Gentry v. Superior Court and *Murphy v. Check 'N Go of California*: Preserving Employees' Class Action Rights

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Pre-dispute employment agreements requiring employees to arbitrate their claims against their employer and waive their right to bring class actions have become increasingly common. Although courts have called this provision a "class action waiver," I will refer to it also as a "prohibition" or "ban" because it is typically unilaterally imposed on the employee by his or her employer without providing the opportunity to make an informed choice.

Such class action prohibitions greatly impede the enforcement of workers' rights because they foreclose the ability to seek relief for those who may not otherwise sue their employer. They also remove the incentive for employers to avoid unlawful conduct where the cost of non-compliance is merely defending the few individual actions that are filed against them. Two recent cases should help stem the tide of class action bans by making it more difficult for employers to enforce them.

In Gentry v. Superior Court (Aug. 30, 2007) 42 C4th 443, 64 CR 3d 773, the California Supreme Court considered for the first time whether a class action waiver could be enforced against an employee alleging a class-wide denial of overtime pay. Although much of the argument between the parties centered on whether the class action ban was unconscionable under Discover Bank v. Superior Court (2005) 36 C4th 148, 30 CR 3d 76, which considered a class action ban in the consumer context, the Gentry court ruled that the ban could be invalidated not only for its unconscionability but also as a violation of public policy. While careful not to declare all class action bans in overtime cases unenforceable, the court held in strong terms that the right to pursue a class action may not be waived when it is a more effective means to vindicate statutory rights than individual litigation or arbitration.

The court's decision was rooted in the strong public policy expressed in California Labor Code §1194, which makes the rights to the legal minimum wage and overtime pay unwaivable. Three practical realities led the court to conclude that a class action ban could interfere with employees' ability to vindicate these unwaivable rights. First, individual wage and hour recoveries are often modest and their pursuit presents substantial risk to individual workers. Proceeding in a class action provides employees with modest claims a means to seek redress. Second, current employees are unlikely to pursue individual cases due to a legitimate fear of retaliation. The court found Division of Labor Standards Enforcement (DLSE) complaint statistics to support plaintiff's assertion that retaliation against employees is widespread. Third, some employees may not pursue litigation because they are unaware their legal rights are being violated. For these reasons, class action bans "frequently if not invariably . . . undermine the enforcement of the statutory right to overtime pay." Gentry, 42 C4th at 457.

Informed by these practical realities, the court held that trial courts faced with this issue must consider the "real world obstacles to vindication of class members' right to overtime pay through individual arbitration," including the modest size of individual recoveries, potential retaliation against class members, and the fact that absent class members may not be informed about their rights. 42 C4th at 463. In considering these factors, the trial court must invalidate the class action ban if (1) a class action would likely be more effective in vindicating employee's rights than an individual action, and (2) not permitting a class action would lead to less comprehensive enforcement of the overtime laws for the affected employees. 42 C4th at 463.

In Murphy v. Check 'N Go of California, Inc. (Oct. 17 2007)156 CA4th 138, 67 CR 3d 120, the First District Court of Appeal considered a trial court's pre-Gentry invalidation of a class action ban in an employment arbitration agreement on unconscionability grounds. The trial court found, as an initial matter, that the agreement could not vest authority in the arbitrator to determine unconscionability issues. Next, it held the agreement's class action ban to be unconscionable under Discover Bank because it effectively exculpated the employer from responsibility by prohibiting class actions, the only effective means of redressing the overtime violation. Finally, the trial court found the entire arbitration agreement unenforceable in light of these two deficiencies.

The Court of Appeal upheld the trial court on all points, finding confirmation in Gentry. In particular, it found that the trial court's analysis of the class action ban was bolstered by Gentry's instruction to consider "real world obstacles" class members would face in enforcing their rights absent a class action. Murphy, 156 CA4th at 148. Declarations submitted by plaintiffs' counsel and two other attorneys experienced in wage and hour litigation addressed these concerns by attesting to the small size of claims and the continued exploitation of employees unaware of their rights or unable to secure legal representation. The court also noted that, while Gentry opined that unenforceable class action bans could be easily severed from an arbitration agreement, it left open the option of invalidating an entire agreement that contains multiple unconscionable terms. Because the agreement both banned class actions and left the determination of unconscionability to the arbitrator, the trial court's determination that the entire agreement was unenforceable was not in error. Murphy gives hope to employees who not only want to pursue a class action but want to do so in court instead of in class arbitration proceedings.

Gentry and Murphy provide important guidance for those seeking redress for employees subject to a class action ban. While Gentry left unclear whose burden it is to show that class rather than individual adjudication is more effective, its strong terms suggest that the presumption should lie against the employer. For example, Gentry explained that there still exists "the possibility that there may be circumstances under which individual arbitrations may satisfactorily address the overtime claims of similarly aggrieved employees," Gentry, 42 C4th at 464 - indicating that the norm is that individual arbitrations would not be satisfactory, and that "class actions waivers in wage and hour and overtime cases would have, at least frequently if not invariably, [an] exculpatory effect. . . ." 42 C4th at 457 (emphasis added). Any showing required of plaintiffs should be minimal because the issue will typically arise in opposition to an employer's motion to

compel arbitration before any substantial discovery has taken place. Murphy suggests as much, finding the declarations of plaintiff, plaintiff's counsel, and attorneys experienced in wage and hour law sufficient in the absence of controverting evidence from the employer. See Murphy, 156 CA 4th at 148-149.

Plaintiffs should be prepared to show how, absent a class action, employees would face practical obstacles to enforcing their rights under the particular circumstances of their case. Evidence of a high percentage of current employees may be persuasive because they are presumed to reasonably fear retaliation. In addition, the transient nature of the job, a high turnover rate, language barriers, the employer's representations about the legality of its conduct, or other factors may show that employees are less likely to know their rights were violated or be in a position to pursue litigation absent a class action. See Gentry, 42 C4th at 461. Evidence of low wages or a high turnover in the job category at issue will show that individual recoveries would be modest. Counsel and other attorneys experienced in the field can attest to the difficulty of representing employees with modest claims on an individual basis, as in Murphy. As in Gentry, information from the DLSE may also support assertions about the size of claims or the frequency of retaliation.

Finally, Gentry and Murphy should be read broadly to apply beyond the overtime context because class action bans could interfere with the effective enforcement of many other unwaivable employment protections.

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