Tuesday, February 3, 2015

LETTER: Opposing a motion to compel arbitration

LETTERS TO THE EDITOR COLUMN

I write in response to the article by the Judge William F. Highberger concerning arbitration. ["Compelling arbitration: a decision tree," Jan. 26].

Under *both* the Federal Arbitration Act and the California Arbitration Act (CAA), "the preference for arbitration extends only to those disputes the parties agree to arbitrate." *Elijahjuan v. Superior Court*, 210 Cal. App. 4th 15, 20 (2012). Thus, "[t]he agreement to arbitrate disputes concerning ... Agreements ... does not include the [statutory] claims." *Id.* at 23. This is because "Labor Code claims do not arise out of the contract." *Id.* at 24. Where a "contract does not mention the arbitration of statutory claims or identify any statutes," it does not apply to "statutory labor claims." *Hoover v. American Income Life Ins. Co.*, 206 Cal. App. 4th 1193, 1208-09 (2012).

An exception to the FAA applies to any "class of workers engaged in foreign or interstate commerce." 9 U.S.C. Section 1. This phrase applies to "those engaged in transportation." *Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 121 (2010). The exception includes drivers. *Harden v. Roadway Package Systems Inc.*, 249 F.3d 1137, 1140 (9th Cir. 2001). However, it is not "limited to ... drivers" but also applies to those whose work is "so closely related" to interstate and foreign commerce, including drivers' supervisors. *Palcko v. Airborne Express Inc.*, 372 F.3d 588, 593 (3rd Cir. 2004). Under California law, "actions ... for ... due and unpaid wages ... may be maintained without regard to ... any private agreement to arbitrate." Labor Code Section 229.

As to delegation clauses, "the enforceability of an arbitration agreement is ordinarily to be determined by the court." *Ajamian v. CantorCO2e LP*, 203 Cal. App. 4th 771, 781-82 (2012). Even where there is "clear and unmistakeable" delegation language, it can be defeated "where other language in the agreement creates uncertainty in that regard." *Id.* at 790. Thus, a delegation clause is unenforceable where "one provision ... stated that issues of enforceability or voidability were to be decided by the arbitrator, [but] another provision indicated that the court might find a provision unenforceable." *Baker v. Osborne Development Corp.*, 159 Cal. App. 4th 884, 893 (2008).

Highberger opines that *Malone v. Superior Court*, 226 Cal. App. 4th 1551 (2014), held that *AT&T Mobility LLC v. Concepcion* "overruled a line of California authority that if an "agreement delegates the question [of arbitrability] to the arbitrator," it is unenforceable. However, that part of *Malone* was focused on "the financial interest of the arbitrators who would be deciding the delegated issue." The other portions of the decisions referenced appear to remain good law.

The issue of whether a case can be compelled to arbitration is a highly complex and evolving area of law. Highberger's article does an excellent job of describing the basic precepts applicable to the analysis. I have tried to describe some of the arguments which an attorney may find useful to oppose a motion to compel arbitration.

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