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9th Circ. Warns Employers Not To Overreach On Arbitration

By **Abigail Rubenstein**

Law360, New York (October 29, 2013, 9:04 PM ET) -- The Ninth Circuit's decision Monday not to enforce Ralphs Grocery Co.'s individual arbitration agreement in a proposed wage-and-hour class action because it was unconscionable under California law should caution employers not to overreach by crafting one-sided arbitration policies, attorneys say.

In a unanimous ruling, a three-judge panel upheld a California federal judge's decision refusing to send former Ralph's deli clerk Zenia Chavarria's wage-and-hour claims to individual arbitration in her proposed class action against the grocery chain.

The panel concluded that the store's arbitration policy, which workers agreed to in their employment applications, was unenforceable because it was unjustifiably one-sided.

The ruling should remind employers that even though the U.S. Supreme Court has recently handed down a series of pro-arbitral decisions, they cannot assume that courts will enforce their arbitration agreements no matter what, lawyers told Law360.

“The message for employers is don't get cute with your arbitration agreements by trying to come up with provisions that effectively dissuade employees from bringing claims,” Thomas Kaufman of Sheppard Mullin Richter & Hampton LLP said.

In the Ralphs case, the appeals court found that the arbitration agreement was procedurally unconscionable because it was presented to workers on a take-it-or-leaveit basis as a condition of applying for employment and because its terms were not even provided to Chavarria until three weeks after she agreed to be bound by it.

The court further concluded that the policy was substantively unconscionable because it required the employer and employee to split arbitration fees, which could have the effect of pricing workers out of the dispute process, and because it included a selection process for the arbitrator that effectively allowed the employer to pick every time.

And perhaps most important for other employers looking to enforce their arbitration agreements, the panel noted that the state law undergirding the unconscionability holding was not preempted by the Federal Arbitration Act and that the Supreme Court's ruling in American Express Corp. v. Italian Colors Restaurant does not preclude courts from considering the costs that an arbitration agreement imposes on an employee to bring a claim.

“The Ninth Circuit is saying that the FAA can't be used to strike down every state law that might

invalidate an arbitration agreement," Rex Heinke of Akin Gump Strauss Hauer & Feld LLP said.

"It depends on what the state law is doing," Heinke said. "If it is just hostile to arbitration as such then it is preempted by the FAA, but if the state law is designed to make sure arbitration is a fair proceeding, then the FAA is not going to preempt it."

And attorneys say the warning the distinction drawn by the Ninth Circuit sends employers should carry all the more weight because it was decided not by a particularly liberal panel that might be expected to be sympathetic to the employee side, but by a panel that included Consuelo M. Callahan — a judge rumored to have been on President George W. Bush's shortlist for the Supreme Court.

Employers in California should also take particular notice of the decision, attorneys say, because it reinforces much of what the California Supreme Court said in its **recent decision** in Sonic-Calabasas A. Inc. v. Frank Moreno, although it did not explicitly cite that case.

In Sonic-Calabasas, the state's highest court found that under the U.S. Supreme Court's ruling in AT&T Mobility v. Concepcion, the FAA preempted a state law doctrine prohibiting employers from asking employees in their arbitration agreements to waive their right to a hearing before the state labor commissioner. But the decision states courts may continue to enforce unconscionability rules that do not "interfere with fundamental attributes of arbitration."

"With this ruling and Sonic-Calabasas, it is now clear the California unconscionability law remains as robust as ever and fully applicable to arbitration agreements, except in the narrow circumstances outlined by the five justice majority in Sonic-Calabasas," Michael Rubin of Altshuler Berzon LLP said.

That means that employers that try to demand too much in their arbitration agreements introduce the possibility that their policies won't hold up in court, lawyers say.

"The takeaway from the Chavarria opinion mirrors very closely of the Sonic-Calabsas decision, and it is that arbitration agreements have to be fair," Charles Jung of Nassiri & Jung LLP said. "The Ninth Circuit here kind of expressed the same concerns that the California Supreme court did, reflecting a belief that perhaps employers had gone too far in pushing the envelope in their arbitration agreements, where some employers have almost come to believe that they can tilt the scales."

Employers that persist in being overzealous and trying to implement one-sided arbitration agreements that make it difficult for employees to pursue even individual claims against them therefore do so at their own peril.

Such employers could even end up setting the stage for precedents that roll back some of the gains that employers have gotten from the Supreme Court's pro-arbitration bent, attorneys say.

"The one way that the beneficial playing field that the Supreme Court has given employers to avoid class actions will be defeated will be if the test cases that go to the appellate courts involve employers overreaching to dissuade employees from pursuing arbitration," Kaufman said.

Judges Richard C. Tallman, Richard R. Clifton and Consuelo M. Callahan sat on the panel for the Ninth Circuit.

Ralphs is represented by Steven B. Katz, Linda S. Husar and Mara Matheke of Reed Smith LLP.

Chavarria is represented by Glenn A. Danas of Capstone Law APC and Mark Yablonovich, Neda Roshanian and Michael D. Coats of the Law Offices of Mark Yablonovich.

The case is Zenia Chavarria v. Ralphs Grocery Co., case number 11-56673, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by John Quinn and Philip Shea.
