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[California Court Of Appeal Extends *Armendariz* To Cover Independent Contractors](#)

In the seminal case *Armendariz v. Foundation Health Psychcare*, the Supreme Court of California established the standard for determining the enforceability of mandatory arbitration agreements for employees. *Armendariz* generally held that mandatory arbitration agreements were enforceable if they were mutual and did not "serve as a vehicle for the waiver of statutory rights." *Armendariz* set forth a number of minimum requirements that must be met for a mandatory employment arbitration agreement to be valid, including requiring a neutral arbitrator, providing for sufficient discovery, requiring a written decision adequate enough to allow judicial review, allowing for all remedies available in a judicial action, and not requiring the employee to pay unreasonable costs or fees. In the recent case *Wherry v. Award, Inc.*, the Fourth Appellate District extended the *Armendariz* standard beyond the employment relationship and applied the same standard to mandatory arbitration agreements for independent contractors.

In *Wherry*, Plaintiffs Karena Wherry and Rocelyn Traieh entered into independent contractor agreements with Defendants to act as real estate salespeople. The agreements contained mandatory arbitration provisions. After approximately one year, the relationships between Plaintiffs and Defendants were terminated and, shortly thereafter, Plaintiffs sued Defendants for gender discrimination, sexual harassment, and retaliation under the Fair Employment and Housing Act ("FEHA"). Defendants moved to compel arbitration.

The Court of Appeal refused to compel arbitration, holding that the arbitration agreements were procedurally and substantively unconscionable. The Court held that the agreements were procedurally unconscionable because they were given to Plaintiffs on a take it or leave it basis, without the possibility of negotiating any of the material terms.

The Court found that the agreements were substantively unconscionable because they permitted the arbitrator to award the prevailing party attorneys' fees and arbitration costs. In a civil FEHA action, a defendant is only permitted to recover attorneys' fees if the action is frivolous and the agreements did not contain that limitation. Obviously, there are no arbitration costs in a civil proceeding and, consequently, a defendant cannot recover those costs in court. The Court held that by granting the arbitrator discretion to award fees and costs that would not be recoverable in court, the agreements expanded Defendants' rights and were unconscionable. The Court disregarded Defendants' argument that the agreements only permitted, and did not require, the arbitrator to award the fees and costs and found that merely granting the arbitrator the discretion was sufficient to invalidate the agreements. The Court further found that the agreements were substantively unconscionable because they required a party to file a claim within 180 days of the event triggering the action, which was shorter than the statutory period required for filing a

FEHA action in civil court.

The Court acknowledged that it had the discretion to sever the offending provisions from the arbitration agreements and enforce the remainder of the agreements, but declined to do so because the agreements were "rife with unconscionability." Instead, the Court struck the entirety of both agreements.

Overall, *Wherry* is not a groundbreaking analysis of the actual *Armendariz* standard. Rather, *Wherry* is important because it extended the *Armendariz* standard beyond the employment realm and applied it to independent contractors. In light of *Wherry*, businesses should review and reassess their arbitration agreements with independent contractors. Additionally, *Wherry* should serve as a reminder to employers that mandatory arbitration agreements must always be carefully drafted because even minor errors can cause an agreement to be unenforceable.

Authored by Sheppard Mullin's [Labor & Employment Practice Group](#).