

## EMPLOYMENT LAW UPDATE

Juan C. Araneda

Jennifer A. Becker

David P. Borovsky

Shoshana Y. Chazan

Chip Cox

Edward F. Donohue, III

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Kathleen A. Foley

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Irene K. Yesowitch

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### Federal Law

#### ***Circuit City Stores, Inc. v. Mantor* (9<sup>th</sup> Cir. July 22, 2003) 03 C.D.O.S. 6431**

#### ***Under California Law, A Management/Employee Arbitration Agreement Can Be Procedurally Unconscionable Despite An Opt-Out Clause.***

By Jason A. Geller and Shoshana Y. Chazan

Plaintiff Paul Mantor worked for Circuit City from 1992 until October 2000, when Circuit City terminated his employment. When Circuit City hired Mantor, it had no arbitration program. In 1995, Circuit City implemented an arbitration program called the "Associate Issue Resolution Program" (AIRP). Although Circuit City circulated the forms regarding the AIRP in 1995, Mantor was able to avoid either signing up or openly refusing to participate in the AIRP for three years.

During a 1998 meeting with both a district manager and Circuit City's Personnel Manager for Northern California, Mantor asked what would happen if he declined to participate in the arbitration program. The Circuit City managers responded to the effect that he would have no future with the company. Thereafter, Mantor agreed to participate in the AIRP, acknowledging in writing his receipt of (1) an "Associate Issue Resolution Handbook," (2) the "Circuit City Dispute Resolution Rules and Procedures," and (3) a

"Circuit City Arbitration Opt-Out Form."

Mantor's employment terminated one year later. On October 10, 2001, Mantor brought a civil action in state court, alleging twelve causes of action. On October 17, 2001, to preserve his right to arbitrate his claims in the event that a court determined that his claims were subject to arbitration, Mantor submitted an arbitration request form and a cashier's check in the amount of seventy-five dollars to Circuit City's Arbitration Coordinator.

On November 26, 2001, Circuit City petitioned the Federal District Court to compel arbitration. The District Court granted Circuit City's motion to compel and stayed the state court action pending arbitration. Mantor filed a timely notice of appeal with the Ninth Circuit Court of Appeal. On appeal, Mantor argued the District Court erred in granting the order to compel arbitration because the Circuit City arbitration agreement is "unconscionable" under California contract law.

Federal law provides that arbitration agreements “shall be valid, irrevocable, and enforceable” except when grounds “exist at law or in equity for the revocation of any contract.” But the federal courts will apply state law governing the unconscionability of adhesive contracts. In California, “unconscionability” exists when one party lacks meaningful choice in entering a contract or negotiating its terms and the terms are unreasonably favorable to the other party. Thus, under the recent decision in *Armendariz*, a contract to arbitrate is unenforceable under the doctrine of unconscionability when there is “both a procedural and substantive element of unconscionability.”

Circuit City argued that, because Mantor was given an opportunity to “opt-out” of the arbitration agreement, the agreement was not oppressive--and therefore not procedurally unconscionable. However, the court focused on Circuit City management's pressure on Mantor not to opt-out, including threatening his job outright if Mantor exercised his “right” to opt-out. The fact that Circuit City management pressured and even threatened Mantor into assenting to the arbitration agreement demonstrates that he had no meaningful opportunity to opt-out of the program. The Court reasoned that when one party to a contract exerts far greater bargaining power than the other party, or when the stronger party pressures, harasses, or compels the other party into entering into a contract, procedural unconscionability is present.

Furthermore, the court found that Circuit City had not greatly improved its arbitration agreement after other courts

had found it was “substantively” unconscionable. When the Court reviewed the 1998 version of Circuit City's arbitration agreement, it found unconscionable the scope of the agreement itself, as well as the terms concerning the statute of limitations, the prohibition on class actions, the filing fee, cost-splitting, remedies, and Circuit City's unilateral power to modify or terminate the arbitration agreement. For the reasons expressed in its prior decisions, the Court continued to hold that these terms were substantively unconscionable. Therefore, the Court sided with Mantor and reversed the District Court's ruling that the agreement was enforceable.

California employers hoping to utilize arbitration agreements should read the Circuit City cases carefully to ensure that their agreements do not run afoul of the requirements imposed by *Armendariz* and its progeny. A carefully crafted arbitration agreement, not imposed upon employees by force but entered into voluntarily, should survive challenge.

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