

EMPLOYMENT LAW UPDATE

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***Mercuro v. Superior Court***

116 Cal.Rptr 2<sup>nd</sup> 671 (February 13, 2002)  
2<sup>nd</sup> District Court of Appeal

***The California Court of Appeal holds that the procedural requirements for arbitration agreements under Armendariz apply to statutory claims other than violations of the Fair Employment and Housing Act.***

*By Jason A. Geller*

In another case dealing with the evolving landscape of employment arbitration in California, the California Court of Appeal held that the requirements for enforcement of arbitration agreements under *Armendariz v. Foundation Health Psychcare Services, Inc.* apply not only to statutory claims for discrimination under the Fair Employment and Housing Act (“FEHA”), but also to claims under other statutes such as Labor Code Section 230.8, prohibiting employers from discriminating against employees for taking time off for children’s school activities, and Labor Code Section 970, prohibiting employers from misrepresenting terms and conditions of employment.

Plaintiff Fred Mercuro worked as a securities broker for Countrywide Securities Corporation (“Countrywide”). As a condition of his employment, he signed the Form U-4 provided by the National Association of Securities Dealers (“NASD”). The U-4 required that he arbitrate all employment disputes, including statutory claims of

discrimination, in accordance with the NASD constitution, bylaws and rules. However, Mercuro never received copies of these materials from the NASD.

About a year after his employment had started, Countrywide presented Mercuro and other employees with another arbitration agreement which covered some employment disputes, including employment discrimination, but not others. Mercuro refused to sign the new arbitration agreement because he felt the consideration provided by Countrywide for it, an extra day of vacation or 25 shares of stock, was inadequate for giving up his right to a jury trial in the event of a dispute. In response, Countrywide’s managers threatened that his employment would not go well if he did not sign the new arbitration agreement. After he still refused to sign it, management told him that it would make it impossible for him to earn a living at Countrywide and drive him out. Under this pressure and coercion, Mercuro eventually signed the new agreement.

After his employment with Countrywide ended, Mercurio filed a lawsuit against it for age and disability discrimination, fraud and wrongful termination in violation of public policy. The trial court granted Countrywide's motion to compel arbitration. Mercurio then requested review of the order compelling arbitration by the Court of Appeal.

In directing the trial court to reverse its order compelling arbitration, the Court of Appeal focused on the standards set forth in *Armendariz* concerning "unconscionability" and other "minimum safeguards" necessary to secure employees' statutory rights under the discrimination laws. The Court found that Countrywide used oppressive tactics, including economic pressure, to force Mercurio to sign the agreement. Because of the high degree of pressure, or "procedural unconscionability," the Court found that the arbitration agreement was not enforceable.

Moreover, the Court observed that the agreement was unfairly one-sided in favor of Countrywide because it forced Mercurio to arbitrate his claims but exempted from arbitration certain claims most likely to be brought by Countrywide. In following *Armendariz*, the Court held that the agreement was unfair because it failed to guarantee a neutral arbitrator in view of the "repeat player effect," namely, that Countrywide repeatedly appeared before the same arbitrators who might be biased in favor of Countrywide.

Finally, the Court clarified that the strict requirements of *Armendariz* concerning the necessary components of an arbitration agreement not only apply to FEHA claims, but also apply to claims under any statutes "enacted for a public reason." The Court also found that the discovery provisions limiting each side to three depositions and a total of thirty discovery requests were reasonable under *Armendariz*.

*Mercurio* further clarifies the rules regarding the arbitration of employment disputes. It provides guidance about enforceable limitations on discovery contained in arbitration agreements and also extends the application of the *Armendariz* "safeguards" to potentially unlimited statutory claims, not just FEHA claims. The case reminds California employers to scrutinize thoroughly their arbitration agreements and be wary of becoming too aggressive with the terms therein, which might result in a court deeming the agreements to be unenforceable.

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