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Class-less? An Analysis of the California Supreme Court's Denial of Employers' Right to Use Class Arbitration Waivers in Employment Agreements in *Gentry v. Superior Court*

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CLASS-LESS?

AN ANALYSIS OF THE CALIFORNIA SUPREME COURT’S DENIAL OF EMPLOYERS’ RIGHT TO USE CLASS ARBITRATION WAIVERS IN EMPLOYMENT AGREEMENTS IN *GENTRY V. SUPERIOR COURT*

MICHAEL B. COOPER¹

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I. INTRODUCTION

In August of 2007 the California Supreme Court took a second affirmative step towards nullifying the efficacy of class arbitration waivers.² In *Gentry v. Superior Court*, the California Supreme Court sought to further clarify their then

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² See generally *Gentry v. Superior Court (Gentry)*, 42 Cal. 4th 443 (2007). As will be discussed in depth throughout this Note, the *Gentry* court follows closely on the heels of *Discover Bank v. Superior Court* which limited the validity of class arbitration waivers in consumer contracts. See generally *Discover Bank v. Superior Court (Discover Bank 2)*, 36 Cal. 4th 148 (2005).

two year old ruling in *Discover Bank v. Superior Court*.³ The two primary issues in *Gentry* were the validity of a class arbitration waiver within an employment setting and whether the entire arbitration agreement was void for unconscionability.⁴ The majority concluded that, in some instances, such a class arbitration waiver may be invalid and that any presence of procedural unconscionability warranted judicial scrutiny of the agreement in full.⁵

The California Court of Appeal had rejected Gentry's petition for mandate based on the validity of the arbitration agreement he had signed when hired by his former employer, Circuit City Stores, Inc.⁶ The California Supreme Court reversed that ruling and remanded with instructions to thoroughly analyze the arbitration agreement for substantive unconscionability.⁷ Moreover, the majority found that the class arbitration waiver in a wage and hour employment claim may be invalid since it would be a de facto waiver of an unwaivable statutory right.⁸

This decision expands the holding of *Discover Bank 2*, which addressed consumer contracts, to the realm of employment contracts.⁹ As such, the position of the majority places class arbitration waivers in employment agreements in peril; specifically, the use of a class arbitration waiver may not only be an invalid clause within the agreement, but could potentially void the entirety of the employment contract.¹⁰ The widespread use of alternative dispute resolution measures in employment contracts, many with a class arbitration waiver, creates the potential that *Gentry* will have a widespread effect throughout Corporate America.¹¹ The

³ *Id.* at 452. The California Supreme Court made it quite clear that Gentry's petition for rehearing was granted so that the court could "clarify our holding in *Discover Bank*." *Id.*

⁴ *See generally id.* at 453, 466-67.

⁵ *Id.* at 450. The court held that "at least in some cases, the prohibition of classwide relief would undermine the vindication of the employees' unwaivable statutory rights and would pose a serious obstacle to the enforcement of the state's overtime laws." *Id.*

⁶ *Gentry v. Superior Court (Gentry Appeal)*, 135 Cal. App. 4th 944, 946-47 (Ct. App. 2006). The record in the California Court of Appeal reflects the deference the Second Appellate District showed for the arbitration agreement under the California Arbitration Act. *Id.* at 948.

⁷ *Gentry*, 42 Cal. 4th at 472-73. Upon remand, the California Court of Appeal again denied Gentry's claim stating that the arbitration agreement was not unconscionable, nor did the holding of *Discover Bank 2* apply to the present claim. *See Gentry Appeal*, 135 Cal. App. 4th at 948.

⁸ *Id.* at 450.

⁹ *See generally Discover Bank 2*, 36 Cal. 4th 148. In the future a court which finds the arbitration clause invalid, due to unconscionability or an invalid waiver of a statutory right, may be cause to void the entire agreement if sufficiently offensive to the *Gentry* holding. *See generally Gentry*, 42 Cal. 4th at 443.

¹⁰ *See generally* J. Maria Glover, Note, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735 (2006) (discussing the growing use of mandatory arbitration provisions and clauses that prohibit class actions in employment contracts thereby raising the specter of corporate abuse); Jonathan Rizzardi, *Recent Development: Discover Bank v. Superior Court of Los Angeles*, 21 OHIO ST. J. ON DISP. RESOL. 1093 (2006) (discussing the impact of *Discover Bank 2* and its ramifications for mandatory arbitration provisions within consumer and employment contracts in the future); Julia B. Strickland & Stephen J. Newman, *Shock Waives*, 29 L.A. LAW., Mar. 2006, at 22 (discussing the authors' role as lead counsel on behalf of *Discover Bank 2* and their view of the widespread impact *Discover Bank 2* will have in California corporate law).

¹¹ *See* Strickland & Newman, *supra* note 10, at 22. Strickland and Newman contend that the California Supreme Court's decision in *Discover Bank 2* impinges the "freedom of contract . . . in the context of private agreements for dispute resolution." *Id.* The inference may be drawn that the wide breadth of *Discover Bank 2* will likewise be seen in the wake of *Gentry*. *Gentry* specifically addressed

ambiguity in the majority's decision sets the stage for a series of subsequent decisions where the court will have to ascertain when exactly a class arbitration waiver "undermine[s] the vindication of the employees' unwaivable statutory rights."¹²

Gentry's impact presents three interesting questions for California trial courts, California employers, and California employees. First, how should a trial court determine "in some cases" that the class arbitration waiver seeks to waive a statutory right and should be struck down?¹³ Second, as *Gentry* is implemented throughout the state, are employers and employees to assume that wage and hour issues are not subject to arbitration, or just not subject to class arbitration? Third, has the California Supreme Court created an administrative monster for the trial courts by placing certain employment disputes outside of the arbitral forum and solely within the judicial system?

This case note will provide a detailed evaluation and prediction of the landscape remaining in a post-*Gentry* California and the cases to follow in that vein. Part II will present a brief overview of arbitration agreements, class arbitration waivers and relevant statutes within the California Labor Code.¹⁴ In Part III, the essential facts behind *Gentry* will be set forth as a means to illustrate the basis from which the California Supreme Court reached their recent conclusion.¹⁵ Part IV examines the opinions of both the Court's majority and dissenting Justices.¹⁶ Part V will attempt to synthesize what ramifications *Gentry* may have in California on employment contracts, public policymaking and the state judicial system.¹⁷ Finally, Part VI concludes this case note.¹⁸

II. LEGAL BACKGROUND

A. Arbitration Agreements

Over the course of the second half of the twentieth century, "Corporate America" began to explore avenues of dispute resolution outside of the established court systems.¹⁹ Among the developments has been an increased preference for

the unwaivable statutory right to a minimum wage and overtime pay for California employees. *See generally Gentry*, 42 Cal. 4th at 443.

¹² *Gentry*, 42 Cal. 4th at 450.

¹³ *Id.*

¹⁴ *See infra* Part II.

¹⁵ *See infra* Part III.

¹⁶ *See infra* Part IV.

¹⁷ *See infra* Part V.

¹⁸ *See infra* Part VI.

¹⁹ *See generally* David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* (Cornell/ PERC Inst. on Conflict Resol., Ithaca, N.Y.), Jan. 1998. In a survey of more than half of the Fortune 1000 corporations, the study found that the use of alternative dispute resolution was employed by nearly every corporation that completed the survey. *Id.* at 8. Specifically, the survey found that 87% of the Fortune 1000 had utilized mediation as a means to avoid a dispute leading to litigation. *Id.* at 9. The use of arbitration amongst these corporations was 80% within the previous three years. *Id.* Interestingly, the survey also

the use of an arbitrator to officiate disputes.²⁰ Corporate America has moved steadily towards the use of arbitrators in a number of situations; among the most prevalent have been consumer-related disputes and employment-related disputes.²¹ What was once predominantly the province of labor unions and corporations has now spread to the average American consumer and employee.²²

In 1925, the United States Congress passed the Federal Arbitration Act (“FAA”), which set forth a “strong federal policy [in favor] of enforcing arbitration agreements, including agreements to arbitrate statutory rights.”²³ The FAA was a means by which the Federal government sought to rebut the predominant feeling among the Federal judiciary that an arbitral forum was inadequate when compared to the courts.²⁴ Two years after the United States Congress acted, the California Legislature followed suit and passed the first comprehensive arbitration legislation in California.²⁵ The current arbitration statute, the California Arbitration Act (“CAA”), was adopted in 1961 and has since remained in full effect.²⁶

California courts have been consistent in their approach towards the enforcement of arbitration in the abstract.²⁷ The use of arbitration agreements

concluded that the use of alternative dispute measures was favored by an overwhelming majority of in-house counsel, with over 80% preferring mediation or arbitration to litigation. *Id.*

²⁰ Lipsky & Seeber, *supra* note 19, at 9. The Cornell/ PERC Institute on Conflict Resolution survey gauged the pulse of the corporate in-house counsel for more than half of the Fortune 1000 corporations and found that the trend towards alternative dispute methods was growing. *Id.* at 29-30. Corporations surveyed forecasted that the increase in the use of mediation and arbitration would continue to grow; more than 80% foresaw using mediation and nearly 70% anticipated using the arbitral process to avoid expensive litigation. *Id.*

²¹ *Id.* The survey specifically found that the corporations were most likely to employ the use of mediation or arbitration in employment settings. *Id.* at 11. Nearly 80% of those surveyed used mediation for employment disputes and the use of arbitration was found in 62% of employment disputes. Lipsky & Seeber, *supra* note 19, at 11.

²² See generally James J. Alfini, Sharon B. Press, Jean R. Sternlight & Joseph B. Stulberg, *MEDIATION THEORY AND PRACTICE* (2nd ed. 2006). The authors present a historical perspective of the growth and domain of alternative dispute resolution in the opening chapter. *Id.* It is noted that the original intent behind the alternative dispute legislation was “the goal of sustaining industrial stability” to “private sector union and management personnel engaged in collective bargaining.” *Id.* at 1. It is worth noting that the employment realm has seen “the most explosive growth in the use of” alternative dispute resolution procedures since the late 1960’s. *Id.* at 10

²³ *Armendariz v. Found. Health Psychcare Servs., Inc. (Armendariz)*, 24 Cal. 4th 83, 96-97 (2000).

²⁴ See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984) (describing the Congressional intent behind the Federal Arbitration Act as a declaration of a national policy favoring arbitration and providing for the enforcement of such provisions).

²⁵ *Armendariz*, 24 Cal. 4th at 97. The California legislature adopted the first state-wide arbitration act in 1927 which declared arbitration agreements to be irrevocable and enforceable “in terms identical to those used in section 2 of the federal act.” *Id.* Moreover, “since that time California courts and its Legislature have ‘consistently reflected a friendly policy toward the arbitration process.’” *Id.*

²⁶ *Id.* The California Supreme Court made clear that the arbitration policy in California was further expanded and clarified in 1961 and remains the effective policy of the state. *Id.* at 98. Additionally, of particular importance to the discussion presented in this Note, is that the California Arbitration Act, “unlike the FAA, contains no exemption for employment contracts.” *Armendariz*, 24 Cal. 4th at 98.

²⁷ See *id.* (holding that arbitration agreements should be enforced pursuant to the Federal Arbitration Act and the California Arbitration Act provided they do not violate established contract principles allowing for avoidance of a contract); *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064 (2003) (holding that California will remain true to the premise of the Federal Arbitration Act and enforce valid arbitration agreements).

between parties has been upheld in a variety of instances by the California Supreme Court.²⁸ However, while the courts are willing to uphold the validity of such agreements to arbitrate, that is not to say that the courts have given parties complete freedom to enter into arbitration agreements.²⁹ Instead, California courts have applied the common law defenses to contracts as a means by which to ensure that arbitration agreements are not invalid or illegal.³⁰

In 2000, the California Supreme Court handed down a decision in *Armendariz v. Foundation Health Psychcare Services, Inc.*, which has become a seminal case in California arbitration law.³¹ In *Armendariz*, the California Supreme Court took up the issue of whether mandatory employment arbitration agreements could be upheld in light of prevailing statutory rights.³² The court held that “such claims are in fact arbitrable *if* the arbitration permits an employee to vindicate his or her statutory rights.”³³ Moreover, “the arbitration must meet certain minimum requirements, including neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the cost of arbitration.”³⁴ Upon setting forth the minimum requirements for arbitration to constitute a valid dispute resolution forum, the court went on to explore the possibility that an otherwise valid arbitration agreement may be void based on the common law doctrine of unconscionability.³⁵

²⁸ See generally *Armendariz*, 24 Cal. 4th at 83; *Discover Bank 2*, 36 Cal. 4th at 148; *Little*, 29 Cal. 4th at 1064.

²⁹ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (stating that some statutory claims may not be appropriate for arbitration; however, “if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.”) *Id.*

³⁰ See 9 U.S.C. § 2 (2007) (the statutory language states that written provisions to settle disputes by arbitration are enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.”).

³¹ See, e.g., *Murphy v. Check ‘N Go of Cal., Inc.*, 156 Cal. App. 4th 138, 145 (Ct. App. 2007) (raising *Armendariz* as the standard for analyzing whether an arbitration agreement should be deemed unconscionable or not), and *Little*, 29 Cal. 4th at 1064 (using the accepted *Armendariz* analysis to ascertain whether the arbitration agreement in question met the substantive and procedural requirements necessary for enforcement).

³² *Armendariz*, 24 Cal. 4th at 90. The *Armendariz* court set forth a series of minimum requirements which courts should use to analyze whether or not an agreement to arbitrate is valid and enforceable. *Id.* Specifically, the court highlighted the “neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration.” *Id.*

³³ *Id.* (emphasis added). The discussion surrounding the ability to arbitrate statutory rights has been robust in recent years. “The core concern . . . is whether there is a sufficiently close nexus between the class action waiver and non-waivable substantive rights such that these waivers should not be left to private bargaining.” Glover, *supra* note 10, at 1760.

³⁴ *Armendariz*, 24 Cal. 4th at 91.

³⁵ *Id.* at 113.

Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion. “The term contract of adhesion signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” If the contract is adhesive, the court must then determine whether ‘other factors are present, which, under established legal rules—legislative or judicial—operate to render it unenforceable.’

Armendariz declared that “under both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”³⁶ “Unconscionability is one such ground.”³⁷ Unconscionability has two primary components: procedural unconscionability and substantive unconscionability, which must both be present in order for the court to find that an agreement is unconscionable.³⁸ The doctrine is generally met where there exists an “absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonabl[y] favorable to the other party.”³⁹

Unconscionability is most often found in so-called “contracts of adhesion.”⁴⁰ A contract is deemed adhesive if a “standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.”⁴¹ If a contract is

Id.

³⁶ *Szetela v. Discover Bank (Discover Bank I)*, 97 Cal. App. 4th 1094, 1099 (Ct. App. 2002) (holding that “an agreement to arbitrate is enforceable unless a recognized contract defense, such as unconscionability, exists.”). *Id.* The *Discover Bank I* court set forth the essential elements of contract unconscionability: procedural and substantive. *Id.* at 1100-01. Procedural unconscionability “focuses on the manner in which the disputed clause is presented to the party in the weaker bargaining position.” *Id.* Substantive unconscionability “addresses the fairness of the term in dispute.” *Id.*

³⁷ *Id.* Unconscionability, as a common law contract defense, has been a defense to agreements to arbitrate adopted by the California Supreme Court. *See, e.g., Armendariz*, 24 Cal. 4th at 113. However, recent decisions by the California Supreme Court have led the court to find that there is a sliding scale between procedural and substantive unconscionability; therefore, the mere presence of one element may be sufficient to establish a complete defense to the contract if there is an abundance of the other element. *Discover Bank I*, 97 Cal. App. 4th at 1100. “The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.” *Id.*

³⁸ *Dean Witter Reynolds, Inc. v. Superior Court of Alameda County*, 211 Cal. App. 3d 758, 767 (Cal. Ct. App. 1989). The *Dean Witter Reynolds* court thoroughly examined the various methods courts use to analyze whether unconscionability is present. *Id.* at 767-68. Procedural unconscionability is often identified by the presence of oppression, or “no real negotiation and the absence of meaningful choice.” *Id.* at 767. The second factor found in procedural unconscionability is hallmarked by surprise; the surprise occurs when “the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms.” *Id.* On the other hand, substantive unconscionability is found where the contract “is overly harsh or one-sided and is not justified by the circumstances in which the contract was made.” *Id.* at 768. The overarching principle was reiterated by the *Dean Witter Reynolds* court, quoting the *A & M Produce Co.* court, that both elements must be present “before a contract will be held unenforceable” and “a relatively larger degree of one will compensate for a relatively smaller degree of the other.” *Id.* (quoting *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 487 (Cal. Ct. App. 1982)).

³⁹ *Id.*

⁴⁰ *See Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1071 (2003) (standing for the principle that the “procedural element of an unconscionable contract generally takes the form of a contract of adhesion...”). *Id.* The *Little* court quoted heavily from the *Armendariz* decision in ascertaining whether a contract was one of adhesion or not. A contract of adhesion is generally “imposed and drafted by the party of superior bargaining strength, relegate[ing] to the subscribing party only the opportunity to adhere to the contract or reject it.” *Armendariz*, 24 Cal. 4th at 113.

⁴¹ *Armendariz*, 24 Cal. 4th at 113. The *Armendariz* court sought to provide a clear explanation of what exactly constitutes a contract of adhesion. As such, quoting from *Neal v. State Farm Ins. Cos.*, a contract of adhesion can also be characterized as one which does not result from a freedom of bargaining and equality of bargaining. *Neal v. State Farm Ins. Cos.*, 188 Cal. App. 2d 690, 694 (Cal. Ct. App. 1961). Moreover, “most contracts which govern our daily lives are of a standardized character. We travel under standard terms, by rail, ship, airplane, or tramway. We make contracts for life or accident assurances under standardized conditions. We rent houses or rooms under similarly

found to be adhesive, that does not invalidate its contents; rather, an element of adhesion is “the beginning and not the end of the analysis insofar as enforceability of its terms is concerned.”⁴² Therefore, a contract of adhesion may be “fully enforceable according to its terms unless certain other factors are present which, under established legal rules . . . operate to render it otherwise.”⁴³

If a court determines that a contract is one of adhesion, the next inquiry will entail whether unconscionability is also present in sufficient measure to allow the court to refuse to enforce the agreement.⁴⁴ That is, even if a contract is adhesive, it is not unconscionable and may still be enforced; adhesion simply raises a red flag for the court to examine unconscionability. As mentioned above, unconscionability is composed of a procedural and substantive element; the “former includes (1) ‘oppression’ . . . and (2) ‘surprise’” while the latter consists of “an allocation of risks or costs which is overly harsh or one-sided and is not justified by the circumstances in which the contract was made.”⁴⁵ While both procedural and substantive unconscionability must be evidenced to invalidate an agreement, “a relatively larger degree of one will compensate for a relatively small degree of the other.”⁴⁶

controlled terms; authors or broadcasters, whether dealing with public or private institutions, sign standard agreements; government departments regulate the conditions of purchases by standard conditions.” *Id.* (quoting Friedmann, *Law and Social Change in Contemporary Britain*, p. 45).

⁴² *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 819 (1981) (quoting *Wheeler v. St. Joseph Hosp.*, 63 Cal.App.3d 345, 357 (Cal. Ct. App. 1976)). The *Scissor-Tail* court relied on a series of California cases which have held that the use of a contract of adhesion may still be valid and enforceable. *Id.* See generally *Wheeler v. St. Joseph Hosp.*, 63 Cal. App. 3d 345 (Cal. Ct. App. 1976); *Meyers v. Guarantee Sav. & Loan Assn.*, 79 Cal. App. 3d 307 (Cal. Ct. App. 1978); *Yeng Sue Chow v. Levi Strauss & Co.*, 49 Cal. App. 3d 315 (Cal. Ct. App. 1975); and *Schmidt v. Pacific Mut. Life Ins. Co.*, 268 Cal. App. 2d 735 (Cal. Ct. App. 1969).

⁴³ *Graham*, 28 Cal. 3d at 819-20. The recognized legal rules which may result in the avoidance of a contract of adhesion are legislative and judicial rules. *Id.* Among the legislative rules which may provide for a defense to a contract of adhesion are statutory provisions stipulating that certain provisions will make the contract unenforceable. *Id.* at 820. There are two judicially recognized limitations to the enforcement of contracts of adhesion: first, if the “provision does not fall within the reasonable expectations of the weaker or ‘adhering’ party [it] will not be enforced against him”; and second, a “provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or ‘unconscionable.’” *Id.*

⁴⁴ *Armenariz*, 24 Cal. 4th at 114. The California Civil Code provides that “a court can refuse to enforce an unconscionable provision in a contract.” *Id.* (quoting CAL. CIV. CODE § 1670.5). The statute states that “if the court as a matter of law finds the contract or clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.” *Id.*

⁴⁵ *Dean Witter Reynolds*, 211 Cal. App. 3d at 767-68. A tangential element noted by the California Court of Appeal in this decision was that of the buyer’s sophistication as it relates to whether a contract will be found unconscionable. *Id.* The courts made a distinction between sophisticated and unsophisticated buyers and the role that sophistication will play in the courts decision. In the former situation, the courts are less apt to find sophisticated buyers subject to unconscionable contracts; while in the latter case, the courts seek to protect unsophisticated buyers from remaining subject to an unconscionable contract. See *Perdue v. Crocker Nat’l Bank*, 38 Cal. 3d 913, 927 (1985). Interestingly, the *Gentry* court drew no such parallel to employment contracts and the sophistication of the employee.

⁴⁶ *Dean Witter Reynolds*, 211 Cal. App. 3d at 768. The *Dean Witter Reynolds* court was faced with a situation whereby an attorney opened a retirement account with the defendant Dean Witter Reynolds. *Id.* at 761. The court found that the fees charged by the defendant when the attorney closed out his account presented “some measure of substantive unconscionability” since the “challenged fees maybe ‘too high.’” *Id.* at 768. The court’s analysis focused on whether there was indeed oppression or

B. Class Action Waivers: Discover Bank 2

Prior to the decision in *Gentry*, the California Supreme Court had taken up the issue of class action waivers in consumer contracts in *Discover Bank v. Superior Court* (“*Discover Bank 2*”).⁴⁷ While arbitration agreements have been upheld and enforced by California courts, subject to the minimum requirements set forth above, the issue of a class action waiver in mandatory arbitration agreements had not been adjudicated prior to the *Discover Bank 2* decision.⁴⁸ This case hinged on: first, whether the arbitration agreement was valid; and second, whether the provision for class action waiver was also valid.⁴⁹ While most jurisdictions have upheld the use of such waivers in similar agreements, the California Supreme Court met the provision with greater skepticism in *Discover Bank 2*.⁵⁰

The *Discover Bank 2* court held that “under some circumstances class action waivers would not be enforceable under California law.”⁵¹ A class action waiver may be unconscionable “when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages. . . .”⁵² The court did “not hold that all class action waivers are necessarily unconscionable.”⁵³ Instead, where a waiver “becomes in practice the exemption of the party ‘from responsibility for [its] own

surprise which would show procedural unconscionability. *Id.* The court held that “any claim of ‘oppression’ may be defeated if the complaining party had reasonably available alternative sources of supply.” *Id.* In this instance though, the available alternatives that the attorney had to choose from when opening a retirement account negated any claim that the practice by defendant was oppressive, and thus, not unconscionable. *Id.* at 772.

⁴⁷ See generally *Discover Bank v. Superior Court of Los Angeles*, 36 Cal. 4th 148 (2005) (*Discover Bank 2*).

⁴⁸ See Julia B. Strickland & Stephen J. Newman, *Shock Waives*, 29 L.A. LAW. 22 (Mar. 2006). Strickland and Newman state that “California courts have long struggled with the inherent tension between a general policy of favoring freedom of contract and a desire to scrutinize contractual choices individual parties make.” *Id.* at 22. The *Discover Bank 2* court was an initial attempt to scrutinize the use of class action waivers in the consumer contract setting. *Id.* at 25.

⁴⁹ See *Discover Bank 2*, 36 Cal. 4th at 149.

⁵⁰ See Julia B. Strickland & Stephen J. Newman, *Shock Waives*, 29 L.A. LAW. 22, 24 (Mar. 2006). There has been a nationwide trend to litigate the issue of class arbitration waivers. *Id.* “Most jurisdictions that have ruled on the issue enforce class actions waivers. In contrast, recent decisions in California reflect greater skepticism toward these provisions.” *Id.* The decisions in these cases have placed California “at odds with the general trend nationwide. The majority of jurisdictions that have ruled on this issue allow enforcement of class action waiver provisions pursuant to ordinary freedom-of-contract principles. *Id.* at 25.

⁵¹ *Id.* The *Discover Bank 2* court held, in full, that “at least under some circumstances, the law in California is that class action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class action litigation or the right to class wide arbitration.” *Discover Bank 2*, 36 Cal. 4th at 153.

⁵² *Discover Bank 2*, 36 Cal. 4th at 162. The *Discover Bank 2* court reasoned that the predictably small amounts of damages are sufficiently persuasive to disavow the use of a class arbitration waiver in a consumer contract. Justice Moreno stated that the class arbitration waiver is void as unconscionable where “it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.” *Id.* Moreover, it was argued that to uphold the class arbitration waiver would be to in effect exempt the “party ‘from responsibility for its own fraud, or willful injury to person or property of another.’” *Id.* at 163. In the previously described scenario, a class arbitration waiver would be “unconscionable under California law and should not be enforced.” *Id.*

⁵³ *Id.*

fraud or willful injury to the person or property of another” the waiver is “unconscionable under California law and should not be enforced.”⁵⁴

The aforementioned California law, California Civil Code § 1668, states that “all contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.”⁵⁵ Therefore, if the class action waiver were to indirectly exempt Discover Bank from their alleged fraudulent charging of late fees, the waiver would be deemed in violation of public policy and thereby unconscionable and invalid.⁵⁶ The court carefully stated that the class action’s validity was not dependent on whether the waiver was within an arbitration agreement or not.⁵⁷ Since the waiver’s lawfulness is not dependent on whether it is a part of an arbitration agreement, the “arbitration clause did not immunize the class action waiver from review pursuant to ordinary unconscionability analysis.”⁵⁸

C. California Labor Code

The crux of Gentry’s initial class action suit was the violation by Circuit City

⁵⁴ *Id.* at 163. The language employed by the *Discover Bank 2* court is nearly identical to the statutory language of the California Civil Code governing contracts. The language is also reminiscent of the statutory language of the Federal Arbitration Act which states that written provisions to settle disputes by arbitration are enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.” See 9 U.S.C. § 2 (2007).

⁵⁵ CAL. CIV. CODE § 1668 (Deering 2007). One California Court of Appeal decision summed up the statute’s intent as follows: “despite its broad language, section 1668 does not apply to every contract.” *Cregg v. Ministor Ventures*, 148 Cal. App. 3d 1107, 1111 (Cal. Ct. App. 1983). Instead, section 1668 will “only be applied to contracts that involve ‘the public interest.’” *Id.* The *Cregg* court did acknowledge that “the concept of a contract involving the public interest is surely difficult to define.” *Id.*

⁵⁶ See *Discover Bank 2*, 36 Cal. 4th at 161. The court was careful to clarify that “class action and arbitration waivers are not, in the abstract, exculpatory clauses. But because . . . damages in consumer cases are often small and because ‘a company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit’, ‘the class action is often the only effective way to halt and redress such exploitation.’” *Id.* Therefore, the effect of the class action and arbitration waivers in the consumer contracts in question were exculpatory in nature since no individual would bring a suit in this instance as it was a negative value suit.

⁵⁷ See generally *id.* at 165. The conclusion reached in this decision is not specific to the use of class arbitration waivers in arbitration agreements. Rather, the principles set forth in *Discover Bank 2* are more broadly applicable to all contracts. “It applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements.” *Id.* at 165-66.

⁵⁸ Julia B. Strickland & Stephen J. Newman, *Shock Waives*, 29 L.A. LAW. 22, 25 (Mar. 2006). The distinction drawn by the *Discover Bank 2* court is important as it broadens the scope of California courts’ “traditional protection of consumer interests.” *Id.* Among the concerns addressed by the court were: “doubt that individual small claims court litigation, administrative proceedings, or informal resolution could serve as ‘adequate substitutes’ for class action proceedings seeking to redress claims of intentional wrongdoings to large numbers of people, causing predictably small amounts of damage.” *Id.* The decision places California in the minority of jurisdictions which have held that class arbitration waivers are not enforceable. *Id.* Among the other jurisdictions disallowing the use of class arbitration waivers are Missouri, Ohio, West Virginia and Florida. See generally *Whitney v. Alltel Communications*, 173 S.W. 3d 300 (Mo. Ct. App. 2005); *Eagle v. Fred Martin Motor Co.*, 809 N.E. 2d 1161 (Ohio Ct. App. 2004); *West Virginia ex rel. Dunlap v. Berger*, 567 S.E. 2d 264 (W. Va. 2002); *Powertel, Inc. v. Bexley*, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999).

Stores, Inc. of the California Labor Code.⁵⁹ Specifically, Gentry contended that Circuit City's practices were violative of California Labor Code sections §§ 510 and 1194 which stipulate how many hours in a workday and overtime compensation respectively.⁶⁰ The importance of these two statutes, as will be discussed below in the analysis of *Gentry*⁶¹, is whether or not they should be deemed unwaivable statutory rights in the context of arbitration agreements containing class action waivers.⁶²

The United States Supreme Court has held that "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."⁶³ However, "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum."⁶⁴ Therefore, the court should consider statutory claims appropriately arbitrable unless "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."⁶⁵

⁵⁹ *Gentry*, 42 Cal. 4th at 450. Gentry brought the lawsuit pursuant to California Labor Code §§ 510 and 1194 which he alleged had been impinged by his employer, Circuit City Stores, Inc. *Id.* at 455. Gentry claimed a misclassification of his employment status as an exempt employee, when in fact he believed that the job description and duties of his position were akin to that of a non-exempt employee. *Id.* at 451.

⁶⁰ See generally CAL. LAB. CODE §§ 510, 1194 (Deering 2007). Section 510 states that "nonexempt employees will be paid one and one-half their wages for hours worked in excess of eight per day and 40 per week and twice their wages for work in excess of 12 hours a day or eight hours on the seventh day of work." *Gentry*, 42 Cal. 4th at 455. Section 1194 seeks to enforce the provisions of section 510 by providing a private right of action to employees who allege their statutory rights have been violated; the statute provides that "notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation." *Id.*

⁶¹ See *infra*, Part III.

⁶² See *Skirchak v. Dynamics Research Corp., Inc.*, 432 F. Supp. 2d 175 (D. Mass. 2006) (holding that under federal law, "[r]equiring employees prospectively to waive their statutory rights to sue in order to obtain or maintain their employment is utterly inconsistent").

⁶³ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). Among the various statutory rights the United States Supreme Court has upheld in the past thirty years include suits arising under the Sherman Act, the Securities Exchange Act of 1934, the Racketeer Influenced and Corrupt Organizations Act and the Securities Act of 1933. *Id.* See generally *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

⁶⁴ *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 743 U.S. at 628). This distinction is particularly important in the language of the United States Supreme Court's decision in *Gilmer*. The arbitration agreement was upheld as valid under the circumstances and the waiver of a statutory right was found to be proper. See generally *id.* Moreover, the ability to freely contract and negotiate is a vital component of corporate practice and should not be unnecessarily impinged without Congress' intervention. *Id.* at 25. This reasoning seems to have driven the *Gilmer* court's decision to uphold the agreement to arbitrate where the arbitral forum adequately allowed for protection of the petitioner's statutory rights under the Age Discrimination in Employment Act of 1967. *Id.* At this point the court also made clear their support of the Federal Arbitration Act. The evident belief that arbitration will provide an adequate forum for the resolution of a statutory right goes to the heart of the Federal Arbitration Act's endorsement of a national policy favoring arbitration. *Id.*; see generally 9 U.S.C. § 2 (2007).

⁶⁵ *Gilmer*, 500 U.S. at 260. The reasoning behind this endorsement of the arbitral forum is twofold. First, the Federal Arbitration Act evinces a strong policy in favor of arbitration. *Id.* at 25. Second, by submitting to arbitration of a statutory right the two parties are trading "the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi*, 473 U.S. at 628. The key distinction in both *Gilmer* and *Mitsubishi Motors Corp.* was the

Specifically, the Supreme Court noted that the legislature may evince its intention through: the text of the legislation, the legislative history, or an “inherent conflict between arbitration and [the legislation’s] underlying purpose.”⁶⁶

Additionally, the particular California Labor Code provisions at issue, if sufficiently synonymous with similar federal labor laws, may be unwaivable statutory rights.⁶⁷ The Federal Labor Standards Act (“FLSA”) was considered by the United States Supreme Court to be of a “nonwaivable nature of an individual employee’s right to a minimum wage and to overtime pay under the Act.”⁶⁸ The Supreme Court reasoned that the “statutory enforcement scheme . . . permits an aggrieved employee to bring his statutory wage and hour claim ‘in any Federal or State court.’”⁶⁹ The failure of Congress to include any procedural barriers led the court to believe that the rights were sufficiently important as to be considered “nonwaivable.”⁷⁰

California Labor Code § 1194 explicitly states that “notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage . . . is entitled to recover.”⁷¹ The “rights to the legal minimum wage and legal overtime compensation conferred by the statute are unwaivable.”⁷² The code establishes “a clear public policy . . . that is specifically directed at the enforcement of California’s minimum wage and overtime laws for the benefit of workers.”⁷³

assurance that the arbitral forum was an adequate forum by which to resolve statutory disputes.

⁶⁶ *Id.* The United States Supreme Court has had a number of occasions to evaluate whether Congress evinced an intention to disallow the arbitral forum for resolution of a statutory dispute. *See generally* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220 (1987).

⁶⁷ *See generally* Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 739-40 (1981) (stating the principle that the United States Supreme Court has held in the past that there are certain provisions within the Fair Labor Standards Act which may not be waived by contract). *See also* Brooklyn Savings Bank v. O’Neil, 324 U.S. 697 (1945); D.A. Schulte, Inc. v. Gangi, 328 U.S. 108 (1946).

⁶⁸ *Barrentine*, 450 U.S. at 740. Therefore, as a nonwaivable statutory right, an employee cannot abridge this right by contract nor may they otherwise waive the rights because “this would ‘nullify the purposes’ of the statute and thwart the legislative policies it was designed to effectuate.” *Id.* (quoting *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697 (1945)).

⁶⁹ *Id.*

⁷⁰ *Id.* at 741. The *Barrentine* court held that “[a]ny custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights.” *Id.* Therefore, if the California Labor Code sections Gentry alleged had been violated are sufficiently synonymous with their federal counterpart, then the California Supreme Court may deem them to be nonwaivable statutory rights in much the same way. This Note assumes the proposition that the analogous nature of the California Labor Code to the Federal Fair Labor Standards Act warrants the same level of protection and classification as a nonwaivable statutory right.

⁷¹ CAL. LAB. CODE § 1194 (Deering 2007).

⁷² *Gentry*, 42 Cal. 4th at 455. *See also* Sav-On Drug Stores, Inc. v. Superior Court, 34 Cal. 4th 319, 340 (Cal. 2004) (holding that California Labor Code section 1194 confirms a “clear public policy . . . that is specifically directed at the enforcement of California’s minimum wage and overtime laws for the benefit of workers”). *Id.* Moreover, “California’s overtime laws are remedial and are to be construed so as to promote employee protection . . . [and] this state has a public policy which encourages the use of class action device.” *Id.*

⁷³ *Earley v. Superior Court of Los Angeles County*, 79 Cal. App. 4th 1420, 1429-30 (Cal. Ct. App.

III. FACTS

A. Factual Background

Robert Gentry was hired as an employee of Circuit City Stores, Inc. in 1995.⁷⁴ As a part of the orientation process, Gentry was given a packet of information; among the items included in this packet were an “Associate Issue Resolution Package” and Circuit City’s “Dispute Resolution Rules and Procedures.”⁷⁵ These two pamphlets contained the relevant information regarding the dispute resolution procedures particular to Circuit City.⁷⁶ Circuit City employees were given a number of dispute resolution options, including arbitration, in the event of an employment-related conflict.⁷⁷

In the event that Gentry opted for the arbitration process, he would have to agree to “dismiss any civil action brought by him in contravention of the terms of the parties’ agreement.”⁷⁸ This provision also contained a class action arbitration waiver stating that “[t]he Arbitrator shall not consolidate claims of different Associates into one proceeding, nor shall the Arbitrator have the power to hear arbitration as a class action.”⁷⁹ Additionally, the arbitration clause placed constraints on damages, awarding of attorney’s fees and restricted the statute of limitations for employment-related actions.⁸⁰ Circuit City employees were permitted to opt out of both the dispute resolution and arbitration agreement programs if done within thirty days.⁸¹ Robert Gentry did not avail himself of the opportunity to opt out of the Circuit City “Dispute Resolution Rules and Procedures.”⁸²

Gentry brought suit against Circuit City Stores, Inc. on August 29, 2002 alleging that he had been subject to violations of the California Labor Code by Circuit City.⁸³ Gentry sought to file his action as a class action lawsuit in California Superior Court on behalf of salaried customer service managers.⁸⁴

2000). It is interesting to note at this point, that the California Court of Appeal has adopted a twofold approach to the statutory wage issue. First, “[s]traight-time wages (above the minimum wage) are a matter of private contract between the employer and the employee. Entitlement to overtime compensation, on the other hand, is mandated by statute and is based on an important public policy.” *Id.* at 1430. “The duty to pay overtime wages is a duty imposed by the state; it is not a matter left to the private discretion of the employer.” *Id.* (citing CAL. LAB. CODE § 1173 (Deering 2007)). The courts have placed great emphasis on the belief that “wage and hours laws ‘concern not only the health and welfare of the workers themselves, but also the public health and general welfare.’” *Earley*, 79 Cal. App. 4th at 1430.

⁷⁴ *Gentry*, 42 Cal. 4th at 451.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Gentry*, 42 Cal. 4th at 451.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

Particularly, Gentry alleged that Circuit City had “illegally misclassified as exempt managerial/executive employees not entitled to overtime pay, when in fact, they were non-exempt non-managerial employees entitled to be compensated for hours worked in excess of eight hours per day and [forty]40 hours per week.”⁸⁵

B. Procedural Posture

In August of 2002, when Gentry initially filed his class action lawsuit, there was a split in California as to the enforceability of these types of class action waivers in contracts – specifically consumer contracts.⁸⁶ Circuit City made a motion to compel arbitration in the Superior Court.⁸⁷ The court, in light of conflicting case law, chose to follow the California Court of Appeal’s decision in *Discover Bank v. Superior Court* and found two of the provisions “substantively unconscionable.”⁸⁸ Upon severance of the unconscionable provisions, the Superior Court ordered Gentry to “arbitrate his claims on an individual basis and submit to the class action waiver.”⁸⁹

Gentry subsequently filed a mandate petition with the California Court of Appeal on September 9, 2003.⁹⁰ The petition was denied by the Court of Appeal since the issue was pending before the California Supreme Court.⁹¹ The California Supreme Court granted Gentry’s petition for review and withheld hearing the merits until the decision in the pending *Discover Bank v. Superior Court* action was decided.⁹² Upon reaching a conclusion in the *Discover Bank* action, the California Supreme Court remanded Gentry’s case for reconsideration.⁹³

The California Court of Appeal denied Gentry’s petition for a second time on remand from the California Supreme Court.⁹⁴ The grounds for denial were a lack of unconscionability and the dissimilarity between *Discover Bank* and Gentry’s claims.⁹⁵ It was determined that the thirty day opt-out provision meant that the

⁸⁵ *Id.*

⁸⁶ *Gentry*, 42 Cal. 4th at 451. The split in California case law at the time was between the decisions reached in *Discover Bank 1* and *Discover Bank 2*. *Discover Bank 1* held that class action waivers were unconscionable in a consumer contract. *See generally* Szetela v. Discover Bank, 97 Cal. App. 4th 1094 (Cal. Ct. App. 2002). In *Discover Bank 2*, the California Court of Appeal had held that the use of class arbitration waivers must be upheld under the Federal Arbitration Act and the California Arbitration Act. *See generally* Discover Bank v. Superior Court, 105 Cal. App. 4th 326 (Cal. Ct. App. 2003). However, on appeal, the California Supreme Court reversed the Court of Appeal in *Discover Bank 2*, thereby declaring that in some instances a class arbitration waiver was unconscionable and therefore invalid. *See generally* Discover Bank v. Superior Court of Los Angeles County, 36 Cal. 4th 148 (Cal. 2005).

⁸⁷ *Gentry*, 42 Cal. 4th at 452.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Gentry*, 42 Cal. 4th at 452.

⁹⁴ *Id.*

⁹⁵ *Id.*

arbitration clause was not unconscionable since it was not an “adhesive element.”⁹⁶ Additionally, the Court of Appeal found that the claims in Gentry’s suit were distinguishable from *Discover Bank* since they would not involve “predictably . . . small amounts of damages.”⁹⁷

The California Supreme Court granted review of Gentry’s claim in order to clarify their previous holding in *Discover Bank*.⁹⁸

IV. OPINION ANALYSIS

A. Majority Opinion – Moreno, J.

At the outset, Justice Moreno’s majority opinion establishes that the decision is not going to be one which will provide lower courts a bright line test for future cases of this nature. The essential holding of the case is that “at least in *some* cases, the prohibition of class wide relief would undermine the vindication of the employees’ unwaivable statutory rights.”⁹⁹ Justice Moreno continues on that waivers of this nature “should not be enforced if a trial court determines . . . that class arbitration would be . . . significantly more effective . . . than individual arbitration.”¹⁰⁰ Therefore, because of the possibility of instances where a class arbitration waiver would undermine unwaivable rights, the California Supreme Court remands this case for reconsideration.¹⁰¹

The second issue presented by this case is whether “a provision in an arbitration agreement that an employee can opt out . . . means that the agreement is not procedurally unconscionable, thereby insulating it from employee claims that . . . [it] is substantively unconscionable.”¹⁰² Here the majority sets forth an

⁹⁶ *Id.*

⁹⁷ *Gentry*, 42 Cal. 4th at 452.

⁹⁸ *Id.*

⁹⁹ *Id.* at 450. (emphasis added). The ambiguous nature of this holding, that *some* class arbitration waivers will be invalid and *some* will be upheld by the courts, creates confusion and does little to guide lower courts or employers as to how they should proceed in the future. See generally Rizzardi, *supra* note 10 at 1093 (stating that the impact of *Discover Bank 2* will be an increased uncertainty in consumer contracts as to what may or may not be deemed unconscionable by the courts post-*Discover Bank 2*).

¹⁰⁰ *Gentry*, 42 Cal. 4th at 450. Justice Moreno essentially sets forth as a driving premise of the decision a belief that class arbitration waivers should not be upheld where class arbitration would be the most effective measure to resolve a particular dispute. However, merely echoing the benefits of class action litigation or arbitration is insufficient to guide trial courts in their analysis. As has been noted by many courts,

[I]t is firmly established that the benefits of [class] certification are not measured by reference to individual recoveries alone. Not only do class actions offer consumers a means of recovery for modest individual damages, but such actions often produce “several salutary by-products, including . . . avoidance to the judicial process of the burden of multiple litigation involving identical claims.”

Linder v. Thrifty Oil Co., 23 Cal. 4th 429, 445 (2000) (quoting *Vasquez v. Superior Court of San Joaquin County*, 4 Cal. 3d 800, 808 (1971)).

¹⁰¹ See generally *Gentry*, 42 Cal. 4th at 450.

¹⁰² *Id.* at 450-51. It should be noted that Justice Moreno clearly sets forth an important premise undermining Circuit City’s defense in this case. Justice Moreno notes that a “finding of procedural

essential premise regarding procedural unconscionability; while it is not required to invalidate a class arbitration waiver, it is “a prerequisite to determining that the arbitration agreement as a whole is unconscionable.”¹⁰³ This tenet is important since it establishes that procedural unconscionability must be present in order for the court to analyze whether there is in fact substantive unconscionability. Moreover, the majority states that contrary to the findings by the California Court of Appeal, there is an element of procedural unconscionability present; as such, on remand the court should determine “whether provisions of the arbitration agreement were substantively unconscionable.”¹⁰⁴

The initial discussion presented in the majority opinion centers on whether class arbitration waivers in overtime cases are contrary to public policy or not. As this case was heard following the *Discover Bank 2* decision, the majority undertakes a comprehensive synthesis of the facts and holdings presented therein.¹⁰⁵ The majority carefully and calculatedly sets forth the prime tenets of *Discover Bank 2* as they relate not only to consumer class arbitration waivers, but class arbitration waivers in more general terms.¹⁰⁶ Specifically, the majority highlights that “one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable.”¹⁰⁷ The important distinction between *Discover Bank 2* and *Gentry*, according to the majority, is that

unconscionability is not required to invalidate a class arbitration waiver if that waiver implicates unwaivable statutory rights.” *Id.* at 451. The essential reasoning here, akin to the United States Supreme Court holding in *Barrentine*, is that to avoid a contract involving a non-waivable statutory right one need only plead the right’s unwaivable nature and not a common law contract defense. *See generally Barrentine*, 450 U.S. at 740.

¹⁰³ *Gentry*, 42 Cal. 4th at 450-51. The *Gentry* decision adopts much of the previous case law definition for unconscionability and does little to expand or clarify the meaning of unconscionability in the employment contract context. The two-step analysis for unconscionability, consisting of procedural and substantive unconscionability, is much the same as the language found in previous California Supreme Court decisions. *See, e.g., Armendariz*, 24 Cal. 4th at 113; *accord Little*, 29 Cal. 4th at 1071.

¹⁰⁴ *Gentry*, 42 Cal. 4th at 451. It is interesting that the majority goes so far as to specify the existence and presence of procedural unconscionability based on the employment setting, but fails to undergo any further analysis to ascertain whether substantive unconscionability also exists. The end result of such incomplete analysis is to create a more confusing task for the lower court. On remand, the court must assess whether or not there is indeed unconscionability present in the employment contract and accompanying agreement to arbitrate. Additionally, if the court has found the California Labor Code sections at issue to be non-waivable then the presence, or lack thereof, of unconscionability is irrelevant as the statutory rights cannot be waived. *See id.*

¹⁰⁵ *Id.* at 453-55. The court goes quite far a field from the question at hand in their attempt to clarify what the holding of *Discover Bank 2* was meant to say. The *Discover Bank 2* holding expressed the preference in California for the protection of consumer interests, perhaps to the detriment of the freedom to contract. *See Strickland & Newman, supra* note 10 at 25.

¹⁰⁶ *Gentry*, 42 Cal. 4th at 453-55. The majority reiterates that they believe that “at least some class action waivers in consumer contracts are unconscionable” and that their holding in *Discover Bank 2* was not intended to limit that to consumer contracts. *Id.* at 453. However, this is seemingly at odds with the rhetoric employed by the majority in *Discover Bank 2* (a decision also penned by Justice Moreno). In *Discover Bank 2* it was held that “when the [class action] waiver is found in a consumer contract of adhesion . . . such waivers are unconscionable under California law and should not be enforced.” *Discover Bank*, 36 Cal. 4th at 162-63. The previous holding would seem to indicate its limited application to consumer contracts, a position Justice Moreno backs away from in the *Gentry* decision.

¹⁰⁷ *Gentry*, 42 Cal. 4th at 454.

here the issue presented is an attempt to waive a plaintiff's statutory right under the California Labor Code to minimum wage and overtime pay – an issue the court did not take up in *Discover Bank 2*.¹⁰⁸

Unlike *Discover Bank 2*, Gentry has brought a claim stemming from California Labor Code statutes.¹⁰⁹ The majority analyzes the California Labor Code and reads the textual commitment that an employee is entitled to bring a civil action “[n]otwithstanding any agreement” as meaning the right is unwaivable.¹¹⁰ The majority raises three primary rationales to support their belief that this right is unwaivable: first, the “public policy fostering society’s interest in a stable job market;” second, “the Legislature’s decision to criminalize certain employer conduct;” and third, the “public policy goal of protecting employees in a relatively weak bargaining position against ‘the ‘evil of overwork.’”¹¹¹

The majority undertakes a review of the *Armendariz* requirements for arbitration of an unwaivable statutory right as applied to Gentry’s situation.¹¹² The issue is further focused as the majority frames the issue to be “whether a class arbitration waiver would lead to a de facto waiver of statutory rights”¹¹³ The

¹⁰⁸ *Id.* at 455. While the court did not expressly take up the issue of waiver of statutory rights in *Discover Bank 2*, it did take a broad approach to the question posed. The plaintiff in *Discover Bank 2* sought to avoid enforcement of a class arbitration waiver he claimed to be unconscionable, partly on public policy grounds. See generally *Discover Bank v. Superior Court*, 134 Cal. App. 4th 886, 893-94 (Cal. Ct. App. 2005). There it was left undecided whether “California has a fundamental public policy against class action waivers, finding the issue ‘unnecessary’ to its analysis.” Strickland & Newman, *supra* note 10 at 26.

¹⁰⁹ *Gentry*, 42 Cal. 4th at 455. Gentry’s claim stems from the violation of the aforementioned California Labor Code provisions covering statutory rights to minimum wage, overtime, and the maintenance of a private action against one’s employer to recover damages in violation of said provisions. *Id.*

¹¹⁰ *Id.* This interpretation of the statutory language is particularly interesting given the analysis employed by the United States Supreme Court in *Gilmer*. In that decision, Justice White writing for the majority held that the legislative intent to evidence the non-waivable nature of a statutory right will be found in the statute or accompanying legislative history. See *Gilmer*, 500 U.S. at 26. Justice White plainly stated that the protection of the statutory right should be explicit within the statute or legislative history. *Id.* In *Gentry*, however, the majority takes a liberal approach to the meaning of “[n]otwithstanding any agreement” as a bridge to conclude that the right is meant to be nonwaivable. *Gentry*, 42 Cal. 4th at 455.

¹¹¹ *Gentry*, 42 Cal. 4th at 456. The three premises set forth by the majority to conclude that the statutory rights are not waivable should be compared with the justifications advanced by the United States Supreme Court in *Barrentine* in which Justice Brennan pointed to exact language in the legislative history as to the nonwaivable nature of the statutory right at hand. See *Barrentine*, 450 U.S. at 739. Where the *Barrentine* court had specific language in the legislative history to substantiate their holding, the *Gentry* majority cites vague public policy arguments which have no basis in the legislative history.

¹¹² *Gentry*, 42 Cal. 4th at 456. The *Armendariz* court set forth a series of procedural safeguards to ensure that where a statutory right is being arbitrated, that right is protected to the same extent as it would have been in a judicial forum. See generally *Armendariz*, 24 Cal. 4th at 83. The requirements stated in *Armendariz* are: provision for neutral arbitrators; provisions for more than minimal discovery; requirements of a written award; provisions for all of the types of relief that would otherwise be available in court; and, the arbitration process does not require employees to “pay either unreasonable costs or any arbitrators’ fees or expenses as a condition of access to the arbitration forum.” *Id.* at 102.

¹¹³ *Gentry*, 42 Cal. 4th at 457. The issue as framed is an important distinction between the *Discover Bank 2* and *Gentry* decisions. The *Discover Bank 2* court did not have the opportunity, nor did they voluntarily take up the issue of statutory rights in the arbitral forum. See generally *Discover Bank 2*, 36 Cal. 4th 148. As the *Gentry* court framed the issue it brought an entire segment of arbitration case law, namely *Armendariz*, into play that was not discussed at length in the *Discover*

majority concludes that “under some circumstances such a provision would lead to a de facto waiver and would impermissibly interfere with employees’ ability to vindicate unwaivable rights”¹¹⁴

Here again, the majority is forced to further clarify their holding in *Discover Bank 2* as it pertains to class arbitration waivers. Circuit City relies on the premise set forth in *Discover Bank 2* that miniscule amounts make the likelihood of individual claims unlikely in consumer actions.¹¹⁵ The majority counters that the holding in *Discover Bank 2* was not intended to limit the instances of unenforceable class arbitration waivers to miniscule monetary damages claims; rather, a more general principle was set forth that where a class arbitration waiver acts as an exculpatory clause it should not be enforced.¹¹⁶

The majority bolsters their argument using the reasoning presented by Gentry as to the analogous nature employment claims may have to consumer claims. First, Gentry has presented a wage and hour claim, which will often seek modest damages.¹¹⁷ The majority relies on the *Sav-On Drug Stores, Inc. v. Superior Court of Los Angeles County* premise which legitimizes class actions as necessary tools in certain instances of litigation.¹¹⁸ Class actions allow

Bank 2 decision. The implications that *Armendariz* and unconscionability have on the *Gentry* decision are profound and will be discussed in the analysis below.

¹¹⁴ *Gentry*, 42 Cal. 4th at 457. Justice Moreno, before coming to any conclusion, does make note of the central holding in *Little v. Auto Stiegler, Inc.* whereby submission to an arbitral forum does not waive a party’s statutory rights. *Id.* The *Little* court made it clear that “a party compelled to arbitrate such rights does not waive them, but merely ‘submits to their resolution in an arbitral, rather than a judicial, forum’” *Little*, 29 Cal. 4th at 1079. The distinction the *Gentry* court is implicitly making here is that while *Little* approved of the use of arbitration for statutory rights, those were of a waivable nature; here, however, the statutory rights being submitted to arbitration are not waivable and therefore *Little*’s holding should not apply.

¹¹⁵ *Gentry*, 42 Cal. 4th at 457. Circuit City, relying on *Discover Bank 2*’s reasoning, argued before the California Supreme Court that the invalid class arbitration waivers should only be those in which the claim of damages is a predictably small amount of damages. *Id.* The *Discover Bank 2* court was faced with a consumer class arbitration waiver in which the defendant, Discover Bank, had charged the plaintiff a twenty-nine dollar penalty. *Discover Bank 2*, 36 Cal. 4th at 154. While attempting to certify a class action against Discover Bank, the plaintiff alleged that the number of cardholders affected by Discover Bank’s breach of contract could be millions of consumers. *Id.* The *Gentry* court, on the other hand, was faced with an employment scenario whereby it was conceivable that some of the claims of damage would be substantial and thereby would warrant individual litigation or arbitration. *Gentry*, 42 Cal. 4th at 457.

¹¹⁶ *Gentry*, 42 Cal. 4th at 457. The majority points out that the average claim in California for a wage and hour adjudication, from the years 2000-05, was \$6,038. *Id.* at 458 (quoting ASIAN PACIFIC AMERICAN LEGAL CTR. ET AL., REINFORCING THE SEEMS: GUARANTEEING THE PROMISE OF CALIFORNIA’S LANDMARK ANTI-SWEATSHOP LAW, AN EVALUATION OF ASSEMBLY BILL 633 SIX YEARS LATER 2 (2005)) A second statistic, compiled by the Asian Pacific American Legal Center, stated that the “average claim for overtime and minimum wage violations submitted to [Department of Labor Standards Enforcement] ranged from \$5,000 - \$7,000 and settlement ranged from \$400 - \$1,600.” *Id.* While the amounts involved are certainly more significant than the \$29 at issue in *Discover Bank 2*, they are also quite insignificant when compared to the actual costs of present day litigation. Interestingly, Justice Moreno noted that the *Bell* court had found that a claim for \$37,000 would not even be “ample incentive” for an individual lawsuit for overtime pay. *Id.* at 458.

¹¹⁷ *Id.* at 457-58. The record in the California Court of Appeal and the California Supreme Court does not make mention of the amount of damages Gentry has claimed.

¹¹⁸ *Gentry*, 42 Cal. 4th at 459. Justice Moreno succinctly and effectively quells Circuit City’s argument in favor of the efficiency of arbitration in his adoption of the *Sav-On Drug Stores* holding. The majority points out that “the requirement that numerous employees suffering from the same illegal practice each separately prove the employer’s wrongdoing is an inefficiency that may substantially

“employees who are subject to the same unlawful practices a relatively inexpensive way to resolve their disputes” and eliminates potentially repetitious litigation while providing “small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.”¹¹⁹

Second, the majority considers that employees may be hesitant to bring individual actions for fear that their employer may retaliate in response to the litigation.¹²⁰ The majority then notes that a California statute prohibits retaliation in response to litigation by employees.¹²¹ However, the statute is disregarded as the majority draws the conclusion that the anti-retaliation statute is insufficient to relieve the “fear of retaliation” which may “deter employees from individually suing their employers.”¹²²

Third, the possibility that an employee may not know that his/her rights have been violated provides an additional justification for the majority to find class arbitration waivers potentially invalid.¹²³ Justice Moreno sets forth a compassionate and detailed list of possible scenarios by which an employee may be ignorant of, or unable to pursue redress for, legal rights infringed by their employer.¹²⁴ The majority reaches the conclusion that for the foregoing

drive up the costs of arbitration and diminish the prospect that the overtime laws will be enforced.” *Id.* The *Sav-On* court majority noted that for common claims, akin to the claim presented in *Gentry*, “absent class treatment, each individual plaintiff would present in separate, duplicative proceedings the same or essentially the same arguments and evidence” *Sav-On Drug Stores, Inc.*, 34 Cal. 4th at 340. This duplicative process would “be neither efficient nor fair to anyone, including defendants” *Id.*

¹¹⁹ *Gentry*, 42 Cal. 4th at 459. Akin to *Sav-On Drug Stores*, the *Gentry* court reasons that the class action, whether in litigation or arbitration, will provide the parties and the forums with an expedited and efficient means to resolve disputes. The *Sav-On Drug Stores* opinion extols the virtues of class actions “by establishing a technique whereby the claims of many individuals can be resolved at the same time. . . eliminat[ing] the possibility of repetitious litigation and provid[ing] small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.” *Sav-On Drug Stores, Inc.*, 34 Cal. 4th at 340.

¹²⁰ *Gentry*, 42 Cal. 4th at 459-60. The conundrum faced by many employees in the situation analogous to *Gentry*’s is an unpleasant one at best. The *CH2M Hill* court summarized this scenario best when they framed it as two unappealing choices. See *Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798, 820-21 (2001). The first choice is to resign and bring legal action shortly after the initial signs that their rights had been violated. *Id.* The second choice is to “persist in the informal accommodation process and risk forfeiture of the right to bring such an action altogether.” *Id.* at 821. The *CH2M Hill, Inc.* court did make mention of a third option, albeit the worst case scenario, whereby the employee retains their employment “while bringing formal legal action against the employer.” *Id.*

¹²¹ *Gentry*, 42 Cal. 4th at 460. The relevant statute is California Labor Code section 98.6 which states, in pertinent part,

no person shall discharge an employee or in any manner discriminate against any employee or applicant for employment because . . . the employee or applicant for employment has filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to his or her rights

CAL. LAB. CODE § 98.6 (Deering 2007).

¹²² *Gentry*, 42 Cal. 4th. at 461. The *Gentry* court takes a pragmatic approach towards the anti-retaliation statute in this instance. Justice Moreno wrote that since the “retaliation would cause immediate disruption of the employee’s life and economic injury” and the dispute resolution process yields an uncertain outcome, the mere existence of an anti-retaliation statute does not adequately protect the employee. *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 461-62. A Federal District Court in New York, in a class action certification claim, set forth a poignant assessment of the need for class actions in an employment setting. See generally

possibilities, without “effective enforcement, the employer’s cost of paying occasional judgments . . . may be significantly outweighed by the cost savings of not paying overtime.”¹²⁵

After consideration of Gentry’s arguments, the majority adopts an approach which orders a trial to court consider the aforementioned factors and concludes that if:

[a] class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer’s violations, it must invalidate the class arbitration waiver to ensure that these employees can ‘vindicate [their] unwaivable rights in an arbitration forum.’¹²⁶

The majority reinforces their holding by citing the failure of the California Legislature to overturn or modify any of the elements set forth in *Armendariz*.¹²⁷ The minimum requirements set forth in *Armendariz* are employed as an initial means for trial courts to ascertain whether the arbitral forum will adequately protect the statutory rights of an employees claim in similar situations.¹²⁸

The majority quickly dispenses with Circuit City’s argument that the administrative process ensured by the statute would adequately protect employees’

Ansoumana v. Gristede’s Operating Corp., 201 F.R.D. 81 (S.D. N.Y. 2001). Individual employees, of a certain class of employment, may be unwilling to file their own individual suits. *Id.* at 85-86. “Their lack of adequate financial resources or access to lawyers, their fear of reprisals (especially in relation to the immigrant status of many), the transient nature of their work, and other similar factors suggest that individual suits as an alternative to class action are not practical.” *Id.* The impractical element is significant, as the appropriate standard in class action litigation is whether or not bringing individual suits is “impractical,” not “impossible.” *See Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993).

¹²⁵ *Gentry*, Cal. 4th at 462. In addition to Justice Moreno’s economic analysis of the costs of litigation versus the costs of doing business for many corporations it is important to note that there is a second economic analysis which factors into many employment wage and hour cases. Many employees may be unwilling to bring their claims in either the arbitral or judicial forum individually because the suit is a so-called “negative value claim.” *See Glover, supra* note 10 at 1737. “A negative value suit is one in which the total costs of pursuing the claim exceed the total expected recovery for that claim.” *Id.* at 1737, n.3. The resulting effect of a negative value claim is that an individual is less likely to pursue that claim for fear that the litigation or arbitration costs, coupled with any possible ramifications, will offset any award down the road. “Unless you can aggregate your claims with those of others, you may have no effective recourse to vindicate your claims.” *Id.* at 1737.

¹²⁶ *Gentry*, 42 Cal. 4th at 463. It is at this point in the analysis where Justice Moreno seems to lead lower courts into a quagmire of uncertainty. For instance, he writes that “not all overtime cases will necessarily lend themselves to class actions, nor will employees invariably request such class actions.” *Id.* at 462. However, previously he had extolled the analogous nature of wage and hour claims to consumer claims (such as the one presented in *Discover Bank 2*) by pointing out that they were both for relatively small amounts. *Id.* at 458. Secondly, after stating the benefits of a class action in an employment wage and hour setting Moreno closes with the thought that not “in every case will class action or arbitration be demonstrably superior to individual actions.” *Id.* at 462. As will be discussed below, this failure to set forth a clear standard for lower courts will likely lead to a second series of litigated cases whereby the California Supreme Court must clarify not only *Discover Bank 2* but now also *Gentry*.

¹²⁷ *Gentry*, 42 Cal. 4th at 464, n.7. The majority notes that the California Arbitration Act has been amended by the Legislature three times since the decision in *Armendariz*. *Id.* Justice Moreno holds these amended versions up as proof that the Legislature has not intended to allow statutory rights to be waived through contract. *Id.*

¹²⁸ *See generally id.* at 464.

statutory rights.¹²⁹ The majority does not believe that its holding runs afoul of the FAA either.¹³⁰ Instead, Justice Moreno relies on their finding that class action waivers are to be analyzed in the same manner, regardless of whether contained in an arbitration agreement or not.¹³¹ The majority contradicts the dissent's belief that legislative indicators point towards the arbitration of employee-related wage and hour disputes.¹³² Instead, the majority sets forth an assertion that over the past 70 years the legislative intent in California has been to ensure that employees have "direct access to a judicial forum to enforce their rights."¹³³

The second half of this opinion addresses whether or not there is unconscionability present in the class arbitration waiver and agreement sufficient to declare the entire agreement invalid.¹³⁴ Justice Moreno notes that the California Court of Appeal found that the thirty day opt-out provision was indicative of no finding of procedural unconscionability.¹³⁵ However, contrary to the lower court,

¹²⁹ *Id.*

¹³⁰ *Gentry*, 42 Cal. 4th at 465. The majority draws a subtle distinction here which bears mentioning. The Federal Arbitration Act, as its name implies, covers only "written provision[s] . . . evidencing a transaction involving commerce to settle by arbitration..." 9 U.S.C. § 2 (2007). Justice Moreno contends that since the holding set forth in *Gentry* will apply to arbitration agreements and non-arbitration agreements alike it is outside the province of the Federal Arbitration Act. *Gentry*, 42 Cal. 4th at 465. This premise was also posited by Justice Moreno in his *Discover Bank 2* decision whereby he debated and dismissed Discover Bank's argument that the Federal Arbitration Act should prompt the court to enforce the class arbitration waiver. See *Discover Bank 2*, 36 Cal. 4th at 163-73. This runs contrary to the United States Supreme Court line of cases stemming from *Mitsubishi Motors Corp.* which have come to define the scope of the Federal Arbitration Act. See generally *Mitsubishi Motors Corp.*, 473 U.S. at 614.

¹³¹ *Gentry*, 42 Cal. 4th at 465. Justice Moreno's rationale behind this assertion is seemingly the same reasoning set forth in *Discover Bank 2*. There, Justice Moreno held that the Federal Arbitration Act does not preempt an unconscionability defense to the enforcement of class action waivers under California state law. *Discover Bank 2*, 36 Cal. 4th at 165. The majority says that since whether a class action waiver is lawful does not depend on whether it is part of an arbitration clause, the arbitration clause did not immunize the class action waiver from review pursuant to ordinary unconscionability analysis. *Id.* Pointing to the statutory language, Justice Moreno draws a distinction between a "state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue" and "section 2 of the FAA and a state law that 'governs issues concerning the validity, revocability, and enforceability of contracts generally.'" *Id.*

¹³² *Gentry*, 42 Cal. 4th at 465 n. 8. "Proponents may also argue that the lack of a pronouncement by the California Legislature of a general policy prohibiting enforcement of class action waivers demonstrates a lack of fundamental public policy." Strickland & Newman, *supra* note 10 at 26. Strickland and Newman's proposition, albeit in reference to *Discover Bank 2*, is just as applicable to Justice Moreno's contention in *Gentry* that legislative silence is equivalent to acquiescence.

¹³³ *Gentry*, 42 Cal. 4th at 465 n. 8. The majority further interprets the legislative intent as evidencing a refusal to enforce "provisions of arbitration agreements that significantly undermine the ability of employees to vindicate their statutory right to overtime pay." *Id.* Additionally, the majority finds comfort in the Federal Arbitration Act and California Arbitration Act which both "permit arbitration-neutral rules that limit specific provisions of arbitration agreements on public policy grounds." *Id.*

¹³⁴ *Id.* at 466. The California Court of Appeal did not find the presence of any procedural unconscionability and therefore stopped their analysis at this point. See generally *Gentry v. Superior Court*, 135 Cal. App. 4th 944 (Cal. Ct. App. 2006). The Court of Appeal relied on the presence of a thirty day opt-out provision which they determined to be, much like the Ninth Circuit in previous cases, sufficient to avoid unconscionability challenges. *Id.* at 949-50.

¹³⁵ *Gentry*, 42 Cal. 4th at 465. In addition to the Court of Appeal, the Ninth Circuit upheld the Circuit City arbitration agreements on two previous occasions in 2002. See generally *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104 (9th Cir. 2002); *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198 (9th Cir. 2002). The Ninth Circuit found that the thirty day opt-out provision meant that the contract

the majority holds that since the statutory rights are not waivable the arbitration agreement must meet the strict standards set forth in *Armendariz*.¹³⁶

Justice Moreno acknowledges that statutory rights, which are not waivable, may be arbitrated; however, the employer and employee may only arbitrate such rights “after a dispute has arisen.”¹³⁷ The distinction in this case, and one the majority finds convincing, is that this agreement to arbitrate was entered into prior to the dispute.¹³⁸ As such, the court must “ensure that the arbitration forum . . . is sufficient to vindicate his or her rights.”¹³⁹ The majority proceeds to undertake an *Armendariz* analysis of the agreement to ascertain whether in fact the entire agreement should be struck down based on Gentry’s assertion of unconscionability.¹⁴⁰

First, Gentry’s counsel argued that the agreement was ineffective because he could not have assented to the agreement by his silence.¹⁴¹ However, the majority briefly addresses the straight-forward and easily comprehensible nature of the agreement and dismisses Gentry’s contention.¹⁴² In fact, the majority explicitly

was not one of adhesion; therefore the threshold element of procedural unconscionability had not been met making the substantive unconscionability analysis unnecessary. See *Ahmed*, 283 F.3d at 1200.

¹³⁶ *Gentry*, 42 Cal. 4th at 467. Herein lies the essential distinction made by the *Gentry* court in relation to the previous line of arbitration agreement case law. The *Gentry* case distinguishes the non-waivable nature of certain statutory rights with the ability of employers and employees to freely contract.

¹³⁷ *Id.* The majority in this instance seeks to further parse the case between pre and post dispute agreements to arbitrate. This further dissection of the arbitral opportunities for employees and employers makes it all the more likely that these statutory disputes will be further confined to the judicial forum, as opposed to the arbitral forum. The inability to contract pre-dispute, as stated in *Armendariz*, effectively removes all employee wage and hour claims from the arbitral forum since no employer is going to announce ahead of time their intent to cheat employee out of deserved wages. See generally *Armendariz*, 24 Cal. 4th at 103, n.8; and Glover, *supra* note 10 at 1747-48.

¹³⁸ *Gentry*, 42 Cal. 4th at 468-69.

¹³⁸ *Gentry*, 42 Cal. 4th at 468-69.

¹³⁹ *Id.* at 467. However, as previously noted, this assurance that the arbitral forum is sufficient to vindicate a statutory right is a tautological argument since the pre-dispute arbitration agreement shall not be enforced according to *Gentry* and *Armendariz*. See generally *id.*; *Armendariz*, 24 Cal. 4th at 103, n.8. If the pre-dispute agreement will not be enforced, why should the courts entertain the time and effort to analyze the sufficiency of the arbitral forum to achieve the protection of statutory rights?

¹⁴⁰ See generally *Gentry*, 42 Cal. 4th at 467-68. Unconscionability is one recognized defense in California courts for the avoidance of a contract, a provision the Federal Arbitration Act recognizes as a defense to arbitration agreements. See 9 U.S.C. § 2 (2007); accord *Dean Witter Reynolds, Inc. v. Superior Court of Alameda County*, 211 Cal. App. 3d 758, 767-68 (Cal. Ct. App. 1989). See *supra* notes 31-35 and accompanying text for an overview of the *Armendariz* analysis.

¹⁴¹ *Gentry*, 42 Cal. 4th at 468. The majority quickly and efficiently takes up Gentry’s argument regarding acceptance by silence and summarily dismisses the notion. Quoting competing arguments from Corbin on Contracts, the majority first notes that “an offeror has no power to cause the silence of the offeree to operate as an acceptance”; however, it is then noted that Corbin also stated that silence can constitute acceptance when “;the conduct of the party denying a contract has been such as to lead the other reasonably to believe that silence . . . would be sufficient” to create a contract.” *Id.* (quoting Corbin on Contracts (rev. ed. 1993) §§ 3.19, 3.21, p. 407, 414)

¹⁴² *Gentry*, 42 Cal. 4th at 468. The agreement to arbitrate reads as follows:

I understand that participation in the Issue Resolution Program is voluntary. If I do not wish to participate in the arbitration component of the Program, however, I must send the completed ‘Circuit City Arbitration Opt-Out Form,’ which is included in this package. I must send the Opt-Out Form via U.S. mail . . . within 30 calendar days of the date on which I signed below. I understand that if I do

finds that Gentry “manifested his intent to use his silence . . . as a means of accepting the arbitration agreement.”¹⁴³ Therefore, the question is not whether Gentry validly assented to the agreement; instead, the court must evaluate whether there was sufficient evidence of unconscionability in the agreement to invalidate it.¹⁴⁴

Justice Moreno sets forth the various definitions and standards surrounding the legal concept of unconscionability in the arbitration context.¹⁴⁵ While the California Court of Appeal did not find there to be any procedural unconscionability, the majority notes that a complete *Armendariz* analysis entails assessing whether there are *both* procedural and substantive unconscionability.¹⁴⁶ While there is a continuum of incidental to severe unconscionability, if the court concludes that there is “no element of procedural unconscionability . . . a court will not disturb the contract.”¹⁴⁷

In reversing the Court of Appeal, the majority states that the agreement does indeed contain elements of procedural unconscionability; however, the majority fails to specifically identify what those elements may be.¹⁴⁸ The mere presence of

not . . . I will be required to arbitrate all employment-related legal disputes I may have with Circuit City.

Id. It is clear from the language in the arbitration agreement, and the majority reasoned accordingly, that this was not legalese or complicated language; instead, the form was quite specific and clear as to what steps Gentry must take to avoid the arbitration component of the program.

¹⁴³ *Id.* According to Corbin, quoted at note 139 *supra*, the reasonable expectation of Circuit City in this instance was that Gentry’s silence (or failure to opt out) constituted an acceptance. *Id.* Moreover, the court reemphasizes that the arbitration agreement “was neither inconspicuous or difficult to understand.” *Id.*

¹⁴⁴ *Gentry*, 42 Cal. 4th at 468-69. Justice Moreno accurately assesses the true essence in Circuit City’s argument: there is a valid contract that Gentry assented to by his silence. However, the argument set forth by Gentry, perhaps not eloquently stated, is that even if there is a valid contract, the contract should be set aside based on its unconscionable elements. *Id.*; see *supra* note 38 and accompanying text.

¹⁴⁵ *Id.* at 571-73. The essential elements of unconscionability are: the presence of both procedural and substantive unconscionability which results in an overly harsh or one-sided result. See generally *Armendariz*, 24 Cal 4th at 113-14; and *Discover Bank 2*, 36 Cal. 4th at 160-61.

¹⁴⁶ *Id.* One resulting impact that *Gentry* is sure to have on California courts is a more thorough undertaking of the unconscionability analysis originally set forth in *Armendariz*. The majority’s emphasis on ensuring that the lower court not conclude their analysis prematurely if they find no procedural unconscionability seems to indicate that courts will turn more of their attention to the unconscionability analysis than they may have previously. However it may also indicate, as will be discussed below, that the courts will be able to conjure elements of unconscionability where before they did not.

¹⁴⁷ *Id.* at 470. The majority again backs down from their own heavy handed rhetoric by acknowledging that if a lower court were to find zero presence of procedural unconscionability then there can be no unconscionability. *Id.* The court itself says that “if we take the Court of Appeal . . . at its word that there was no element of procedural unconscionability in the arbitration agreement . . . then the logical conclusion is that a court would have no basis . . . to scrutinize or overturn even the most unfair or exculpatory of contractual terms.” *Id.* This sentiment seems to stand in apposite from the analysis *Moreno* undertakes whereby he takes the Court of Appeal to task for prematurely concluding their unconscionability analysis by stating there was no procedural unconscionability. See generally *id.* at 468-69.

¹⁴⁸ *Id.* Here again, it would seem, much as in *Discover Bank 2*, the majority goes quite far a field to make a finding of unconscionability such as to warrant invalidating the arbitration agreement. In *Discover Bank 2*, the focus was on the method of presentation and the acceptance by conduct employed by Discover Bank in implementing the arbitration agreements. See *Discover Bank 2*, 36 Cal. 4th at

procedural unconscionability necessitates that a court investigate whether there is also substantive unconscionability.¹⁴⁹ Since the Court of Appeal failed to find procedural unconscionability, their analysis ended; on remand, the Court of Appeal will have to indulge in a thorough analysis to ascertain if substantive unconscionability can be found in the agreement.¹⁵⁰ In coming to this decision, the majority sets forth a finding of procedural unconscionability based on two considerations: first, Gentry was not fully and adequately informed as to arbitration; and second, that an employee in Gentry's position would not feel free to opt out.¹⁵¹

Justice Moreno carefully re-states that the presence of procedural unconscionability, which the majority has found, does not necessarily invalidate the arbitration agreement.¹⁵² Instead, it is an indicator to courts that the agreement should undergo judicial scrutiny to ascertain if any substantive unconscionability exists.¹⁵³ The majority dictates that on remand the Court of Appeal should instruct the trial court to look at the entire arbitration agreement and not simply the class arbitration waiver.¹⁵⁴ Lastly, if on remand, both procedural and substantive

162-63. In *Gentry* the court manages to turn the thirty day opt-out provision into an example of procedural unconscionability. *Gentry*, 42 Cal. 4th at 470. In rejecting the Court of Appeal's determination that the opt-out provision exempted the agreement from procedural unconscionability, the court's reasoning is sparse and inadequate to make such a bold claim. See *id.* Justice Moreno simply states that "Gentry's failure to opt out of the arbitration agreement did not represent an authentic informed choice." *Id.*

¹⁴⁹ *Id.* The majority, in relying on the precedent established in *Armendariz*, has too strictly adhered to the dogmatic principles set forth in that decision. The *Armendariz* court simply noted that there are two elements present in a finding of unconscionability and that they are often found in contracts of adhesion. See generally *Armendariz*, 24 Cal. 4th at 113-15. The employment setting is often one in which contracts of adhesion are utilized; but, the failure to find procedural unconscionability necessarily means that the contract may not be set aside based on unconscionability. See *Neal v. State Farm Ins. Cos.*, 188 Cal. App. 2d 690 (Cal. Ct. App. 1961); and *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473 (Cal. Ct. App. 1982).

¹⁵⁰ *Gentry*, 42 Cal. 4th at 476. The instructions on remand to indulge in an analysis of substantive unconscionability appears to be a leading instruction from Justice Moreno. The Court of Appeal had determined that there was no procedural unconscionability and now the California Supreme Court has determined there is procedural unconscionability. Compare *Gentry*, 135 Cal. App. 4th at 950; and *Gentry*, 42 Cal. 4th at 470.

¹⁵¹ *Id.* at 470-72. It is interesting that the majority finds procedural unconscionability in this instance, especially given the distinctions drawn between *Gentry* and *Discover Bank 2* by the court. In *Discover Bank 2*, the procedural unconscionability was found to be the bill-stuffing of the arbitration agreement and the deceitful manner in which cardholders were allowed to opt-out. See *Discover Bank 2*, 36 Cal. 4th at 153-54. In *Gentry*, Justice Moreno goes to some length discussing the provisions within the 'Associate Issue Resolution Handbook' and the language of the 'Dispute Resolution Rules and Procedures' packet as being confusing and unconscionable. *Gentry*, 42 Cal. 4th at 470-72.

¹⁵² *Id.*

¹⁵³ *Id.* While Justice Moreno is careful not to group all class arbitration waivers as being unconscionable, he is less careful in his instruction to lower courts regarding the presence of unconscionability. The Court of Appeal underwent a thorough analysis of the arbitration agreement and the class arbitration waiver. See generally *Gentry*, 135 Cal. App. 4th at 948-51. What the message the California Supreme Court sends in this decision is that even a thorough analysis searching for procedural unconscionability may not be enough, so lower courts should always indulge the substantive unconscionability analysis as well.

¹⁵⁴ *Id.* at 472-73. It is not clear from the lower court's decision whether they in fact limited themselves to the class arbitration waiver or whether they view it in the context of the entire arbitration agreement. It would seem that a failure to find procedural unconscionability in the class arbitration waiver, as the only challenged provision by *Gentry*, was what led the lower court to declare an absence

unconscionability are found, then the trial court must decide whether the terms should be severed or if the entire agreement should be invalidated.¹⁵⁵

B. Dissenting Opinion – Baxter, J.

Justice Baxter, on behalf of Justices Chin and Corrigan, dissents in this decision based primarily on the belief that deference should be given to private arbitration agreements.¹⁵⁶ The dissent contends that the majority's decision is a continuance of the precedent set forth in *Discover Bank 2* whereby this court has wrested more control over private arbitration agreements.¹⁵⁷ It is argued by the dissent that the FAA and CAA both serve to protect the freedom of individuals to enter into arbitration agreements which will not be subject to interference from the judicial forum.¹⁵⁸

The dissent does not set forth a belief that all arbitration agreements should be enforced; rather, absent the most exceptional circumstances, the courts should allow the arbitration to proceed "as the parties themselves have agreed."¹⁵⁹ Quite plainly, the simple fact that the arbitration agreement was a *voluntary* program convinces the dissent that the court should not interfere in this instance.¹⁶⁰ The dissent cites a number of factors indicating the validity of the agreement including: the straightforward nature of the documents, the inclusion of an opt-out provision,

of procedural unconscionability.

¹⁵⁵ *Id.* at 473.

¹⁵⁶ *Id.* at 473 (Baxter, J., dissenting). Justice Baxter, along with Justices Chin and Brown, dissented from the majority in the *Discover Bank 2* decision as well. See *Discover Bank 2*, 36 Cal. 4th at 174, 185. Justice Corrigan did not take part in the *Discover Bank 2* decision as she had not yet been appointed to the bench as of June of 2005. Interestingly enough, Justice Corrigan replaced Justice Brown on both the bench and in the dissent to this decision.

¹⁵⁷ *Id.* (Baxter, J., dissenting). The Federal Arbitration Act was supposed to function as a national policy in favor of arbitration. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). It was meant "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place them upon the same footing as other contracts." *Id.* The dissent argues that the majority is not abiding by this central tenet of the Federal Arbitration Act.

¹⁵⁸ *Id.* Justice Baxter sets forth a strong preference for the arbitral forum, characterizing the option as "relatively cheap, simple and expeditious" when compared to the judicial forum. *Id.* The majority's decision, according to Baxter, is contrary to the "liberal federal policy favoring arbitration agreements" found in the Federal Arbitration Act. *Id.* at 474.

¹⁵⁹ *Id.* at 474 (Baxter, J., dissenting). "The FAA was designed 'to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate . . . and to place such agreements 'upon the same footing as other contracts.'" *Volt Info. Scis v. Leland Stanford Jr. U.*, 489 U.S. 468, 478 (1989) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. at 219-20). The *Gilmer* court expressly described the situation presented in *Gentry* where they acknowledged that "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review in the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer*, 500 U.S. at 31.

¹⁶⁰ *Id.* The dissent believes that there were sufficient mechanisms in place to ensure that the employee was informed and that the program was indeed voluntary. For instance, the arbitration agreement was set forth in a written agreement, "which plaintiff Gentry received" and "were further explained in a video presentation, which he attended." *Id.* The packet of information also stated that the employee "could consult with an attorney about his legal rights." *Id.* Finally, the packet clearly stated that he could opt out without penalty by mailing a form within thirty days. *Id.* The sum of all the parts found within the arbitration agreement, coupled with the failure of Gentry to exercise his opt-out option, warrants the court upholding the arbitration agreement according to the dissent.

and Gentry's acceptance by signing the form.¹⁶¹

The dissent strongly disagrees with the majority's finding of procedural unconscionability sufficient to warrant a remand to analyze whether there is also substantive unconscionability.¹⁶² In fact, the dissent notes that the majority does not actually reach a result in this case "because [it] cannot – by any analysis to be found in the prior case law."¹⁶³ The dissent carefully sets forth a detailed distinction between the court's holding in *Discover Bank 2* and the present case. The reasoning in *Discover Bank 2* was that class arbitration waivers may be invalid when part of a mandatory contract involving small amounts of damages.¹⁶⁴

Justice Baxter notes here that the claims at issue are not necessarily miniscule damage amounts; additionally, Circuit City did not attempt to unilaterally force the arbitration agreement on their employees.¹⁶⁵ According to the dissent, the majority's willingness to follow the *Discover Bank 2* reasoning in this case effectively invalidates all class arbitration waivers.¹⁶⁶ While the majority explicitly stated that these waivers were not necessarily invalid, the dissent contends "that is the practical effect of the majority's holding."¹⁶⁷

¹⁶¹ *Id.* This view would be keeping in line with the intent evidenced in the Federal Arbitration Act. The *Volt Info. Sciences* court held that the FAA does not require arbitration; rather "it simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Info. Sciences*, 489 U.S. at 478.

¹⁶² *Gentry*, 42 Cal. 4th at 475 (Baxter, J., dissenting). In a rather scathing rebuke of the majority's position in this decision, Justice Baxter notes that the basis for the majority's holding cannot be found in either case law or on public policy terms. *Id.* In order to find that this arbitration agreement was unwaivable, the court must first establish that the "class remedy is essential" to the protection of that statutory right. See *Armendariz*, 24 Cal. 4th at 100-13. Without such a finding, which the majority has not made, it is inappropriate to place the class arbitration waiver within the unwaivable statutory right category.

¹⁶³ *Id.* More emphatically than the failure to ground the decision in case law, the dissent also takes the majority to task for failure to base their reasoning on public policy grounds. Asserting that unconscionability as a contract defense is a public policy argument, the dissent then dismisses the majority's attempt to guise their reasoning under this umbrella. *Id.* See also *Gilmer*, 500 U.S. at 33. (for the premise that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."). *Id.*

¹⁶⁴ *Id.* The *Discover Bank 2* court held that a waiver "found in a consumer contract of adhesion in . . . disputes . . . predictably involve small amounts of damages . . . becomes in practice the exemption of the party from responsibility for its own fraud" and is unconscionable under California law. *Discover Bank 2*, 36 Cal. 4th at 162-63. see also Jonathan Rizzardi, *Recent Development: Discover Bank v. Superior Court of Los Angeles*, 21 OHIO ST. J. ON DISP. RESOL. 1093, 1095-96. Rizzardi assesses the factors that the *Discover Bank 2* court relied on in their analysis; specifically, the idea that the impracticality of individual suits over small amounts of damages would allow the credit card company to reap unjust profits. *Id.*

¹⁶⁵ *Id.* at 475-76 (Baxter, J., dissenting). As noted in the majority opinion, the average wage and hour claim in California over the five year period from 2000-2005 was between \$5,000 and \$7,000. *Id.* at 458. This is a substantial difference from the *Discover Bank 2* claims which would have been in the amount of \$29. *Discover Bank 2*, 36 Cal. 4th at 154.

¹⁶⁶ *Id.* The extension of *Discover Bank 2* to the present set of facts raises concern among the dissenting Justices as the consumer contract application has now encompassed the employment contract. See generally Myriam Gilles, *Opting out of Liability: The Forthcoming Near Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005) (discussing the impact that the court's disregard for class arbitration waivers may have on class litigation in the future); see also Linda J. Demaine & Deborah R. Hensler, *Volunteering to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, LAW & CONTEMP. PROBS., Winter/Spring 2004.

¹⁶⁷ *Id.* The California Courts, pre-*Gentry*, seem to lean "heavily (if not overwhelmingly) on the

Finally, on a public policy level, the dissent disagrees with the majority's interpretation of the California legislature's intent surrounding arbitration agreements.¹⁶⁸ It is argued that the failure of the Legislature to provide that these rights are statutorily unwaivable is no accident; instead, "the Legislature knows how to provide for a right to class action relief that cannot be waived."¹⁶⁹ The dissent again suggests that the majority is undermining the goals of legislative actions including the FAA and CAA.¹⁷⁰ The mere fact that the majority is finding reasons not to enforce arbitration agreements evinces hostility towards arbitration in contravention of the language of the FAA and CAA.¹⁷¹

Lastly, in response to the majority's finding of procedural unconscionability, the dissent contrarily takes the stance that there is no procedural unconscionability and therefore the agreement should be enforced.¹⁷² Unlike mandatory contracts, the arbitration agreement at issue was a voluntary program from which Gentry could have opted out entirely.¹⁷³ The dissent notes that the Court of Appeal, in finding no procedural unconscionability, was in accord with two previous decisions handed down by the Ninth Circuit Court of Appeal.¹⁷⁴ Finally, the

side of state control, and in favor of traditional litigation" in lieu of enforcing class arbitration waivers. Strickland & Newman, *supra* note 10, at 25. The holding in *Gentry* seems to reinforce the premise set forth by Strickland and Newman that the courts would rather see disputes settled in the judicial forum as opposed to the arbitral forum.

¹⁶⁸ *Gentry*, 42 Cal. 4th at 477, n.3 (Baxter, J., dissenting). Among the various statutes which seem to favor the use of class action promulgated by the legislature include California Code of Civil Procedure section 382 and California Labor Code section 923. Section 382 reads "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." CAL. CIV. PROC. CODE § 382 (Deering 2008). Section 923 states that "governmental authority has permitted and encouraged employers to organize . . . [t]herefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing." CAL. LABOR CODE § 923 (Deering 2008).

¹⁶⁹ *Id.* There are a number of statutes pointed to by the dissent which show the legislature's ability to set forth a "right to class action relief that cannot be waived." *Id.* One such statute, as the court dealt with in *Discover Bank 2*, was the Consumers Legal Remedies Act. See CAL. CIV. CODE. §§ 1751, 1752, 1781 (Deering 2008). Section 1751 explicitly states that "[a]ny waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void." *Id.* The unwaivable provision, in part, stated that "[n]othing in this title shall limit any other statutory or any common law rights of the Attorney General or any other person to bring class actions." *Id.* Thusly, the dissent argues that the legislature does know how to express their intent when they wish to do so; since they have not under the applicable Labor Code in this case should mean the court should enforce the class arbitration waiver.

¹⁷⁰ *Id.* at 479 (Baxter, J., dissenting).

¹⁷¹ *Id.* The tone and findings of the majority's opinion are contrary to the Congressional intent in passing the Federal Arbitration Act whereby they sought "to reverse this 'hostility to arbitration'." Glover, *supra* note 10, at 1739.

¹⁷² *Id.* at 480 (Baxter, J., dissenting). As the Court of Appeal below had found, the presence of the thirty day opt-out provision meant that this class arbitration waiver was procedurally *conscionable*. See *Gentry*, 135 Cal. App. 4th at 950. The lower court found that Gentry's claim that the agreement was procedurally unconscionable "despite the opt-out provision" was "without merit." *Id.* Justice Baxter, for the dissent, likewise believes that the ability to opt-out "without penalty, simply by mailing back a form" was not procedurally unconscionable. *GentryGentry*, 42 Cal. 4th at 480 (Baxter, J., dissenting).

¹⁷³ *Id.* By definition, a contract of adhesion must be one of a "take it or leave it nature" and the ability to freely opt-out seems to imply that the Circuit City employment contract is not one of adhesion. See *generally* Little v. Auto Stiegler, Inc., 29 Cal. 4th 1064, 1071 (2003).

¹⁷⁴ *Gentry*, 42 Cal. 4th at 480 (Baxter, J., dissenting). The interesting thing to note about the two previous decisions in the Ninth Circuit Court of Appeal is that in each instance the employment

dissent believes that the majority has erred in its interpretation of the class arbitration waiver (as in *Discover Bank 2*) and further moved California “away from the mainstream on this the issue.”¹⁷⁵

V. POST-*GENTRY* LANDSCAPE AND ANALYSIS

A. Administrative Impact on California’s Judiciary

In the wake of *Gentry*, California employers and employees will be forced to assess whether or not their existing agreements are adequate to ensure that each party gets what they had originally bargained for. Following the *Gentry* decision, yet another step in the direction against enforcement of class arbitration waivers, employers will want to ensure that they are able to enforce the employment agreements that have already been signed.¹⁷⁶ An inability to enforce class action waivers will subject more employers to litigation, specifically class action litigation.¹⁷⁷

The cumbersome effect of *Gentry* may prove to be an increasingly crowded state and federal judicial system within California. If the existing class arbitration waivers are invalid and the California Supreme Court is going to subject arbitration agreements to a greater degree of scrutiny, it would seem logical that the courts will bear the weight of not just increased litigation but also increased diversity in opinion.¹⁷⁸ While there is a strong federal and state policy in favor of arbitral forums, it stands to reason that with decreased confidence in the judiciary’s willingness to uphold such agreements, both employers and employees will bypass

arbitration agreement was between Circuit City and their employees. Additionally, in each prior suit brought through the Federal Court the court applied California state law in their analysis of the arbitration agreements. See *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104 (9th Cir. 2002); and *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198 (9th Cir. 2002).

¹⁷⁵ *Id.* at 479 (Baxter, J., dissenting). Again, it is worth remembering what was noted by Strickland and Newman following the *Discovery Bank 2* decision. “The majority of jurisdictions that have ruled on this issue allow enforcement of class action waiver provisions pursuant to ordinary freedom-of-contract principles.” Strickland & Newman, *supra* note 10, at 25..

¹⁷⁶ See generally Douglas A. Wickham & Ryan P. Eskin, *Gentry v. Superior Court: California Supreme Court Sets a High Bar for Enforcing Class Arbitration Waiver Clauses*, ASAP (September 2007). Wickham and Eskin set forth, from an employer counsel’s point of view, the potential impact to be felt by the *Gentry* decision. While the authors express guarded optimism over the fact the *Gentry* court did not invalidate *all* class arbitration waivers, they do note that the decision casts doubt as to whether class action waiver clauses will be enforced in a variety of employment settings. *Id.* at 3.

¹⁷⁷ See *id.* at 4. The authors make a strong point that the ambiguity in the *Gentry* court’s holding will lead to more litigation at the trial court level to ascertain whether or not a given class arbitration waiver is valid or not. *Id.* Moreover, both the Federal and California Civil Procedure rules provide courts with guidance as to class certification; however, the holding in *Gentry* has created greater ambiguity in guiding the trial courts. See generally FED. R. CIV. P. 23; CAL.CIV. PROC. CODE § 382 (2004).

¹⁷⁸ See generally John Rizzardi, *Recent Development: Discover Bank v. Superior Court of Los Angeles*, 21 OHIO ST. J. ON DISP. RESOL. 1093, 1097-98 (2006) (stating that in the wake of *Discover Bank 2* there was a ““very significant impact on other courts’ presented with class arbitration waiver issues”). The author notes that with the increased uncertainty as to the efficacy of class arbitration waivers employers and employees are going to seek clarity and reassurance from the courts; thereby, the amount of litigation in this area will likely increase as a result of its displacement from the arbitral forum. *Id.*

arbitration and steer towards the judicial forum.¹⁷⁹

In addition to a greater number of employers and employees pursuing litigation, the possibility also exists that the courts will see a greater number of wage and hour cases being brought as class actions. If post-*Gentry*, the courts are unwilling to enforce a class arbitration waiver, it seems plausible that the aggrieved employee will avail themselves of the class action option to ensure the suit is economically worthwhile.¹⁸⁰ One trend in class action litigation is the concept of avoiding a “negative value” claim; California declaring that class arbitration waivers are effectively invalid opens the door to more class actions, which typically do not succumb to “negative value.”¹⁸¹

As *Gentry* is interpreted and new agreements are negotiated between employers and employees, it will be interesting to note the mechanisms employers attempt to use to ensure that employees may only bring actions individually. Employees, and their advocates, may find themselves emboldened to pursue class actions where once they would have sought an individual resolution to their claim.¹⁸² The overall impact of such a trend would be to not only clutter the courts in California, but also to slow the resolution and recovery process for employers and employees.¹⁸³ In a field where many of the claims, albeit not all, will be of a modest damage amount, the slowed recovery of any damages will hurt both employers and employees in the process.¹⁸⁴

¹⁷⁹ See Wickham & Eskin, *supra* note 174.. “While upholding the validity of such clauses, the court created a new standard that may create formidable obstacles to enforcement as applied to overtime class action claims.” *Id.* One of the premises set forth by the authors is that the judicial forum will be the only avenue to find clarity in a class arbitration waiver. The inability to enforce the waiver along a bright line will spur employees to pursue the judicial forum and bypass their obligation to arbitrate their class employment disputes. *Id.* at 3-4.

¹⁸⁰ See generally Glover, *supra* note 10. A negative value claim is one in which the potential litigant is unwilling to bring a claim because the cost to pursue the claim exceeds the possible recovery if vindicated. *Id.* at 1737. If, under *Gentry*, the courts are willing to invalidate class arbitration waivers the employee will be more inclined to join as a class to bring their claims to avoid a negative value claim. However, where there are circumstances which a court, post-*Gentry*, will uphold the class arbitration waiver, then this seems to invite class litigation by aggrieved employees to ensure again that the claim is a positive value claim. It is the ambiguity in the *Gentry* and *Discover Bank 2* holdings which are creating such confusion as to which forum and type of claim an employee(s) should bring. See generally Strickland & Newman, *supra* note 10.

¹⁸¹ As the majority noted, the average claim in *Discover Bank 2* was to recover a \$29 fee incurred; on the other hand, in the average wage adjudication the recovery was \$6,038. See *Gentry*, 42 Cal. 4th at 458. While the difference between the consumer and employment is substantial, the reality is that even a \$6,038 claim is a negative value claim in today’s litigation dollars. See generally Glover, *supra* note 10, at 1737.

¹⁸² See Rizzardi, *supra* note 10, at 1097. The inability to count on class arbitration waivers will have “an enormous effect in California and will make it impossible for companies to use class arbitration bars as a get out of jail free card.” *Id.* A possible tactic which more businesses may employ is to insert choice of law clauses so as to avoid the appearance in California courts where these clauses are not certain to be enforced. *Id.* at 1098.

¹⁸³ See generally Wickham & Eskin, *supra* note 174. It may very well be that the slowed course of recovery is due to the invitation by the *Gentry* court for “trial courts to speculate as to whether a class arbitration” waiver is valid or not. *Id.* at 4.

¹⁸⁴ The majority opinion in *Gentry* notes that the employee may be intimidated by the thought of bringing a claim against their employer as an individual; therefore the court wants to protect the right of employees to join as a class to avoid possible retaliation. See *Gentry*, 42 Cal. 4th at 459-60. If the fear of retaliation is one that the *Gentry* court wishes to dispel, then perhaps there should also be a cognizant

B. Parsing of Additional Statutory Rights

A second potential impact from the *Gentry* decision will be in the way that the courts, and possibly the legislature, carve up statutory rights, which will be classified as either waivable or not. As the *Gentry* decision makes clear, and in line with the *Discover Bank 2* holding, the court is willing to view certain statutory rights as being unwaivable.¹⁸⁵ The real issue here is that the court has determined that statutory rights may be deemed unwaivable either through a legislative textual commitment or through judicial interpretation.¹⁸⁶

The *Gentry* case was initially a grievance over the failure of Circuit City to pay Gentry adequate overtime wages under the California Labor Code.¹⁸⁷ Gentry's argument was that he had been misclassified as exempt when hired and therefore deprived of his statutory right to overtime.¹⁸⁸ The issue post-*Gentry* becomes whether the courts will extend their protective net beyond the current holding (covering overtime wages) and begin to draw in other rights under the Labor Code, or any other code for that matter.¹⁸⁹ As the dissent makes clear, and

recognition of the inability of employees in a class litigation to recover quickly, thereby providing a distinct disincentive for employees to bring their claims as a class.

¹⁸⁵ See *Gentry*, 42 Cal. 4th at 456. "In short, the statutory right to receive overtime pay embodied in section 1194 is unwaivable." *Id.* (citing *Armendariz v. Found. Health Psychcare Serv., Inc.*, 24 Cal. 4th 83. This is where the majority most clearly deviates from their own precedent and that of the United States Supreme Court. The *Armendariz* holding did not say that unwaivable statutory rights were beyond the scope of arbitration. See generally *Armendariz*, 24 Cal. 4th 83. Instead, *Armendariz* set forth an analysis of the arbitral forum to ensure that unwaivable statutory rights would be adequately adjudicated in that setting. *Id.* at 103. Likewise, in *Gilmer v. Interstate/Johnson Lane Corp.*, the United States Supreme Court held that statutory claims may be "the subject of an arbitration agreement, enforceable pursuant to the FAA." *Gilmer*, 500 U.S. at 26. The *Gilmer* court set forth an important holding in arbitration case law: "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

¹⁸⁶ The majority here has again broadly read the statute as written and disregarded the precedents before them. The statute itself says that "notwithstanding any agreement . . . the employee is entitled to recover in a civil action." *Gentry*, 42 Cal. 4th at 455. The statute itself does not explicitly state that it is unwaivable, nor does the legislative history; instead, the majority takes an expansive view of the language and infers intent on the part of the California Legislature to protect this statutory right from being waived. *Id.* However, the United States Supreme Court has held that "the party should be held [to their bargain to arbitrate] unless Congress itself has evinced an intention to preclude a waiver...." *Gilmer*, 500 U.S. at 26.

¹⁸⁷ The relevant sections of the California Labor Code address an employee's statutory rights to recover for violations of minimum wage and overtime laws. See generally CAL. LABOR CODE §§ 510, 1194.

¹⁸⁸ Gentry's claim, while brought under the California Labor Code provisions, is analogous to the Fair Labor Standards Act which sets forth a federal policy in favor of a minimum wage provision. See generally 29 U.S.C. § 201 (2008). In *Barrentine v. Arkansas-Best Freight Sys., Inc.* the United States Supreme Court explicitly found that provision of the Fair Labor Standards Act, while unwaivable statutory rights, were subject to a valid arbitration agreement under the Federal Arbitration Act. See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981).

¹⁸⁹ See *Gentry*, 42 Cal.4th at 477. The dissent forcefully argues that the majority has overreached and "elevate[d] a mere judicial affinity for class actions . . . above the policy expressed by both Congress and our own Legislature that voluntary individual agreements to arbitrate . . . should be enforced according to their terms." *Id.* It would seem in the wake of *Discover Bank 2* and *Gentry*, the California Supreme Court is displaying a strong judicial preference in favor of litigation over arbitration; moreover, the majority in each case chose to invoke the unwaivable nature of the statutory

is evidenced by the language of the statutes, the FAA and the CAA state that this right may be arbitrated if both parties are in agreement and certain minimum requirements are met.¹⁹⁰

What impact could an increased scope of unwaivable statutory rights have on California? First, the employers may be more likely to classify employees as “exempt” from hour and wage statutes to avoid the potential for a class action from aggrieved employees regarding overtime pay.¹⁹¹ Second, more employees may wish to be classified as “non-exempt” to ensure that they maintain their right to bring a class claim for violation of their statutory rights to overtime wages.¹⁹² The increased pressure on both employers and employees to classify job openings to ensure that respective rights are protected will only add to the costs of doing business in California.¹⁹³

Lastly, if the legislature views the *Gentry* court’s interpretation of the California Labor Code as incorrect, there exists a real possibility that the California Legislature will begin to carve out statutory rights that did not previously exist.¹⁹⁴ The legislature has evinced their intent to make certain rights unwaivable while others are not afforded the same protection; however, as the court continues to redefine legislative intent, it will spur the legislature to be more explicit in each

right as the basis for their holding. See, e.g., *Gentry*, 42 Cal. 4th at 456; *Discover Bank 2*, 36 Cal. 4th at 163.

¹⁹⁰ See, e.g., *Gilmer*, 500 U.S. at 26. The *Gilmer* court noted that there have been a number of statutory rights for which the court has approved of the arbitral forum. For instance, the court has validated arbitration agreements addressing the Sherman Act, the Securities Exchange Act of 1934, the Racketeer Influenced and Corrupt Organizations Act and the Securities Act of 1933. *Id.* The *Armendariz* court also noted that the use of the arbitral forum is appropriate to resolve statutory right disputes given certain safeguards to protect the statutory right of the aggrieved. *Armendariz*, 24 Cal. 4th at 103.

¹⁹¹ The applicable California Labor Codes are not applicable to employees classified as exempt under the statutes. Therefore, had *Gentry*’s job description been in conformity with an exempt position, Circuit City would not have been liable for the claims alleged by *Gentry*. Therefore, businesses may be inclined to classify their employees as exempt in order to avoid the wage and overtime provisions of the California Labor Code.

¹⁹² This point goes to the pragmatic nature of a negative value claim discussed in the Vanderbilt Law Review Note by J. Maria Glover. The negative value claim is especially topical in the employment wage and hour setting as the misclassification of an employee may lead to damages, but nominal damages when totaled. See generally Glover, *supra* note 10. Without the assurance of a class action, an individual employee may be less inclined to file a complaint over wage and hour violations. Therefore, it may behoove an employee to seek out a non-exempt job in California as the *Gentry* decision may protect them from individual arbitration and provide an avenue for recovery through class litigation.

¹⁹³ See generally MILKEN INSTITUTE, 2005 COST OF DOING BUSINESS INDEX 1 (2005), http://www.milkeninstitute.org/pdf/cost_of_doing_business_2005.pdf. The state of California ranks 4th for the highest cost of doing business, due in no small part to having the 5th highest wage cost index. *Id.*

¹⁹⁴ While a legislative response from the California Legislature would surely be a reactionary piece of legislation, as opposed to a proactive statute, it would set forth once and for all their actual intent. The United States Supreme Court, in *Gilmer*, noted that the courts should look for an express textual commitment from the legislature in ascertaining whether or not a statutory right is considered unwaivable. See *Gilmer*, 500 U.S. at 26. Specifically, if the California Legislature wants to make their intent known, courts will look to the text of the statute, the legislative history or an “inherent conflict between arbitration and the [statute’s] underlying purposes.” *Id.* If the courts, as in *Gentry*, continue to infer a legislative intent which is not expressly committed, then the legislature will be forced into action to clear up the confusion perceived by the courts.

statutory right they confer on citizens.¹⁹⁵ Increased clarity in legislation is not necessarily a negative, but it may invite a great deal of strife between employers and employees as they attempt to influence the outcome and classification of certain statutory rights under the Labor Code.¹⁹⁶

C. Public Policy Impact on California Business

In light of the above arguments, it would seem that *Gentry* will have far-reaching implications within the state of California, and potentially beyond its borders. In denouncing class arbitration waivers, the California Supreme Court has created yet another reason for employers to seek to move their operations out of state.¹⁹⁷ As noted by the dissent, the *Gentry* holding moves California increasingly away from the mainstream on the issue of class arbitration waivers.¹⁹⁸ As employers begin to reevaluate their agreements with employees, it may be beneficial for a corporation to take their operations out of state to avoid the possibility of class actions brought by employees.¹⁹⁹

¹⁹⁵ As in *Barrentine*, the court is capable of reading the statutory language correctly where the legislature explicitly states their intent. The Fair Labor Standards Act of 1938 expressly stated that “an aggrieved employee [may] bring his statutory wage and hour claim ‘in any Federal or State court of competent jurisdiction.’” *Barrentine*, 450 U.S. at 740. As such, the *Barrentine* court declared that the Fair Labor Standards Act is of a nonwaivable nature and may not be “abridged by contract or otherwise waived.” *Id.* Again, to draw an analogy between the Fair Labor Standards Act and the California Labor Code, the *Gentry* court may very well be correct that the statutory rights at issue are unwaivable. However, in order for the court to assess that this right is unwaivable, they must discern that from the legislative language itself. See *Gilmer*, 500 U.S. at 26.

¹⁹⁶ This is a topic which is unaddressed in this Note, but certainly worthy of future inspection. As the courts are inferring legislative intent, and the legislature is responsively legislating to clarify their intent, the employers and employees will weigh in on that legislative process. The increase of pro-employer or pro-employee influence into the legislative process will only spur greater debate as to the waivable or unwaivable nature of various statutory rights under the Labor Code.

¹⁹⁷ Among the various factors contributing to a business exodus from California are the environmental regulations, costs of employing workers and the perceived anti-business sentiment within the state’s government. See generally Jennifer Robison, *Bill May Stir California Business Exodus*, LAS VEGAS REVIEW-JOURNAL, Sept. 7, 2006 at 1D; Stephen Vames, *Businesses Ponder Leaving California*, WALL ST. J., Aug. 20, 2003; Los Angeles County Economic Development Corporation, *Economic Vitality, Trade & Jobs*, 2005 accessed at <http://www.laedc.org/newsroom/releases/2005/20051116-list.pdf> (last accessed February 4, 2008). The sum total of these elements has proven difficult for California to overcome in recent years when coupled with a national economic downturn. One study cited in the Vames article cites 20% of the 400 California businesses contacted had business plans which included leaving California. See Stephen Vames, *Businesses Ponder Leaving California*, WALL ST. J., Aug. 20, 2003.

¹⁹⁸ In the wake of *Discover Bank 2* the attorneys for Discover Bank noted that the refusal to uphold class arbitration waivers further lead California away from the mainstream on this issue. See Julia B. Strickland & Stephen J. Newman, *Shock Waives*, 29 L.A. LAW. 22, 25 (Mar. 2006). “The majority of jurisdictions that have ruled on this issue allow enforcement of class action waiver provisions pursuant to ordinary freedom-of-contract principles.” *Id.* Moreover, the “majority of courts faced with class action waivers have upheld their validity against claims that they are unconscionable.” J. Maria Glover, Note, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1751 (2006). Additionally, at the Federal Court level, the “Third, Fourth, Fifth and Seventh Circuits all have enforced class action waivers.” *Id.* at 1751-52.

¹⁹⁹ As the landscape in California grows blurrier, in-state corporations will be confronted with a crucial decision as to whether they should expose themselves to possible class litigation by their employees or seek a majority jurisdiction in which they can ensure that class arbitration waivers will be upheld. Prestigious labor and employment firms, such as Littler Mendelson P.C., have issued releases

Additionally, from a pragmatic standpoint, the California Supreme Court's aim in clarifying *Discover Bank 2* should be to provide greater guidance and clearer lines for the trial courts to adopt. However, the vague nature of the *Gentry* decision provides no new guidance for trial courts to assess whether or not the class arbitration waiver actually waives an unwaivable statutory right.²⁰⁰ Perhaps clear examples of other unwaivable statutory rights, a bright line test, or some other means could have aided the trial courts and avoided duplicative claims in years to come.²⁰¹ The failure to delineate why this particular statutory right is unwaivable, and what criteria trial courts should use to make that same determination, will lead to greater confusion and an eventual re-clarification by the California Supreme Court.²⁰²

A significant portion of the majority's decision focuses on the precedent set in *Armendariz* regarding the invalid nature of an unconscionable arbitration agreement.²⁰³ This dogmatic adherence to the *Armendariz* analysis has created

to their clients (and potential clients) advising of the potential risks they may face in light of the *Gentry* holding. See generally Douglas A. Wickham & Ryan P. Eskin, *Gentry v. Superior Court: California Supreme Court Sets a High Bar for Enforcing Class Arbitration Waiver Clauses*, ASAP (Sept. 2007), available at <http://www.littler.com/PressPublications/Documents/17256.pdf>. Perhaps the most apt description of the current state of affairs, regarding class arbitration waivers, is that "*Gentry* establishes a very high bar for enforcing class action waiver clauses in the face of overtime claims, [but] the bar is not completely insurmountable." *Id.* at 3. Thus the current state of affairs is ambiguous if nothing else!

²⁰⁰ "The resolution of this issue will be left to trial courts and intermediate appellate courts for development in future cases." *Id.* at 4. The failure to draw a bright-line test, or distinguish between the validity of one clause and the invalidity of the Circuit City arbitration clause, has presented a troubling landscape for businesses to navigate. As with many issues for Corporate America, it will likely become a purely economic decision. This is problematic for California, as noted in note 195, *supra*, the business climate is already unwelcoming for newcomers to California.

²⁰¹ Absent the presence of clear legislative intent the courts, in their role as interpreters of statute, should provide clarity for the lower courts and business community in California. Instead, the *Gentry* court has created a void in the dialogue where before there was assurance. The lack of express legislative language in the California Labor Code meant that employers could rely on the validity of a class arbitration waiver in their employment contracts. However, post-*Gentry*, employers are left with the admonishment that "*Gentry* directs trial courts to evaluate the relative effectiveness of the class action device in the specific case when deciding whether to enforce the class action waiver clause." *Id.* This failure to provide for reasonably anticipated conflicts in employment contracts may very well be the lasting legacy of *Gentry* – creating more confusion than clarity.

²⁰² One article has already attempted, in summary fashion, to encapsulate what the authors believe to be the factors trial courts will consider when weighing the class arbitration waiver. See *id.* at 2. The four factors Wickham and Eskin glean from the decision are: "1. the size of the potential individual recovery and whether it is 'modest' or not; 2. the potential for retaliation against members of the class; 3. whether members of the class may not be informed of their rights; and 4. other 'real world obstacles' to the vindication of the putative class members' right to overtime pay through individual, and not class, arbitration." *Id.* This note takes the position that these four factors are not dispositive of the *Gentry* holding; therefore, it seems to the author that Wickham and Eskin place too great an emphasis on these four factors.

²⁰³ While it is true that the *Armendariz* court held that an unconscionable arbitration agreement was void based on contract principles, it is an insufficient parallel to the *Gentry* case. *Armendariz* set forth an analysis by which the court should assess the adequacy of the arbitral forum; in addition, *Armendariz's* focus was to ensure that the arbitral forum was adequate so as to adjudicate statutory rights of the aggrieved. See generally *Armendariz*, 36 Cal. 4th at 102, 113-15. The *Gentry* court's reading of *Armendariz* indicates an expansive role for *Armendariz* in future California case law. In particular, *Armendariz* only sought to ensure that the arbitral forum allowed the employee to "vindicate his or her statutory rights." *Id.* at 90. This should be read as an endorsement of the arbitral forum; instead, the *Gentry* court has taken *Armendariz's* holding and used it to usurp the authority of the arbitral forum to adjudicate wage and hour statutory right cases.

two real problems in the wake of *Gentry*. First, the majority's strict reading of the clause "after a dispute arises" means that all class arbitration waivers have been de facto eliminated in California.²⁰⁴ If pre-dispute agreements to arbitrate statutory rights are invalid, as is the case presented in *Gentry*, then the practical effect will be that post-dispute arbitration agreements of statutory rights will be impractical to enter into by either party.²⁰⁵ Second, the new standard of judicial scrutiny applied to arbitration agreements will likely result in a greater number of agreements deemed unconscionable under *Armendariz*.²⁰⁶

While the majority was too strict in its adherence to *Armendariz*, it was quite expansive in the way they interpreted the legislative intent behind the California Labor Code provision at issue.²⁰⁷ The dissent makes a compelling argument as to the true legislative intent; it is noted that there are other statutes which explicitly state that the right is not waivable.²⁰⁸ It would seem that the majority has attempted to expand the realm of unwaivable statutory rights without regard to the legislature's ability to declare their intent if they so choose.²⁰⁹ This disregard of

²⁰⁴ The majority attempts to draw a bright-line between a pre and post dispute arbitration agreement in the statutory rights context. See *Gentry*, 42 Cal. 4th at 467. However, by drawing this bright-line, the majority has carved out the entire pie in attempting to slice it.

²⁰⁵ See generally J. Maria Glover, Note, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735 (2006).

²⁰⁶ This hypothesis remains to be seen. The true impact that *Gentry* will have in the coming years will be found at the trial and appellate court levels throughout California. However, in the meantime, employers and their counsel will certainly be evaluating their employment agreements to arbitrate disputes, particularly as they relate to wage and hour issues. Many attorneys will likely advise their clients to take a 'wait and see' approach to this issue as the wheat is separated from the chaff. Confusingly, "the *Gentry* court did not 'foreclose the possibility that there may be circumstances under which individual arbitrations may satisfactorily address the overtime claims of a class of similarly aggrieved employees, or that an employer may devise a system of individual arbitration that does not disadvantage employees in vindicating their rights under section 1194.'" Douglas A. Wickham & Ryan P. Eskin, *Gentry v. Superior Court: California Supreme Court Sets a High Bar for Enforcing Class Arbitration Waiver Clauses*, ASAP (Sept. 2007), available at <http://www.littler.com/PressPublications/Documents/17256.pdf>.

²⁰⁷ It is worth noting the interesting conflict inherent in Justice Moreno's opinion. On the one hand, Justice Moreno narrowly construes the precedent set forth in *Armendariz*; however, in the next stroke of his pen, Justice Moreno expansively interprets the limited statutory language of section 1194. See generally *Gentry*, 42 Cal. 4th at 455, 467. The lengths and limitations Justice Moreno goes to, in writing for the majority, suggests that perhaps the dissent may have been on-point with their primary critique of the majority's reasoning – the majority's decision does not sound in either case law or statute because there is no such basis for the holding. See *Gentry*, 42 Cal. 4th at 475 (Baxter, J., dissenting).

²⁰⁸ As in *Discover Bank 2*, Justice Baxter dissents from the majority as they attempt to constrict and limit the application of the Federal or California Arbitration Acts. Justice Baxter notes that both the United States Congress and the California Legislature have enacted legislation with explicit language as to the unwaivable right they are conferring. See *Gentry*, 42 Cal. 4th at 477 (Baxter, J., dissenting). Additionally, the United States Supreme Court has reiterated the same point on a number of occasions; yet, in this instance and in *Discover Bank 2*, the majority turns a blind eye to the textual silence evidenced by the California Legislature in California Labor Code section 1194. See, e.g. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981).

²⁰⁹ The expansion of the seemingly unambiguous language of section 1194 in and of itself is not a typical example of so-called judicial activism. If, however this is a trend beginning with *Discover Bank 2* and going forward, the California Supreme Court may continue to expansively grant citizens greater statutory protection by deeming rights unwaivable. The danger here is usurping the individuals fundamental right to contract as evinced by the Federal Arbitration Act section 2. See generally 9

the legislature's role in drafting laws serves to further cloud the already murky waters of statutory interpretation for employers and employees when drafting agreements.²¹⁰ As stated above, this will only serve as yet another negative for corporations considering whether to conduct their affairs within California or elsewhere.²¹¹

Lastly, on a legal philosophy level, how do employers and employees feel confident in their existing, or to be formed, agreements in California? One of the hallmarks of corporate law is to provide predictability so that both parties can feel secure in their decisions.²¹² *Gentry* creates a significant amount of doubt and concern for both parties going forward. It will not be until the next employment-related class arbitration waiver case makes its way to the California Supreme Court that any further clarity can be found.

VI. CONCLUSION

In *Gentry*, the California Supreme Court has again, in line with *Discover Bank 2*, moved California further from the mainstream when it comes to class arbitration waivers. The Court of Appeal had found that the class arbitration waiver was valid within the arbitration agreement which was deemed conscionable. In reversing the lower court, the majority has created a more confusing body of case law and invited more litigation surrounding class arbitration waivers. The conclusion that *in some instances* a class arbitration waiver could be invalid provides little guidance for lower courts, employers or employees in California.

Gentry represents an expansion of the precedent set in *Discover Bank 2* and a trend in California to raise up the judicial forum as superior to the arbitral one. In apparent contravention of the national and state policy in favor of arbitration, the majority has carved out yet another exception whereby litigation should prevail

U.S.C. § 2 (2008).

²¹⁰ While prior to *Gentry* employers could feel secure that the statutory language would be adhered to, akin to *Barrentine*, *Gilmer*, and *Mitsubishi Motors Corp.*, in the post-*Gentry* landscape there will be more uncertainty. See generally *Barrentine*, 450 U.S. 728; *Gilmer*, 500 U.S. 20; *Mitsubishi Motors Corp.*, 473 U.S. 614. The California Legislature has not expressed a desire to ensure that an employee's statutory rights to minimum wage and overtime are unwaivable. However, the interpretation by the California Supreme Court in *Gentry* leads employers to infer that there may be many other employee-related rights which may be characterized as unwaivable.

²¹¹ From a common sense perspective, it would behoove corporations to domicile themselves in a state which favorably interprets arbitration clauses within employment contracts (such as Oregon, Arizona or Nevada). Following *Gentry*, it seems evident that California is moving from the majority and joining the minority of jurisdictions which will not uphold similar class arbitration waivers in an employment setting. See generally Julia B. Strickland & Stephen J. Newman, *Shock Waives*, 29 L.A. LAW. 22 (Mar. 2006). A brief look at the states which *do* uphold class arbitration waivers, from a geographic standpoint, could lead employers to operate in any of the states bordering California. In fact, according to Strickland and Newman's review, California is the only state west of the Mississippi River which does not recognize class arbitration waivers. See *id.*

²¹² Professor Thomas G. Bost, Corporations Law Lecture, given at Pepperdine University School of Law (Fall 2007). In addition to providing predictably in corporate law, according to Professor Bost, the goals of a friendly business atmosphere are laws which are workable, predictable and friendly to corporations. *Gentry* has presented yet another stumbling block for California business law in each of the three aforementioned goals.

over arbitration. Without further clarification, or legislative action, *Gentry* may prove to be yet another demerit in the eyes of Corporate America as it measures the corporate climate within California. California's future is set to include an over-taxed judiciary laden with employment arbitration agreements, increased litigation over statutory rights, and an increasingly expensive and uncertain business climate.