



## Legal Alert: U.S. Supreme Court Lets Stand Decision of California State Court Refusing to Enforce Arbitration Agreement Containing Class Waiver Provision

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The U.S. Supreme Court has refused to review the decision of the California Court of Appeals in *Athens Disposal Co. v. Franco*, which held that an arbitration agreement between a trash company and a driver that included a waiver of class claims and prohibited the employee from seeking civil penalties on behalf of other workers was unconscionable and so tainted with illegality that it was unenforceable. See *Athens Disposal Co. v. Franco*, U.S., No. 09-272, *cert. denied*, January 11, 2010.

In *Athens Disposal*, the plaintiff sued the employer claiming it violated California labor laws relating to meal and rest breaks and overtime pay. The employer filed a motion to compel arbitration based on an arbitration agreement between it and the employee, which was written in Spanish (the employee's first language) and signed by the employee. The arbitration agreement provided that both parties "forgo and waive any right to join or consolidate claims in arbitration with others or to make claims in arbitration as a representative or as a member of a class or in a private attorney general capacity." The arbitration agreement specified that it is governed by the Federal Arbitration Act. The trial court granted the employer's motion to compel arbitration; however, the California Court of Appeals reversed this decision.

In finding the arbitration agreement unenforceable, the Court of Appeals relied on the California Supreme Court's decision in *Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007). *Gentry* held that, in some cases, a class action waiver in an arbitration agreement "can be exculpatory in practical terms because it can make it very difficult for those injured by unlawful conduct to pursue a legal remedy." Although *Gentry* specifically addressed overtime claims, the Court of Appeals held that it also applies to claims for meal and rest breaks under the California Labor Code.

In determining whether to enforce the waiver of class claims in the arbitration agreement, the Court of Appeals applied the factors set forth in *Gentry*: (1) the modest size of the potential individual recovery; (2) the potential for retaliation against members of the class; (3) the fact that absent members of the class may be ill informed about their rights; and (4) other real world obstacles to the vindication of class members' right to overtime pay through individual arbitration. According to *Gentry*, if a court concludes, based on

these factors, "that a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations, it must invalidate the class arbitration waiver to ensure that these employees can 'vindicate [their] unwaivable rights in an arbitration forum.'" Applying this analysis, the Court of Appeals held that the class claim waiver in *Athens Disposal* was unconscionable and unenforceable under state law.

Additionally the Court of Appeals held that language in the arbitration agreement prohibiting an employee from acting "as a private attorney general" rendered the agreement illegal and unenforceable because it conflicts with California's Private Attorneys General Act.

The California Supreme Court refused to review the Court of Appeals' decision. Subsequently, the employer petitioned the U.S. Supreme Court for review, arguing that the California Supreme Court decision in *Gentry*, as well as other decisions from the Ninth Circuit, conflict with decisions from other federal appeals courts that have upheld class waivers in arbitration agreements subject to the FAA, unless the waiver amounts to an exculpatory clause which would preclude vindication of statutory rights. The employer argued that in this case there was a sufficient amount in controversy to provide incentive for the employee to vindicate his statutory rights. The Supreme Court denied the petition for review without comment.

### **Employers' Bottom Line**

The Supreme Court's refusal to review this case means that California state courts, as well as federal courts in the Ninth Circuit, are likely to continue their trend of finding waivers of class claims in arbitration agreements unconscionable, particularly in statutory rights cases where the employee is judged to be unable to obtain counsel to effectively assert legal rights except through the means of a class action recovery. The courts will consider on a context basis whether a class action waiver clause is unconscionable because an attorney would not have sufficient recovery incentive to bring an individual action. For drafting purposes, employers may want to consider the possibility of including other options such as a severability clause where there is a class action waiver in the arbitration agreement.

If you have any questions regarding this issue or other labor or employment law issues, please contact John Allgood, [jallgood@fordharrison.com](mailto:jallgood@fordharrison.com), or the Ford & Harrison attorney with whom you usually work.