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Court of Appeal Upholds Class Action Waivers in Employment Agreement

In a decision with potentially wide-ranging implications, the California Court of Appeal has held that an employment agreement requiring employees to forgo their right to participate in a class action lawsuit and instead arbitrate those claims individually is not unconscionable under California law. *Konig v. U-Haul Co.* of California, 2006 Cal. App. LEXIS 1992, 2006 WL 3720248 (Cal. Ct. App., Dec. 19, 2006). Significantly, *U-Haul* extends the landmark holding in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005) — a consumer class action — to the employment context, finding that a class action waiver is substantively unconscionable only if each employee could hope to recover no more than a "predictably . . . small amount of damages."

As a condition of employment, U-Haul required its employees to sign an arbitration agreement stating in relevant part, "I agree to forego any right . . . to bring claims on a representative, class member basis, or as a private attorney general." In affirming the trial court's order compelling arbitration and dismissing plaintiff's class action claims for unpaid wages and unfair business practices, the court of appeal found that although the arbitration clause was procedurally unconscionable because it contained no opt-out provision or mechanism to negotiate the terms, the terms were not so "unfairly one-sided" as to result in substantive unconscionability. The court based its ruling on *Discover Bank*, which held that class action waivers in consumer contracts were substantively unconscionable when "disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money."

Applying the *Discover Bank* reasoning to the employment agreement at issue, the *U-Haul* court found that plaintiff had presented no evidence before the trial court that the class members' potential damages and penalties would be "predictably . . . small." Rather, plaintiff had argued below that he and other putative class members had incurred damages that could exceed $1,000 per month, a number that the court determined was far too large to meet the *Discover Bank* unconscionability standard.

U-Haul is not the first time that a California court has upheld a class action waiver in an employment agreement. In *Gentry v. Superior Court*, 135 Cal. App. 4th 944 (2006), the court of appeal held that under *Discover Bank*, a class action waiver signed by plaintiff, a former Circuit City employee, was not substantively unconscionable because plaintiff "alleged statutory violations that could result in substantial damages and penalties should he prevail on his individual claims." However, the California Supreme Court granted review of the court of appeal's decision, voiding the precedential value of that case. Depending on whether the high court upholds the *Gentry* opinion or grants review in *U-Haul*, California law regarding class action waivers in employment contracts could become markedly different in a short period of time. Therefore, employers would be well-advised to refrain from adding such provisions to employment contracts until it is determined that *U-Haul* and/or *Gentry* are good law.

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