms, and held that the FAA applied to most employment contracts—all, that is, except the Ninth Circuit Court of Appeals. Moreover, the other federal courts saw nothing in the "text, legislative history, or purposes underlying Title VII mandating an exception for the civil rights statute." Only the Ninth Circuit held that the FAA’s exclusion of employment contracts of “any other class of workers engaged in foreign or interstate commerce” meant that all contracts of employment fell outside the scope of the statute. In Circuit City Stores, Inc. v. Adams, the Supreme Court, in a five to four ruling, reversed the Ninth Circuit and held that “Section 1 [of the FAA] exempts . . . only contracts of employment of transportation workers.” The Court did not specifically address the issue of a Title VII exception, because the case before it involved claims brought under California law. The following year the Court reaffirmed its ruling in a Title VII case, EEOC v. Waffle House, Inc. In this case, all nine justices endorsed the idea that the FAA applies to employment contracts. However, the majority also held that the Equal Employment Opportunity Commission (EEOC) was free to pursue a claim on behalf of an individual, despite the existence of an arbitration agreement. This ruling will have limited effect on employment disputes, considering that the EEOC brings suit in a very small number of cases each year. However, the EEOC’s ability to pursue statutory claims notwithstanding an arbitration clause has important implications for the California Labor Commission, as shown below.
III. Law

As a result of Circuit City, Waffle House, and earlier decisions holding that the FAA preempts state law, states can no longer declare the FAA inapplicable to employment contracts, even where statutory claims are involved. An arbitration clause can be challenged only under general state contract law doctrines, in particular the doctrine of unconscionability. This is what happened in Circuit City v. Adams on remand (Adams III), where the Ninth Circuit held that the arbitration clause was unenforceable, because its terms were unconscionable. Thus, state contract law provides a means of challenging arbitration clauses on a case-by-case basis. However, the unconscionability standard is traditionally difficult to meet, and some commentators argue that it will apply only to the most egregious cases. Nevertheless, state courts have made use of the concept in developing guidelines for evaluating arbitration clauses.

The California Supreme Court provided guidelines for its lower courts to follow in Armendariz v. Foundation Health Psychcare Services, Inc. In this case, the plaintiff brought a claim for wrongful termination against her employer under the Fair Employment and Housing Act of California (FEHA), which is the state analogue to a Title VII claim. The employer sued to compel arbitration, based on a mandatory agreement signed by the plaintiff. The court found the arbitration clause unconscionable because it required the employee, but not the employer, to arbitrate disputes, and because it provided for limited damages and remedies. The court considered whether the offending provisions could be severed and the remainder of the

75. Plourde, supra note 12, at 171-72.
76. "The principles of contract law . . . require courts to enforce any arbitration contract unless there is a showing of fraud, duress, mistake, or other misconduct. . . ." Jiang, supra note 24, at 277.
77. Under California Civil Code § 1670.5, a court can refuse to enforce a contract provision which is unconscionable. CAL. CIV. CODE § 1670.5 (West 2003). Determining unconscionability involves a two-prong test: 1) procedural unconscionability (oppression or surprise due to unequal bargaining power) and 2) substantive unconscionability (harsh or one-sided results). Both must be present (though not in the same degree) in order for a court to void a provision or an entire contract. Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (2000).
79. Plourde, supra note 12, at 172-73 (discussing Circuit City).
80. Id. at 175.
81. 6 P.3d 669 (2000).
83. Armendariz, 6 P.3d at 674.
84. Id. at 675.
85. Id. at 692.
contract enforced. 87 It concluded that the lack of mutuality was not severable: the contract was "permeated by unconscionability," and was thus invalid. 88

In its opinion, the California Supreme Court stated six requirements for a valid arbitration clause, based on contract law principles. 89 An agreement that requires an employee to arbitrate statutory claims: 1) cannot limit an employee's statutory damages; 2) must allow the full range of discovery, unless there is an express agreement to the contrary; 3) must provide for a written arbitration decision to allow for judicial review; 4) must require a neutral arbitrator; 5) cannot require the employee to pay any expense that is unique to arbitration; and 6) must apply to the employer as well as the employee. 90

The focus on statutory claims reflects the California Supreme Court's concern that employers might use arbitration agreements to contract out of their statutory obligations. The court quoted dicta from the U.S. Supreme Court's opinion in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 91 pointing out that when a party agrees to arbitrate a statutory claim, it "does not forgo the substantive rights afforded by the statute [but] only submits to their resolution in an arbitral, rather than a judicial, forum." 92 Noting that this point is prescriptive as well as descriptive, the Armendariz court declared, "[I]t sets a standard by which arbitration agreements . . . are to be measured, and disallows forms of arbitration that in fact compel claimants to forfeit certain substantive statutory rights." 93 The court stated that statutory rights created for a public purpose rather than for individual benefit cannot be waived and concluded, "An arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA." 94

Thus, the California Supreme Court made clear in Armendariz that, while it endorses the concept that the FAA applies to employment contracts and to statutory claims, it intends to apply close scrutiny to the arbitration clauses in those contracts. 95 Recent California and Ninth Circuit cases have reaffirmed and extended Armendariz principles. 96

87. Id. at 695-99.
88. Id. at 698.
90. Id.
92. Armendariz, 6 P.3d at 679 (quoting Mitsubishi Motors, 473 U.S. at 628).
93. Id. at 680.
94. Id. at 681.
95. Id. at 679.
In *Mercuro v. Countrywide Securities Corp.*, the Second District of the California Court of Appeal expanded the reach of *Armendariz*, declaring, “*Armendariz’s ‘particular scrutiny’ of arbitration agreements should [not] be confined to claims under FEHA. Rather . . . such scrutiny should apply to the enforcement of rights under any statute enacted ‘for a public reason.’” The court held that *Armendariz* principles therefore applied to claims brought under the California Labor Code as well.

In 2003, the California Supreme Court further broadened the reach of *Armendariz* in *Little v. Auto Steigler.* The court extended *Armendariz* protections to cover a non-statutory employment claim: a *Tameny* claim for termination “in violation of public policy.” The court reasoned that employees’ public policy rights are as strong as statutory rights, and should therefore fall under *Armendariz* as well.

Most recently, in *Ingle v. Circuit City*, the Ninth Circuit Court of Appeals declared that an arbitration clause in an employment contract “raises a rebuttable presumption of substantive unconscionability.” “Unless the employer can demonstrate that the effect of a contract to arbitrate is bilateral . . . with respect to a particular employee, courts should presume such contracts substantively unconscionable.” This means that employers will be required to make an initial showing that the duties, obligations and benefits of the agreement affect the employer and employee equally.

This is a holding of potentially broad scope, as it appears to apply *Armendariz* to all arbitration clauses in employment contracts, and to all types of claims. Moreover, *Armendariz* implied that mandatory arbitration agreements in employment contracts are per se procedurally unconscionable, because they are “imposed on employees as a condition of employment . . . [with] no opportunity to negotiate.” Add to this *Ingle’s* rebuttable pre-
sumption of substantive unconscionability, and the unconscionability standard may not be so difficult to meet after all. Employers may now be facing an uphill battle when they seek to compel arbitration in California courts.

Armendariz and its progeny show that the California (and Ninth Circuit) courts are prepared to closely scrutinize arbitration clauses in employment contracts whenever they come before them. Following the Armendariz guidelines, the courts have declared many such agreements unconscionable and void when employers have sought to compel arbitration. Even in cases where the employee was highly skilled or in management, and presumably had more bargaining power than the average worker, the courts have found arbitration agreements unconscionable.

In some cases where the arbitration agreement was enforced, one clause was nevertheless severed as unconscionable. In only a few cases has the arbitration agreement been enforced in its entirety.

Thus, while Circuit City and Waffle House declared arbitration clauses in employment contracts legal and binding, the California (and Ninth Circuit) courts appear more likely than not to find these agreements unconscionable. These courts recognize the inherently unequal nature of arbitration agreements in the employment context, and rightly scrutinize the agreements closely for fairness. This works to the benefit of the employees in these cases. However, as long as the fairness of arbitration agreements is...
A. The California Labor Code and Labor Commission

The cases cited above involved employees who filed suit in Superior Court, after which their employers moved to compel arbitration. However, many employees take their complaints to the California Labor Commission, rather than to court. The California Labor Code establishes the right of employees to take complaints of violations of the Code either to Superior Court or to the Labor Commission. The Labor Code covers all employees of private employers in California, regardless of their immigration status.

The California Labor Commission is part of the Department of Labor Standards and Enforcement (DLSE), which is under the Department of Industrial Relations. The DLSE enforces wage and labor standards and all labor laws not specifically delegated to another agency (e.g., Fair Employment and Housing Administration, Division of Occupational Safety and Health, or Division of Workers' Compensation).

The Labor Commission has been hearing cases since the turn of the twentieth century. However, legislation in 1976 created the modern form of the Labor Commission. Wage and hour claims are now heard in a "Berman" hearing, named after then-assemblyman Howard Berman, who introduced the legislation creating it. It is designed to protect the statutory rights of workers, to "provide a speedy, informal, and affordable method of resolving wage claims" and "to avoid recourse to costly and time-consuming judicial proceedings." There is no charge to either party unless they desire counsel, which they arrange for on their own.

113. The case-by-case approach may affect more than just the parties involved. Court decisions are publicized and both employers and employees may be aware of them and shape their behavior accordingly. Nevertheless, a case-by-case approach cannot have the broad impact that a statewide or national policy could achieve.

114. CAL. LAB. CODE § 218 (West 2003).

115. Some categories of workers are not covered by the Labor Code: independent contractors; volunteers; trainees; and executive, administrative and professional employees. However, the Labor Code has rigorous standards for determining whether an employee falls into one of these categories. LEGAL AID SOC'Y EMP. LAW CTR., supra note 6, at 11-18. The burden of proof is on the employer who claims such an exemption. Id. at 15 (citing Ramirez v. Yosemite Water Co., 978 P.2d 2, 8 (1999); Norquist v. McGraw Hill Broad. Co., 38 Cal. Rptr. 2d 221, 225-26 (1995)).

116. LEGAL AID SOC'Y EMP. LAW CTR., supra note 6, at 11.


118. Id.

119. Telephone Interview with Miles Locker, Senior Counsel, California Labor Commission (Sept. 29, 2003) [hereinafter Locker Interview II].

120. Id.

121. Id.

The Labor Commission represents a powerful resource for workers, and many make good use of it. Since 1976, workers have filed approximately 50,000 wage and hour claims each year. The Labor Commission requires the parties to meet for a settlement conference before proceeding to a hearing, and most claims are settled there or soon after. Approximately 16,000 claims go to a Berman hearing each year; 70% of those are decided in favor of the employee. Employers file appeals in Superior Court in about 1,000 of those cases, and the Labor Commission typically represents the employee at the appeal. The original decision is affirmed by the Superior Court in approximately 90% of the appeals.

Since 1986, the Labor Commission has also had the authority, under California Labor Code section 98.7, to investigate and resolve employee complaints of discrimination arising under various sections of the Labor Code. These relate primarily to retaliation by the employer when the employee exercises his rights under the Labor Code. The Labor Commissioner was originally charged with enforcing nine Labor Code statutes, and by 2001, the number had increased to twenty-eight. In 2001, 1003 such complaints were filed, 60% of which were for retaliation or discrimination against an employee as a result of “filing or intent to file a claim with the Labor Commissioner.” The next largest group of claims (15%) alleged discrimination due to reporting safety and health violations at the workplace.

Seven hundred ninety-nine cases were closed in 2001. Of these, 50 were decided in favor of the complainant, 98 were settled to the mutual satisfaction of both parties, 172 were dismissed, and the remaining 479 were withdrawn or abandoned by the complainant.


123. The only exception to the no-charge policy is that the Labor Commissioner may assess reasonable attorney’s fees against a complainant where a discrimination complaint is found to be “frivolous, unreasonable, groundless, and brought in bad faith” and where the complaint has been dismissed after a hearing by the Labor Commissioner. CAL. LAB. CODE § 98.7(d)(1) (West 2003).

124. Locker Interview II, supra note 119.

125. Id.

126. Id.

127. Id.

128. Id.


130. See supra note 9 for examples.

131. LUJAN, supra note 129. “[T]he majority of these statutes are contained in the Labor Code . . . but the [DLSE] also enforces statutes contained in the Health and Welfare Code, the Unemployment Insurance Code, and the Industrial Welfare Commission Orders.” Id.

132. Id. This is prohibited by CAL. LAB. CODE § 98.6 (West 2003).

133. LUJAN, supra note 129.

134. Id.
A centralized Discrimination Complaint Investigation Unit with thirteen full-time Deputy Labor Commissioners, well-trained in investigation and report writing and knowledgeable about the relevant statutes, handles discrimination complaints.  

Similarly, the Deputy Labor Commissioners who handle wage and hours claims at eighteen statewide offices are full-time employees, and are well versed in the statutes under which complaints arise.

The strong protections provided by the DLSE to workers are especially important in the context of at-will employment, in which employers are free to hire and fire for any reason, or for no reason. It has long been recognized that the employer-employee relationship is inherently unequal, and laws and administrative proceedings that protect workers help to partially offset their weaker position vis-à-vis their employers. The Labor Commission, with its highly trained staff dedicated solely to enforcing the Labor Code, is a valuable part of the protections enjoyed by California workers.

B. Labor Commission Cases Involving Arbitration Agreements

One of the protections contained in the Labor Code is section 229, which provides, “Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate.”

Notwithstanding the position of the U.S. Supreme Court that the FAA extends to most employee contracts and preempts state law, the California Labor Commissioner has taken an assertive stance regarding arbitration clauses. Senior Counsel Miles Locker states, “DLSE will not halt proceedings on a wage claim in response to an employer’s assertion that the claim is covered by an arbitration ‘agreement.’” If an employer wants to halt the

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136. Id.
138. 4 LABOR AND EMPLOYMENT LAW § 130.02 (Matthew Bender) (2003). “Outside of the discrimination laws . . . there is simply no general statutory law which alters this basic rule [of at-will employment].”Id.
139. Jiang, supra note 24, at 273.
140. The DLSE sees its mission as serving employers as well: “to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.” Div. of Labor Standards Enforcement, Homepage, at http://www.dir.ca.gov/DLSE/dlse.html (last visited Feb. 22, 2004).
141. CAL. LAB. CODE § 229 (West 2003).
proceeding, he must file a motion to compel arbitration in Superior Court.\textsuperscript{143} The court will examine the arbitration agreement under \textit{Armendariz} guidelines. If the court finds the agreement unconscionable, it will deny the motion to compel arbitration, after which the employer is free to appeal.\textsuperscript{144} The Labor Commission typically intervenes on behalf of the employee in the court proceeding, just as it does in other court proceedings pursuant to section 98 of the Labor Code.\textsuperscript{145} Given the close scrutiny the California courts apply to these arbitration agreements, and the rigorous standards required by \textit{Armendariz}, it is by no means certain that the employer will succeed in his motion to compel arbitration. While the DLSE does not collect data on the outcome of these motions, according to Locker, there have been an increasing number of such motions in recent years.\textsuperscript{146} He estimates that in seventy-five percent of these cases, the court has found the arbitration agreement unconscionable and denied the motion.\textsuperscript{147}

The Labor Commission proceeding continues throughout this time, and only in the face of an order to compel arbitration will the Labor Commissioner halt it. Thus, the Labor Commission has made clear its view that California workers have the right to their “day in court,” albeit an administrative court, whether or not they have signed an agreement to arbitrate.

How have the courts responded to this position? The answer is mixed, and this area of law is still evolving. There are only a few cases that have gone up on appeal. As far back as 1987, the U.S. Supreme Court ruled in \textit{Perry v. Thomas} that the FAA preempts section 229 of the California Labor Code.\textsuperscript{148} This case involved an employee who took his claim to court, however, rather than to the Labor Commission.\textsuperscript{149} This ruling predated \textit{Circuit City}, so the Court had yet to make it clear that the FAA was to apply to nearly all employment contracts.

A few years later, the California Court of Appeal addressed the validity of an arbitration clause in a Labor Commission case, \textit{Baker v. Aubry}.\textsuperscript{150} As in \textit{Perry}, the court held that the FAA preempted the California Labor Code, and that arbitration did not deprive appellant of her substantive rights under the Code.\textsuperscript{151} This case was unique, however, in that it involved an arbitration agreement signed not with the employer, but with the New York Stock Ex-
Commonly known as "U-4's," these agreements are required of all employees who register with the NYSE or National Association of Securities Dealers (NASD). There is a long line of cases involving U-4 agreements, and while they have generally been upheld as binding the employee to arbitrate disputes with the employer, they are not, strictly speaking, employer-employee agreements. Moreover, "[a]fter many challenges against the arbitration of civil rights claims, the NYSE and NASD amended the rules. As of January 1, 1999, statutory employment-related discrimination claims are arbitrable only if the parties agree to arbitration after the dispute has arisen." Therefore, Baker, like Perry, is not strictly applicable to Labor Commission cases today.

Livadas v. Bradshaw is another case in a class by itself. The Labor Commission refused to take this case because the employee was covered by a collective bargaining agreement. However, the U.S. Supreme Court held that the employee could proceed with her Labor Commission claim because it was outside the scope of her collective bargaining agreement. Livadas is one of a line of cases that have held that employees under collective bargaining agreements (which typically contain arbitration clauses) may pursue statutory employment disputes in court or other tribunals. It is ironic that the workers who already have all the protections and benefits of a union contract are able to bypass arbitration to claim their statutory rights, while the least protected employees cannot do the same.

153. Id. at 382. This case is also unique in that claimant was suing the Labor Commission under a writ of mandate to compel it to adjudicate her claim. This was prior to the Labor Commission's current stance on arbitration agreements. The Commissioner declined jurisdiction because of the arbitration agreement. Id.
155. See id. for a discussion of several U-4 cases. Perry v. Thomas was itself a U-4 case. 482 U.S. 483 (1987).
156. Jiang, supra note 24, at 251.
157. Id. at 254.
159. Id. at 124-25. Livadas' claim was brought under California Labor Code section 203, which requires immediate payment of all wages owed upon severance of employment. This was an issue not covered in the collective bargaining agreement between her union and her employer. Id.
160. Id. at 123-24. The Court's rationale in these cases is that because the arbitration agreement is not entered into directly by the employee, but is part of a collective bargaining agreement, the employee cannot thereby be deprived of his statutory rights. Id. In addition, labor arbitrators have no authority to adjudicate statutory claims. Id. at 128 n.21 (citing Alexander v. Gardner-Denver, 415 U.S. 36, 53-54 (1974)). In Livadas, the Court also argued that to deny the union member the right to pursue statutory claims elsewhere is to force the member to choose between belonging to a union and protecting her statutory rights. Id. at 117. As such, it violates the intent of the National Labor Relations Act, which guarantees workers the right to bargain collectively. Id.
The first case directly on point is FirstAmerica Automotive, Inc. v. Sweeney. This 2000 case both pre-dated and presaged Circuit City. Here, the California Court of Appeal chose not to follow the Ninth Circuit’s position, expressed in Craft v. Campbell Soup, Co., that the FAA excluded most employment contracts. The Sweeney court held that the FAA did not exclude a car salesman from coverage, and therefore the FAA applied to his case and preempted section 229 of the California Labor Code. Sweeney was therefore unable to pursue his claim for unpaid wages with the Labor Commissioner.

Whether arbitration agreements can be enforced in Labor Commission cases seems to have been answered once and for all in Circuit City Stores, Inc. v. Adams, and the answer seems to undermine the position of the Labor Commissioner. In Circuit City, the Court decreed that most employment contracts fall within the scope of the FAA, and that the FAA preempts contrary state law. Thus, it would seem that an employee who has signed an arbitration clause is now barred from bringing a claim under the California Labor Code to the Labor Commission (or to court).

However, as discussed earlier, the situation is made more complex by the fact that arbitration agreements are subject to state contract law and the doctrine of unconscionability. The court held in Mercuro v. Countrywide Securities Corp. that the arbitration agreement signed by Mr. Mercuro could not be enforced because its terms were unconscionable under Armendariz. Mercuro’s claims were brought under FEHA and the California Labor Code. While he pursued his claims in court, he could have brought the Labor Code claims to the Labor Commission. Had he done so, the court’s ruling would have allowed him to pursue his Labor Commission claim. Thus, while an arbitration agreement theoretically trumps an employee’s right to take a claim to the Labor Commissioner (or to court), the employer will often fail when it tries to compel arbitration, because the agreement is held unconscionable under Armendariz. This means that, while in theory, Circuit City overrules the Labor Commissioner’s refusal to honor arbitration clauses, in practice the Labor Commissioner may prevail after all.
C. Labor Commission Discrimination Claims

Mr. Mercuro's Labor Code claims were actually discrimination claims, not wage claims. When an employee files a discrimination claim with the Labor Commission, he hands the claim over to the Labor Commission for investigation and a decision, rather than going directly against his employer. Here, the Labor Commission is in a position similar to that of the EEOC in Waffle House. The Labor Commission argues that like the EEOC, it is a third party and can pursue victim-specific relief, notwithstanding an arbitration agreement. Ralph's Grocery Co. v. Massey, is a Labor Commission discrimination case currently on appeal in the Fourth District Court of California. At trial, the employer moved to prevent the Labor Commission from investigating and to compel arbitration. The trial judge denied the motion, agreeing with the Labor Commission that it held third party status and could pursue its investigation on behalf of Mr. Massey. Ralph's is now appealing the ruling, arguing that the Labor Commission is not a third party, but an agent of Massey.

The Labor Commission appears to be on strong legal ground here, with Waffle House as precedent. If it can establish that it is acting as a third party in discrimination cases, it will be able to pursue claims on behalf of individual claimants, notwithstanding an arbitration agreement. Rather than relying on the likelihood that an arbitration agreement will be held unconscionable, as it must in wage claims, the Labor Commission could proceed with a discrimination case with greater certainty and efficiency.

IV. LEGAL ANALYSIS

Despite the California courts' willingness to void unfair arbitration agreements in employment contracts, this is not an adequate solution to those who see mandatory arbitration as unfair in the employment context.
For every plaintiff who asserts the right to take an employment claim to court or to the Labor Commission, there are no doubt many more who do not, even though they may have signed an unconscionable arbitration agreement. Many will not know that their arbitration agreement is unconscionable, because the only way to be sure is to have it tested in court. Many will believe their employer who tells them they have no choice but to arbitrate an employment dispute.

In addition, the current situation actually creates a new source of litigation—a "race to the courthouse" to determine whether the claimant has the right to take his claim to the Labor Commission or to court, or whether he must submit it to arbitration. To the extent that the FAA was designed to reduce courthouse congestion, this trend in employment law is counterproductive.

A new development in this area is the legal theory currently being proposed by attorneys at the Labor Commission. They are taking a proactive stance with regard to their rights to take claims in the face of an arbitration agreement. Their position is:

1. Under Armendariz, employees cannot be required to give up their substantive rights. By taking away their right to have an administrative agency resolve their employment dispute, forcing arbitration amounts to a loss of substantive rights.

2. The FAA was not intended to, and does not, state that it preempts the right to an administrative hearing.

3. In order for an arbitration agreement in California to comport with Armendariz, it should contain a provision granting the employee the right to proceed first to the Labor Commission to resolve any dispute that falls under its jurisdiction. If the employer wants to appeal the decision of the Labor Commission, it must post an appeal bond equal to the amount of the disputed award (as currently provided for in the California Labor Code). In this case, however, arbitration—rather than Superior Court—would become the appeal forum.

This theory is still being developed and has yet to be tested in court. However, if successful, it would establish the Labor Commission's right to proceed with any claim within its jurisdiction, notwithstanding the existence of an arbitration agreement. If an arbitration agreement existed, it would serve as an appeals forum. This would eliminate the case-by-case approach of testing the validity of each arbitration agreement. With this theory, the Labor Commission is attempting to establish that administrative proceedings

183. Interview with Michal Belknap, Professor of Law, California Western School of Law, in San Diego, Cal. (Sept. 23, 2003).
184. Locker Interview II, supra note 119.
185. Id.
186. Id.
187. CAL. LAB. CODE § 98.2(b) (West 2003).
188. Locker Interview II, supra note 119.
are not the same as judicial proceedings, and should be treated differently in resolving questions about arbitration of employment disputes.

The U.S. Supreme Court has made clear that the FAA preempts state employment law, and that when a valid arbitration agreement exists, it must be honored, even in statutory claims.\(^9\) Disagree as one may with these rulings, they do not appear likely to be reversed in the near future. However, as we have seen, the question is not as fully settled as it may at first appear. Even with judicial claims, employees are able to take a "back-door" route, by going to court, forcing the employer to move to compel arbitration, and in many cases having the arbitration agreement declared void.

Similarly, with Labor Commission claims, the employee may take a "back-door" route by going directly to the Labor Commission. In addition, the Labor Commission now argues that because it is an administrative forum, it is in a class by itself, similar to employees covered by collective bargaining agreements. As such, its cases warrant different treatment by the FAA. There are some strong arguments to be made in support of this position.

The Labor Commission's administrative proceeding is a non-judicial forum, which shares many of the advantages of arbitration. Administrative proceedings are faster and lower in cost to all parties than court proceedings.\(^9\) In fact, many cases are resolved at pre-hearing settlement conferences, which makes the process even more efficient and conciliatory than arbitration.\(^9\)

More importantly, Labor Commission Hearing Officers are extremely familiar with the relevant law and handle employment cases full-time.\(^9\) In addition, Labor Commission rulings are subject to de novo judicial review.\(^9\) These facts stand in sharp contrast to arbitration, where the arbitrator is likely to be less familiar with California employment law, is not bound to apply the law, and where appeals are strictly limited.\(^9\)

The Labor Commission represents a valuable resource for employees, protecting their statutory rights and providing an efficient avenue for redress of their grievances. To preempt its authority undermines the fairness of social policy. An arbitration clause should not be allowed to stand between employees and their right to pursue claims with the Labor Commission.

\(^9\) See supra notes 122-23 and accompanying text.
\(^9\) LEGAL AID SOC'Y EMP. LAW CTR., supra note 6, at 56.
\(^9\) CAL. LAB. CODE § 81 (West 2003).
\(^9\) Id. § 98.2(a).
\(^9\) See supra Part II.B.
V. CONCLUSION

Employees should not be forced to sign away their right to take a claim to the Labor Commission in order to obtain a job. The protections provided by the Labor Code and enforced by the Labor Commission were hard won, and should not be tossed aside.

In addition, employees should not have to rely on the courts to scrutinize arbitration clauses for unfairness. Many of these agreements are unconscionable in their terms, yet few will be tested in court. Many employees will not know that they have the right to challenge the arbitration agreement, and will assume that their employer is correct when he tells them that they have no choice but to proceed to arbitration. This can mean that arbitration will occur based on an illegal agreement to arbitrate. The employer will have succeeded in contracting out of his statutory obligations, evading the scrutiny of Armendariz.

When an arbitration clause is tested in court, it will frequently be found unconscionable under Armendariz, and the employee's statutory rights will be protected. However, this also means that one of the key purposes of arbitration has been defeated. Instead of shrinking the court docket, the arbitration clause has expanded it. Where there would have been one court proceeding over the claim, now there are two: one to test the arbitration clause, and if it is voided, another to try the claim. Even if the clause is found valid, the court docket has not been reduced: a court case on the claim has been replaced with a court case on the arbitration clause. Similarly, with a Labor Commission claim, an arbitration clause increases the use of court rooms, rather than decreases it.

Society is served by protecting employee's rights, and by striving to mitigate the inherently unequal relationship between employee and employer. Mandatory arbitration clauses do not do so, especially when they bar employee access to the Labor Commission—the very agency dedicated to protecting those rights.

The Labor Commission has so far been forced to take a "back-door" approach to upholding a claimant's right to pursue his claim in spite of an arbitration clause. This is often effective for an individual claimant, but ultimately insufficient as a broad solution to the problem. The Commissioner's new legal theory is an attempt to move from the "back-door" to the "front-door," with a policy that exempts administrative proceedings from the FAA altogether. Is it likely to succeed? The California courts may respond favorably to the argument, based as it is on Armendariz's insistence on protecting the statutory rights of employees. However, if the Labor Commission's new approach is successful in individual cases, it will ultimately be tested on appeal, where the outcome is less certain. If the theory makes its way to the U.S. Supreme Court, it is not likely to find a friendly reception. The Court's recent positions on the FAA indicate that it favors arbitration in nearly every context, and will oppose any obstacles to it.
Ultimately, an act of Congress would probably be required to exempt administrative proceedings from the FAA. In recent years, Democratic members of Congress have introduced legislation exempting employment contracts altogether from the FAA, or at least barring mandatory arbitration of statutory claims for workers. These attempts were unsuccessful. However, a proposal to exempt administrative proceedings from the FAA is much less sweeping in its scope. Because it is narrower, and because a good argument can be made that administrative proceedings offer both efficiency and protection of workers' statutory rights, such a proposal may stand a better chance of success.

Whatever the outcome, it seems safe to say that Circuit City and Waffle House have not given us the final word on arbitration clauses in employment contracts. In California, at least, any such thought is premature.

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