Filed 4/20/18 Nguyen v. Inter-Coast International Training CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ANTHONY NGUYEN et al., Plaintiffs and Respondents, v. INTER-COAST INTERNATIONAL TRAINING, INC., Defendant and Appellant.	B270305 (Los Angeles County Super. Ct. No. BC461585)

APPEAL from an order of the Superior Court of Los Angeles County, Michelle R. Rosenblatt, Judge. Affirmed.

Neil C. Evans for Defendant and Appellant.

Aequitas Legal Group, Ronald H. Bae and Olivia D. Scharrer for Plaintiffs and Respondents.

Plaintiff and respondent Anthony Nguyen filed a class action lawsuit against his former employer, defendant and appellant Inter-Coast International Training, Inc. (Inter-Coast), alleging various wage and hour claims on behalf of himself and other current and former Inter-Coast employees. Inter-Coast subsequently revised its employee handbook to add an arbitration provision, which many potential members of the class signed during the pendency of the suit. After the court certified the class, Inter-Coast filed a motion to compel arbitration of the claims of the class members who signed the arbitration provision. Plaintiffs—Nguyen, later-added named plaintiff Cheryl Alexander, and the rest of the class—opposed the motion, arguing that the arbitration provision was procedurally and substantively unconscionable. The trial court agreed with plaintiffs and denied the motion to compel. Inter-Coast appealed, and we affirm.

BACKGROUND

Nguyen filed a putative class action complaint against Inter-Coast on May 13, 2011. He alleged various wage and hour violations and sought to establish a class of all non-exempt employees Inter-Coast employed during the previous four years. At the time the suit was filed, neither Nguyen nor any of the putative class members had signed arbitration agreements with Inter-Coast.

In March 2012, Inter-Coast revised its employee handbook to add an arbitration provision. The lengthy provision began about one-third of the way down the penultimate page of the handbook, which bore the heading "**EMPLOYEE ACKNOWLEDGMENT AND AGREEMENT**." Beneath three unrelated paragraphs, and without an additional heading, the provision was printed in the same small, single-spaced typeface

as the other text in the handbook. Continuing from the penultimate to the final page of the handbook, the provision stated, in pertinent part, "I also acknowledge that the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context. Because of the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide to both the Company and myself, I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another . . . arising from, relating to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise . . . shall be submitted to and determined exclusively by binding arbitration. . . . If CCP § 1284.2 conflicts with other substantive statutory provisions or controlling case law, the allocation of costs and arbitrator fees shall be governed by said statutory provisions instead of CCP § 1284.2. . . . I UNDERSTAND BY AGREEING TO THIS BINDING ARBITRATION PROVISION, BOTH I AND THE COMPANY GIVE UP OUR RIGHTS TO TRIAL BY JURY."

It appears from the record that 62 putative class members signed the arbitration provision in March 2012. Named plaintiff Nguyen was not among them.[1]

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[1] Nguyen signed a "General Release" which by its terms released Inter-Coast and its principals "of and from all manners of wage disputes, actions, causes of action, suits, debts, covenants, contracts, controversies, agreements, promises, claims and demands whatsoever" in April 2010. That release is not at issue in this appeal.

In May 2012, Inter-Coast filed a motion to compel arbitration. The trial court denied the motion on several grounds, including lack of personal jurisdiction over the putative class members who had signed the arbitration provision but were not yet part of a certified class. We affirmed that denial in an unpublished opinion on August 21, 2013. (See *Nguyen v. Inter-Coast International Training, Inc.* (Aug. 21, 2013, B241938) [nonpub. opn.] (Suzukawa, J., Epstein, P.J., Willhite, J.)

As litigation continued, Inter-Coast revised its employee handbook several times. Each version of the handbook contained an arbitration provision substantively identical to the one described above.[2] Between June 2012 and June 2015, an additional 106 putative class members signed the arbitration provision.

Nguyen moved for class certification in December 2014. Alexander became a named plaintiff in May 2015 and joined the class certification motion. The trial court granted the certification motion in September 2015, certifying three subclasses of current and former Inter-Coast employees with rest period, late pay, and wage statement claims.

Shortly thereafter, in October 2015, Inter-Coast filed the instant motion to compel arbitration. In the motion, Inter-Coast asserted, "In March 2012, a significant portion of the original 219 putative class members in this case, and all of the new

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[2] Some versions of the provision appeared under different general (but not separate) headings, including "**EMPLOYEE ACKNOWLEDGMENT OF HANDBOOK & EMPLOYEE'S AGREEMENT TO BINDING ARBITRATION**," and "***FOR CALIFORNIA EMPLOYEES ONLY* EMPLOYEE ACKNOWLEDGMENT OF HANDBOOK & EMPLOYEE'S AGREEMENT TO BINDING ARBITRATION**."

approximately 120 new [*sic*] class members, executed written agreements which expressly provide for binding arbitration of all disputes between them and their employer. . . . A copy of these written agreements are attached as Exhibit A to the accompanying Declaration of Geeta Brown . . . . [¶] Attached as Exhibit A to the Petition to Compel Arbitration is a true and correct copy of an arbitration agreement executed by approximately 83 employees of INTER-COAST INTERNATIONAL TRAINING, INC. of the original Putative Class Members. There are [*sic*] a new set of approximately 120 class members who have also signed the same arbitration agreement." The single Exhibit A accompanying the filing consisted of a copy of the final two pages of the March 2012 employee handbook. Another accompanying document, Exhibit B, consisted of two separate spreadsheets of names, which Inter-Coast represented was "a true and correct copy of a list of putative class members who signed such arbitration agreements." According to the spreadsheets in Exhibit B, 168 of the 323 class members signed arbitration agreements.

The accompanying declaration of Brown, Inter-Coast's president, asserted: "All personnel who commence or continue employment at Defendant INTER-COAST INTERNATIONAL TRAINING, INC. are given the option to voluntarily comply with the company's alternative dispute resolution policy, which includes the mandatory arbitration of employment-related claims. The employees who have signed same have done so voluntarily. There are employees who have not signed these agreements. However, we are only seeking to compel those putative class members who have signed the arbitration agreements to arbitrate the dispute arising from this Action."

Inter-Coast later submitted a supplemental declaration by Brown, to which it attached what she represented were "true and correct copies of the signed Binding Arbitration Agreements by these current and former employees" listed in the previously submitted Exhibit B spreadsheets. By our court's count, Inter-Coast furnished a total of 168[3] signed arbitration provisions, excerpted from seven different versions of the employee handbook. Two were undated; the remainder were signed between March 13, 2012 and June 29, 2015.

Plaintiffs opposed the motion to compel arbitration. As is relevant here, they argued that the arbitration provisions were unenforceable because they were unconscionable. Plaintiffs argued that the provisions were procedurally unconscionable contracts of adhesion that Inter-Coast required employees to sign as a condition of employment. Citing a declaration from one Inter-Coast employee, plaintiffs asserted that Inter-Coast engaged in oppressive behavior by distributing the updated employee handbooks at an "impromptu meeting during work hours" and telling employees to sign the handbooks without giving them an opportunity to review their contents or disclosing that an arbitration provision had been added. Plaintiffs also cited an affidavit in which a second employee stated she participated in two such meetings, one on March 14, 2012 and another on January 15, 2013.

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[3] These 168 signed forms do not correspond precisely with the 168 names listed in Exhibit B's spreadsheets. There are 24 names on Exhibit B's spreadsheets for whom no signed provisions were provided, and 28 provisions signed with names that do not appear on Exhibit B's spreadsheets. Sixteen of the forms submitted were duplicates; we did not count these in our total.

Plaintiffs further contended there was an element of surprise, as "supposedly agreed-upon terms of the bargain are hidden in a prolix form" drafted by Inter-Coast. In support of this contention of surprise, they pointed to the provision's placement at the end of the 11-page employee handbook, with "nothing to call attention to the fact that it is an arbitration agreement," and the lack of a copy of the applicable arbitration rules. Plaintiffs also asserted that the provision was printed "in a small, tightly packed font that is difficult to read."

Plaintiffs additionally argued that the agreements were substantively unconscionable.[4] They contended that "the arbitration agreements are an improper, unilateral class communication that is designed to discourage participation in this case and subvert the Court's role in managing the class action." Plaintiffs asserted that Inter-Coast "did not have an arbitration policy in place at the time this case was filed" and required putative class members to sign the updated handbooks without telling them about the case or the arbitration provision. Plaintiffs further claimed that Inter-Coast "directly undermine[d] the Court's authority to regulate communications with class members about the pendency of this case" by sending putative class members a "misleading" letter notifying them about the case via letter on March 27, 2012, "approximately two weeks after Defendant had them sign the arbitration agreements."

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[4] Plaintiffs made two arguments in support of substantive unconscionability. We discuss only the first here because the trial court relied only on the first and the parties focus primarily on that argument at this juncture. Plaintiffs' second argument was that "the arbitration [*sic*] attempts to impose fees and costs on class members that they would not have to pay if they brought their claims in court."

Plaintiffs attached a copy of the letter to a declaration by their counsel, Ronald H. Bae.[5] They also provided the court with the class member declarations they relied on, several versions of the employee handbook, and numerous signed "opt out" forms and releases Inter-Coast distributed to putative class members.

In its reply brief, Inter-Coast disputed plaintiffs' contentions of unconscionability. It argued that the arbitration provision was not procedurally unconscionable because there was no surprise. It asserted the provision "is written in easily readable font" and included a fully capitalized clause regarding the waiver of jury trial rights. Inter-Coast also argued there was "uncontroverted evidence"—the assertion in Brown's declaration that employees signed the arbitration agreements voluntarily—that "all other prospective employees were not pressured to sign the Agreement." Inter-Coast did not address plaintiffs' contentions of oppression, though it pointed to case law rejecting the notion that an arbitration agreement is unconscionable due to a failure to include the arbitral rules. As to substantive unconscionability, Inter-Coast argued only that plaintiffs "failed to meet their burden of proving that the agreement is so substantively one-sided as to shock the conscience." It did not challenge plaintiffs' reliance on the testimony of only two class members, or otherwise object to or rebut plaintiffs' emphasis on the arbitration-related activities that took place in March 2012. Inter-Coast did not supplement its evidentiary submissions, nor

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[5] In addition to "absolutely disput[ing] and deny[ing]" the allegations made in the lawsuit, the letter offered recipients "a payment of $100, less applicable taxes . . . upon our receipt of the signed enclosed Settlement Agreement." No copy of the "enclosed Settlement Agreement" is attached; it is unclear whether it is the "opt out" form discussed herein or another document.

did it point out to the court the variety of dates on which the agreements were signed.

The trial court concluded that Inter-Coast met its burden of showing the existence of arbitration agreements that covered the claims at issue in the class action. The court then considered whether plaintiffs met their burden of proving their asserted defense of unconscionability. It concluded they did.

The trial court found that plaintiffs demonstrated "high level[s]" of both procedural and substantive unconscionability. As to procedural unconscionability, the court agreed with plaintiffs that the arbitration agreements were adhesive. It further found that "the arbitration provisions imbedded within the 11-page handbook are not adequately highlighted or separated from the rest of the employee handbook. The arbitration agreement is written in the same small, single-spaced font as the rest of the agreement and is not otherwise separated with its own heading. Further, while the end of the agreement contains [a fully capitalized acknowledgment that the employee is waiving his or her jury trial right], this is of little consolation when reading the provision as a whole. The Court finds that the agreement is unnecessarily difficult to read, which adds an element of surprise." The trial court stated that it did not consider plaintiffs' claims regarding the absence of arbitral rules as a factor in assessing procedural unconscionability.

As to substantive unconscionability, the trial court found "compelling" plaintiffs' argument that Inter-Coast used a "unilateral communication stream to implement its arbitration policy without first making potential class members aware that they may be forfeiting rights by signing an arbitration agreement." The court also found it "important," as well as

"backhanded," "one-sided[,] and unfair" that "the employees were not informed by Defendant of the pending class action or that their signing of an arbitration agreement would affect their ability to participate in the class action." The court noted that Inter-Coast failed to respond to these arguments, which it found were "sufficient to find a high level of substantive unconscionability."

In light of its findings regarding procedural and substantive unconscionability, the trial court denied Inter-Coast's motion to compel arbitration. Inter-Coast timely appealed. (Code Civ. Proc., § 1294, subd. (a).)

DISCUSSION

I. Legal Standards

Both California and federal law favor arbitration as a matter of public policy. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 97-98 (*Armendariz*); *Magno v. The College Network, Inc.* (2016) 1 Cal.App.5th 277, 284 (*Magno*); see *AT & T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339 (*Concepcion*).) Thus, "arbitration agreements are valid, irrevocable, and enforceable except on grounds that exist for revocation of contracts more generally," such as fraud, duress, and unconscionability. (*Magno*, *supra*, 1 Cal.App.5th at p. 284; see *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246 (*Pinnacle*); *Concepcion*, *supra*, 563 U.S. at p. 339.) Because these are contract defenses, the party asserting them, here plaintiffs, bears the burden of proof. (*Magno*, *supra*, 1 Cal.App.5th at p. 284.) To invalidate an agreement on unconscionability grounds, plaintiffs must prove that the agreement was unconscionable at the time it was entered. (Civ. Code, § 1670.5, subd. (a); *Magno*, *supra*, 1

Cal.App.5th at p. 284.)

To make this showing, plaintiffs must demonstrate both procedural and substantive unconscionability. (*Armendariz*, *supra*, 24 Cal.4th at p. 114.) "The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. [Citations.] Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided." (*Pinnacle*, *supra*, 55 Cal.4th at p. 246.) Procedural and substantive unconscionability need not be present in equal measure; instead, they exist on a sliding scale. On that sliding scale, "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." (*Armendariz*, *supra*, 24 Cal.4th at p. 114.)

"[U]nconscionability can manifest itself in many different ways, depending on the contract term at issue." (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 912.) Accordingly, whether a particular arbitration agreement is unconscionable is highly dependent on the circumstances underlying it. (*Id.* at p. 911.) When assessing unconscionability, courts may consider not only the terms of the agreement but also its "commercial setting, purpose, and effect." (*Ibid.*; Civ. Code, § 1670.5, subd. (b).) "The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement." (*Sanchez*, *supra*, 61 Cal.4th at p. 912.)

"'Absent conflicting extrinsic evidence, the validity of an arbitration clause, including whether it is subject to revocation as

unconscionable, is a question of law subject to de novo review.' [Citation.] "'However, where an unconscionability determination 'is based upon the trial court's resolution of conflicts in the evidence, or on the factual inferences which may be drawn therefrom, we consider the evidence in the light most favorable to the court's determination and review those aspects of the determination for substantial evidence.'" [Citations.]" (*Magno*, *supra*, 1 Cal.App.5th at p. 283.)

II. Analysis

A. Procedural Unconscionability

Inter-Coast contends that plaintiffs failed to prove both procedural and substantive unconscionability. As to the former, Inter-Coast argues that plaintiffs "failed to submit any evidence that any employee's signature to the 180 Agreements was in any way procedurally defective," aside from "two self-serving Declarations from two former employees." It further contends that "[a] plain review of the FULL PAGE ARBITRATION AGREEMENT shows that it contains extensive language both explaining the benefits to arbitration and its terms. If an employee read the entire document, it would be clear, on its face, what the employee is signing, why the employee is signing, and that it is NOT unconscionable on its face. This one page document is separate and apart from any other Provision in the Employee Handbook – a complete page dedicated to the subject of binding arbitration. The arbitration provision is not hidden in the Employee Manuel [*sic*] in between other clauses – it is its OWN PAGE, SEPARATE FROM ALL OTHER PROVISIONS IN THE EMPLOYEE HANDBOOK. The document states at the end above the employee's signature, in BOLD TYPE, 'I UNDERSTAND BY AGREEING TO THIS BINDING

ARBITRATION PROVISION, BOTH THE COMPANY AND I GIVE UP OUR RIGHTS TO TRIAL BY JURY.'" Thus, Inter-Coast asserts, "the Court misunderstood or misread the arbitration clause itself." We disagree.

Procedural unconscionability focuses on contract formation and requires oppression or surprise. "'"Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form.'" [Citation.]" (*Pinnacle*, *supra*, 55 Cal.4th at p. 247.) Substantial evidence of both oppression and surprise is present in the record.

Plaintiffs presented a declaration and an affidavit describing meetings at which several employees were given revised handbooks containing the arbitration provision and instructed to sign them. This is substantial evidence of oppression. Inter-Coast dismisses these documents as "self-serving," and relevant only to the two class members who attested to them, but the trial court was entitled to conclude otherwise, particularly where the dates of the described meetings correspond to the dates on which 35 of the submitted agreements were signed. The trial court was equally permitted to conclude the declaration and affidavit were more credible—and broadly applicable—than the contrary evidence Inter-Coast submitted, a declaration from its president, Geeta Brown, asserting generally that all the employees who signed the arbitration provision did so "voluntarily." Weighing the Brown declaration against plaintiffs' when evaluating oppression did not, as Inter-Coast suggests, impermissibly shift the burden of proof onto Inter-Coast. Rather, it demonstrates that the court considered both sides' limited evidence pertaining to the circumstances surrounding the

execution of the agreements and found plaintiffs' more compelling.

The remainder of Inter-Coast's arguments about the physical characteristics of the agreement pertain to the element of surprise. These assertions are not well taken on the record. Despite Inter-Coast's claims to the contrary, the arbitration provision was not, in any of the seven iterations of the handbook in the record, "separate and apart from any other Provision in the Employee Handbook – a complete page dedicated to the subject of binding arbitration." Instead, the lengthy block of small, single-spaced text regarding arbitration (40 to 50 lines, depending on the handbook version) appeared on the final pages of an 11-page handbook, below paragraphs acknowledging the employee's receipt of the handbook, Inter-Coast's unilateral right to revise the policies in the handbook, and, in bold-face type, the at-will nature of the employment relationship. No style elements, such as a heading, indentations, or emphasized text, differentiated the arbitration provision from the other unrelated paragraphs on the page. The final sentence, typed in all capital letters, is the only portion of the provision emphasized in any way. That alone is not sufficient to negate the other strong indicia of surprise inherent in the presentation of the provision. The nature of the provision, and the circumstances under which employees signed it, support the trial court's finding of procedural unconscionability.

B. Substantive Unconscionability

The trial court concluded that the arbitration agreements were substantively unconscionable—"one-sided and unfair"—because they did not inform the signatories they were potentially giving up their existing rights to participate in the instant class

action lawsuit. Inter-Coast challenges this finding on multiple grounds.

It first contends that the trial court "erred in failing to recognize that more than 120 of the signed agreements were signed in 2014 and 2015, well after the notices of this litigation and Plaintiff's counsel's extensive contacts with the putative class members." Inter-Coast faults both plaintiffs and the court for this alleged error, yet ignores its own contribution to the lack of clarity on this issue. Inter-Coast's motion to compel arbitration affirmatively represented that all of the agreements were signed in March 2012: "In March 2012, a significant portion of the original 219 putative class members in this case, and all of the new approximately 120 new [*sic*] class members, executed written agreements which expressly provide for binding arbitration of all disputes between them and their employer." It further submitted the March 2012 version of the arbitration provision as the sole exemplar agreement, accompanied by an assertion from Brown that all of the signatories "signed the same arbitration agreement." There is no indication in the record that Inter-Coast sought to apprise the court that there were actually multiple versions of the arbitration provision that were signed over a period of years. It appears the trial court nevertheless recognized, from close examination of the dated signature pages submitted by Inter-Coast, that multiple "arbitration agreements," contained in "every subsequent version" of the employee handbook, were "at issue."

Inter-Coast's second assertion, that "The Court of Appeal has already ruled that obtaining post-litigation releases and/or Agreements is not a basis to [*sic*] finding unconscionability," is not established. Inter-Coast relies upon *In re BCBG Overtime*

Cases (2008) 163 Cal.App.4th 1293 (*BCBG*) for this assertion. However, the *BCBG* court did not in fact rule on that issue. "Cases are not authority for propositions not considered." (*Alameida v. State Personnel Board* (2004) 120 Cal.App.4th 46, 58; see also *Santisas v. Goodin* (1998) 17 Cal.4th 599, 620 ["An appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided.'"].) The issue in *BCBG* was whether the trial court erred in granting a defendant's motion to strike class allegations from a plaintiff's complaint. (*BCBG*, *supra*, 163 Cal.App.4th at pp. 1295-1296.) In its discussion of that issue, the appellate court observed that "BCBG had been contacting putative class members and getting them to sign 'some sort of . . . an optout agreement,'" and that plaintiffs "suspected that BCBG might be giving the putative class members misinformation to induce them to settle their potential claims." (*Id.* at p. 1300.) Neither the propriety of that contact nor the legal consequence of plaintiffs' suspicions was discussed. The appellate court indicated in a footnote that "BCBG's opposition to the request for a precertification notice seems to be based on *its assertion* that there is nothing improper about its precertification contact with the putative class members" (*id.* at p. 1301, fn. 4, emphasis added), but recitation of a litigant's assertion is not tantamount to the court's endorsement of the assertion. Nor is it a holding that "obtaining post-litigation releases and/or Agreements is not a basis to finding unconscionability."[6]

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[6] Inter-Coast also argues that *Harris v. Tap Worldwide, LLC* (2014) 248 Cal.App.4th 373 (*Harris*) "is very relevant to this discussion" of substantive unconscionability. We disagree. The issue in *Harris* was whether an arbitration provision in an

On the other hand, the case law plaintiffs cite in support of the trial court's finding of unconscionability is equally unsupportive of their position. Plaintiffs rely exclusively on unpublished federal case law, which is neither binding on this court nor, in this instance, persuasive. Plaintiffs are correct that the facts of *Billingsley v. Citi Trends, Inc.* (11th Cir. 2014) 560 Fed. Appx. 914 (*Billingsley*) are strikingly similar to those here. In *Billingsley*, plaintiffs filed a complaint against defendant under the Fair Labor Standards Act and sought to certify their claims as a collective action.[7] After the suit was filed, but before the trial court certified the collective action, Citi Trends "devised and implemented a new alternative dispute resolution ('ADR') policy" and sent human resources representatives to meet with its store managers to get them to sign the new policy. (*Billingsley*, *supra*, 560 Fed.Appx. at p. 918.) "Store managers were ordered to attend the ADR meetings by their supervisors. Citi Trends did not inform the store managers of the true purpose of the mandatory meetings. Instead of telling the store managers that the meetings concerned the company's new ADR policy, Citi Trends told the store managers that the mandatory meetings concerned the issuance of a new employee handbook." (*Ibid.*) The district court concluded that the handbook rollout was "'pretext for presenting the [arbitration] Agreement to the [store

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employee handbook created an agreement to arbitrate; the appellate court's discussion of unconsionability was not published. (See *Harris*, *supra*, at pp. 380-390.)

[7] The key difference between collective actions and class actions is that the former require additional plaintiffs to affirmatively opt in to the suit, while the latter sweep in all putative class members unless they affirmatively opt out. (*Haro v. City of Rosemead* (2009) 174 Cal.App.4th 1067, 1072.)

managers] to derail their participation in this lawsuit." (*Ibid.*) The district court further concluded that Citi's "'calculated'" conduct was "'replete with deceit'" and rendered the arbitration agreements unconscionable as a matter of law. (*Id.* at p. 919.) Plaintiffs here emphasize that the appellate court "upheld this conclusion."

Though it affirmed the district court's ruling, the Eleventh Circuit "d[id] not reach" the question of unconscionability. (*Billingsley*, *supra*, 560 Fed. Appx. at p. 924 fn. 13.) Instead, it analyzed and affirmed the district court's alternate ruling, which was based on an exercise of the district court's "managerial responsibility to oversee party joinder in FLSA collective actions." (*Id.* at pp. 919-920.) Thus, just as *BCBG* does not stand for the proposition that courts have approved the post-complaint preparation and distribution of arbitration agreements, *Billingsley* does not support plaintiffs' assertion that the manner in which Inter-Coast implemented its arbitration policy rendered it substantively unconscionable as a matter of law.

We nevertheless conclude that the trial court made the correct determination here. The arbitration agreement stated, "I also acknowledge that the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve *all disputes which may arise* out of the employment context." An employee, particularly one who was unaware of the pending class action, could reasonably understand this language to apply only to disputes that "may arise" in the future rather than to disputes that already had arisen and remained ongoing. Nothing else in the text of the lengthy provision clarified that the provision was both forward- and backward-looking. The provision was equally silent about class actions, though it did

mention "wage and hour claims of any kind" approximately halfway through. There is no dispute that Inter-Coast did not apprise the employees at the time of signing these agreements that their rights in the class action could be affected thereby. Inter-Coast points to opt-out agreements that some employees signed later as "confirming the validity of their earlier signed Arbitration Agreements," but the question before for the trial court was whether the agreement was unconscionable at the time it was signed, not in hindsight. (Civ. Code, § 1670.5, subd. (a); *Magno*, *supra*, 1 Cal.App.5th at p. 284.) Substantial evidence supported the trial court's finding that the language of the provision and the circumstances under which it was presented to putative class members rendered it unfair, one-sided, and substantively unconscionable.

We conclude the arbitration provision is significantly unconscionable, both procedurally and substantively. Accordingly, the trial court properly denied Inter-Coast's motion to compel arbitration.

DISPOSITION

The order is affirmed. Respondents are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J. MANELLA, J.