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LABOR AND EMPLOYMENT PRACTICE CASE BULLETIN

Anders v. Hometown Mortgage, Inc.

COURTS CONTINUE TO REJECT CHALLENGES TO ARBITRATION AGREEMENTS

Consistent with the trend of recent court decisions, on September 25, 2003 the Eleventh Circuit Court of Appeals narrowed the types of challenges that will allow employees to avoid agreements they have made to arbitrate their disputes with their employers. *See Anders v. Hometown Mortgage Services, Inc.*, No. 0214448, 2003 WL 22209334 (11th Cir. Sept. 25, 2003). Although *Anders* involved mortgage brokering rather than employee-employers disputes, it will apply equally to employment litigation.

The Eleventh Circuit rejected the challenges made by the plaintiff to the arbitration agreement. First, the plaintiff argued that he should be allowed to litigate in court because he could not afford to pay the costs and fees associated with arbitration. The court rejected that challenge because the defendant had stipulated that it would bear whatever arbitration costs or fees an arbitrator ultimately determined the plaintiff could not afford. Second, the plaintiff argued that the arbitration agreement precluded the award of certain remedies (e.g., punitive damages and attorney fees) that the statutes under which the claim was brought would allow if the case were litigated in court. Although limiting remedies can invalidate an otherwise valid arbitration agreement, the agreement in the case had a severability provision. This allowed the court to "sever" the remedial provisions and compel arbitration, with the arbitrator to decide in the first instance whether the remedial limitations were invalid. If the arbitrator found for the plaintiff on the underlying claim but refused to award punitive damages or attorney fees because of the limitation language, that decision could be reviewed by a court following the arbitration.

Comment: Based on *Anders*, employers should (1) include severability clauses in all their arbitration agreements, and (2) if the employee argues that he cannot afford arbitration, offer to pay the fees of an arbitrator and the costs associated with administration of the arbitration—or at least any fees or costs that an arbitrator should ultimately determine an employee cannot afford. For other recent decisions rejecting challenges to arbitration agreements, see the employment cases of *Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255 (11th Cir. 2003); *Fernandez v. Clear Channel Broadcasting, Inc.*, 268 F.Supp.2d 1365 (S.D. Fla. 2003); *Brasington v. EMC Corp.*, No. 02-3117, 2003 WL 22326664 (Fla. 1st DCA Oct. 13, 2003), and two non-employment Supreme Court cases, *Green Tree Financial Corp. v. Bazzle*, 123 S.Ct. 2402 (2003) (home loans); *Pacificare Health Systems, Inc. v. Book*, 123 S.Ct. 1531 (2003) (RICO).