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NINTH CIRCUIT AGAIN MUDDLES ARBITRATION ISSUE (May 15, 2003)

Summary

The Ninth Circuit Court of Appeals, which is the highest federal appellate court with jurisdiction over California and many Western states, refused to enforce an employer's arbitration agreement yesterday. In doing so, the Court placed another roadblock in the way of pre-dispute arbitration agreements.

Details

In *Ingle v. Circuit City Stores, Inc.,* the Ninth Circuit once again considered the requirements for employers to have binding arbitration agreements with their employees. And, once again, the Court has taken a position that is inconsistent with other courts.

In particular, the Ninth Circuit has now ruled that a pre-dispute arbitration agreement is "unconscionable," and therefore unenforceable, if it is offered as a "take it or leave it" proposition *and* if the terms of the arbitration agreement are, in the Court's view, "one-sided."

Importantly, the Ninth Circuit ruled that this particular arbitration agreement was "one-sided" because the nature of the employment relationship is such that employees are much more likely to bring claims than are employers. Because of that conjecture, employers now have the burden to demonstrate that the *effect* of their agreement will be to create truly mutual obligations between the employer and that particular employee. In other words, the Ninth Circuit has directed courts to look past the plain language of the agreement to instead divine the overall impact of the employer's agreement with that particular employee.

In our view, the Ninth Circuit overreached with this decision. For example, instead of limiting itself to an analysis of the actual words in the agreement, the Court instead engaged in some relatively substantial speculation to conclude that the terms of the agreement were unfair. And, unlike other courts that have addressed the issue, the Ninth Circuit placed great weight on the fact that prospective employee had "no choice" but to accept the arbitration agreement. The Court opted to ignore the fact that the employee could have applied for employment with any other employer.

What This Means

For now, we recommend that employers who have arbitration agreements with their employees wait to see whether the Ninth Circuit will reconsider its decision, or whether the United States Supreme Court will review this matter. If the Ninth Circuit's decision stands, however, employers will want to thoughtfully re-visit their arbitration agreements to determine if they comply with this new Ninth Circuit standard.

This E-Update was authored by Joe Connaughton. If you have any questions about this E-Update, please contact the author or any PPS&C attorney (619-237-5200).

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