Dear Member,

This email discusses two recent decisions concerning unsuccessful motions to compel arbitration. In *Norcia*, Samsung unsuccessfully argued that an arbitration provision contained in a brochure in the box containing its cell phone created an enforceable arbitration agreement. In *Vasserman*, the hospital unsuccessfully argued that an arbitration provision contained in a collective bargaining agreement that did not contain a clear and unmistakable waiver of an employee's right to a judicial forum related to statutory claims created an enforceable agreement.

Norcia v. Samsung Electronics America, LLC, 217 WL 218027, Ninth Circuit Filed January 19, 2017

In May 2013, Daniel Norcia purchased a Samsung Galaxy S4 telephone from a Verizon Wireless store in San Francisco. The receipt contained a "Consumer Agreement" which provided, in part, any dispute with Verizon would be settled by arbitration. The receipt did not reference Samsung or any other party. Norcia was given a box containing the Galaxy S4 telephone. The box contained, *inter alia,* a 101-page "Product Safety & Warranty Information" brochure. Section 2 of the brochure contained a provision that all disputes with Samsung would be resolved exclusively through final and binding arbitration. The provision outlined an opt out procedure if exercised within 30 days of the purchase. Norcia did not take any steps to opt out.

In February 2014, Norcia filed a class action complaint against Samsung alleging that Samsung had misrepresented the Galaxy S4 storage capacity and that such deceptive acts constituted common law fraud and violated California's Consumer Legal Remedies Act, California's Unfair Competition Law, and California's False Advertising Law. Samsung moved to compel arbitration based on the arbitration provision contained in the Product Safety & Warranty brochure. The District Court denied the motion finding that receipt of the brochure do not form an agreement to arbitrate the claims asserted. Applying California law, the Ninth Circuit held that Samsung's offer to arbitrate all disputes with Norcia "cannot be turned into an agreement because the person to whom it is made or sent makes no reply, even though the offer states its silence will be taken as consent," unless an exception to this general rule applies. Samsung failed to demonstrate the applicability of any exception to California's general rule. Accordingly, no contract was formed between Norcia and Samsung, and Norcia was not bound by the arbitration provision contained in the package insert.

Vasserman v. Henry Mayo Newhall Memorial Hospital, 2017 WL 491700, Second Appellate District (Los Angeles), Filed February 7, 2017

Tanya Vasserman worked as a registered nurse at the Henry Mayo Newhall memorial Hospital from March 10, 2014 to April 3, 2014. In June 2014, Vasserman filed a class action asserting statutory claims on behalf of herself and five putative classes of plaintiffs. Vasserman alleged various violations of the California Labor Code and other statutes relating to meal and rest breaks, unpaid wages, and unpaid overtime compensation. The Hospital moved to compel arbitration based on the Collective Bargaining Agreement between the California Nurses Association and the Hospital. The CBA provided, in part, that any complaint or dispute arising out of the interpretation or application of a specific article or section of the CBA required the California Nurses Association or the Hospital to file a grievance for binding arbitration with and pursuant to the rules of the Federal Mediation and Conciliation Service.

The issue before the trial and appellate courts was whether the CNA CBA contained "a clear and unmistakable waiver of the covered employee's rights to a judicial forum "relating to the statutory claims alleged in the complaint." The trial court and the appellate court concluded that the arbitration provision did not include a clear and unmistakable waiver and on that basis denied the hospital's motion to compel arbitration. The clear and unmistakable standard is set forth in *Vasquez v. Superior Court*, 80 Cal.App. 4th 430 (2000) and *Wright v. Universal Maritime Service Corp*. 525 U.S. 70 (1998). Relying on *Vasquez and Wright*, the appellate court concluded that the arbitration provision in the CBA made "No mention of the California Labor Code or any other statute, it does not discuss individual statutory rights, nor does it mention waiver of a judicial forum. [The arbitration provision], standing alone, does not include a clear and unmistakable waiver of Vasserman's rights to a judicial forum to bring statutory claims."

After noting Vasserman's brief employment by the Hospital, the appellate court also pointed out that the presumption of arbitrability that typically applies to contractual disputes, did not apply to a collective bargaining agreement.

NOTE TO MEMBERS: In the coming weeks, I will send you additional case summaries. The summaries reflect my analysis and have not been reviewed by CDRC's Board. I invite your comments.

For those who have not renewed their membership, please do so either on-line at www.cdrc.net or by mail. Checks should be sent to CDRC's Treasurer Chuck Pereyra, 800 Wilshire Blvd., Suite 1200, Los Angeles, California 90017. Membership levels are Professional $150, Contributing $250, Sustaining $500, and Sponsoring $750. For those who have renewed or encouraged other colleagues to join, my sincere thanks.

Regards,

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