



July 13, 2011

Contact:
Pamela A. Mixon
Attorney at Law
213.417.5115
pmixon@mpplaw.com

California Court of Appeals Continues to Favor Binding Arbitration Claims by Employers

On June 8, 2011, in *MacIntosh v. Powered, Inc.*, the Court of Appeal of California, First District, Division Five, reversed the trial court's denial of Powered, Inc.'s motion to compel arbitration, forcing the plaintiff, John MacIntosh, a California-based employee of Powered, Inc., to arbitrate his claims in Texas. The Court of Appeal found that the arbitration provisions in Powered Inc.'s standard form Employee Proprietary Information Agreement and its Commission Plan were procedurally unconscionable as adhesion contracts. The Court also held that a provision which gave Powered, Inc., but not its employees, the right to obtain a court injunction, was both procedurally and substantively unconscionable. Nevertheless, the Court believed that the unconscionable injunction provision was severable, and the remainder of the agreement could be enforced. The *MacIntosh* Court further stated that a contractual forum selection clause in both the EPIA and the Plan, requiring arbitration in Texas, was not unconscionable because it neither placed any undue burden on MacIntosh, nor violated California public policy. Thus, the Court remanded the case to the trial court, and instructed it to sever the objectionable provision and grant Powered, Inc.'s motion.

John MacIntosh was employed in the San Mateo, California office of Powered, Inc., a Delaware corporation with its principal place of business located in Texas. Powered, Inc. sent MacIntosh a written offer of employment in October 2008. The letter stated, among other things, that as a condition of his employment with Powered, Inc., he was required to sign and return Powered, Inc.'s standard form "Employee Proprietary Information Agreement" (EPIA). The letter did not include this EPIA. MacIntosh did execute the letter on October 20, and started working for Powered, Inc. on October 27.

On October 30, 2008, MacIntosh was finally provided with the EPIA. The EPIA set forth a number of conditions of employment, including a covenant not to compete, as well as a provision making the employment at will. The EPIA also included an arbitration provision and a choice of law and forum selection clause. The arbitration provision required both parties to submit "any and all controversies, claims, or disputes with anyone," except as provided in subsection (b) of the provision, to binding arbitration to be held in Travis County, Texas under the rules of the American Arbitration Association. Subsection (d) of the arbitration provision gave Powered, Inc. (and not MacIntosh) the right to obtain an injunction in court. MacIntosh completed and signed the EPIA.

In June 2009, MacIntosh was also presented with a document, which he signed, called, "Powered, Inc. 2009 Sales Commission Plan" (Plan). MacIntosh was told he had to sign the Commission Plan in order to receive commissions, which comprised a large part of his income. The Plan included a choice of law

clause which stated that the Plan would be governed by the laws of the State of Texas, and an arbitration provision which required that “[a]ll controversies, claims, or disputes” arising out of the Plan be submitted to binding arbitration to be held in Travis County, Texas under the rules of the American Arbitration Association.

On January 25, 2010, MacIntosh was told that he had been selected for layoff effective January 31, which was just prior to his receiving a commission for the renewal of a contract. MacIntosh contacted an attorney regarding his termination. Powered, Inc. then initiated an arbitration proceeding (requesting venue in Texas) against MacIntosh pursuant to the EPIA and the Commission Plan, seeking declaratory relief as to MacIntosh’s compensation claims.

In March 2010, MacIntosh filed a complaint for age discrimination with the Department of Fair Employment and Housing (DFEH). In April 2010, Powered, Inc. filed a motion to compel arbitration. The trial court denied Powered, Inc.’s motion in June 2010, finding that “the arbitration agreement” (without specifying which one) was procedurally unconscionable and that it contained substantively unconscionable provisions, including requiring a California resident working in California to arbitrate his claims in Texas, and a provision that allowed only Powered, Inc. to obtain an injunction in court. The trial court also refused to sever the offending provisions, finding that the agreement was “permeated with unconscionability.”

The First District Court of Appeal, however, concluded that the employment agreements at issue were not “permeated” with unconscionability, and that the trial court should have severed the substantively unconscionable injunction provision, and granted Powered, Inc.’s motion.

The *MacIntosh* Court similarly found the Plan procedurally unconscionable because MacIntosh was presented with the document after he had already started working for Powered, Inc., and told he had to sign it or he would not receive commissions.

Next, the Court of Appeal held that the EPIA provision that “carved out” equitable relief for Powered, Inc. only, and not the employee, was substantively unconscionable. The Court compared the situation to that in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 121, where the subject “agreement limited an employee’s remedies in the arbitral forum, while the employer was not subject to any comparable limitation...”

The Court of Appeal then considered the contractual forum selection clause requiring arbitration in Texas. The Court of Appeal stated that one subdivision of the Texas forum selection clause of the EPIA was permissive, while another subdivision, as well as a paragraph in the Plan, were mandatory, thus compounding the lack of mutuality (and substantive unconscionability) in the arbitration provision. The Court disagreed with MacIntosh’s assertion that the financial burden of litigation in a foreign forum meant that the forum selection clause was substantively unconscionable.

In addition, the Court found that MacIntosh had failed to present facts showing that he would suffer "extraordinary financial burdens" were he required to litigate in Texas. Accordingly, the *MacIntosh* Court found that the forum selection clause was not unconscionable.

Finally, the *MacIntosh* Court determined that the Powered, Inc. employment agreements at issue were not "permeated with unconscionability as a result of multiple objectionable terms." (citing *Trividi v. Curexo Technology Corp.* (2010) 189 Cal.App.4th 387, 398; *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 666.) Therefore, because only a single unconscionable provision was at issue (the injunctive relief "carve-out"), and that provision could be severed without reforming the contract or augmenting it with additional terms, the term could be severed and the rest of the arbitration agreement enforced.

Conclusion

The language of the *MacIntosh* decision should be a boon for employers. The case shows the lengths the Court of Appeal will go to in order to enforce an arbitration agreement, even one that is seemingly replete with unconscionability.