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Kenneth M.
Jones, Esq.

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Employers Beware: Choice-of-Law Provisions May Hinder Enforcement of Arbitration Agreements

By Kenneth M. Jones

A recent California Court of Appeal decision underscores the possible unintended consequences that a choice-of-law provision may have on the enforceability of employment arbitration agreements. In [Harris vs. Bingham McCutchen](#), 2013 WL 1278361 (2013), the California Court of Appeal held that a choice-of-law provision requiring application of Massachusetts law to the interpretation of the arbitration agreement rendered the agreement unenforceable regarding statutory discrimination claims.

In *Harris*, a former associate of the Bingham McCutchen law firm ("Bingham") filed a lawsuit for disability discrimination and wrongful termination against the firm. The lawsuit included statutory claims for six alleged violations of the California Fair Employment and Housing Act (Government Code §12940) ("FEHA") and violation of California Business and Professions Code §17200, *et seq.* Bingham filed a petition to compel arbitration of Harris' claims, relying on a letter agreement between Harris and Bingham mandating that all legal disputes arising out of Harris' employment with Bingham be submitted to binding arbitration. The agreement, drafted by Bingham, specifically provided:

"You and the Firm agree that any legal disputes which may occur between you and the Firm and which arise out of, or are related in any way to your employment with the Firm or its termination [sic], and cannot be resolved informally, shall be resolved exclusively through final and binding private arbitration before an arbitrator

mutually selected by you and the Firm ..."

Harris opposed the arbitration petition on the grounds that the arbitration provision was unenforceable pursuant to the choice-of-law provision of the agreement, which provided that the letter agreement "be construed in accordance with the internal substantive laws of the Commonwealth of Massachusetts." Harris asserted that Massachusetts law specifically precluded arbitration of her statutory discrimination claims. Harris relied on *Warfield vs. Beth Israel Deaconess Medical Center, Inc.*, 454 Mass. 390, 910 N.E.2d 317 (2009), which held that statutory discrimination claims are not subject to arbitration under Massachusetts law. *Warfield* required that agreements to arbitrate such statutory discrimination claims be stated in clear and unmistakable terms.

In reply, Bingham argued that *Warfield* was inapplicable because Harris's claims were brought under California statutes - not Massachusetts statutes - and because *Warfield* was preempted by the Federal Arbitration Act ("FAA") and pursuant to the United States Supreme Court's decision in *AT&T Mobility vs. Concepcion*, 131 S.Ct. 1740 (2011).

The trial court denied Bingham's petition, and on appeal the California Court of Appeal affirmed the trial court's decision. The appellate court first noted that California strongly favors the enforcement of choice-of-law provisions in contracts, including enforcement of such provisions in the context of arbitration agreements. The court relied on *Pelig v. Neiman Marcus Group, Inc.*, 204 Cal.App.4th 1425 (2012), and several other California cases, and held that a choice-of-law provision may govern the construction and interpretation of arbitration agreements. On this basis, the court concluded that Massachusetts law controlled the interpretation of the arbitration provision.

Next, the court discussed the *Warfield* decision, in which the Massachusetts court held that the arbitration clause in an employment agreement did not bar an employee's right to pursue her statutory antidiscrimination claims in court because the agreement did not state in "clear and unmistakable terms" that the plaintiff was "waiving or limiting any statutory antidiscrimination rights." The *Warfield* court also found that because the plaintiff's remaining claims were "integrally connected" to the antidiscrimination claims, Massachusetts law required that they must be "resolved in one judicial proceeding." The California Court of Appeal took note of the "striking similarity" between the arbitration clause in *Warfield* to that in the *Harris* case, and held that the holding in *Warfield* controlled.

The Court of Appeal rejected Bingham's argument that *Warfield* should only apply to violations of Massachusetts antidiscrimination statutes and not to violation of California antidiscrimination statutes.

The court stated:

"Defendant's interpretation would give defendant the benefit of applying its choice of law provisions in any employment relationship disputes while depriving plaintiff of Massachusetts law addressing statutory rights against discrimination in the workplace. Defendants cannot have it both ways while claiming the employment agreement is not illusory."

Furthermore, the Court of Appeal also noted that because Bingham drafted the agreement, any uncertainty regarding the application of the choice-of-law provision to the arbitration provision would be construed against Bingham.

Lastly, the court addressed Bingham's preemption argument. Bingham argued that Massachusetts law is preempted because it is inconsistent with the purposes of the FAA and the standards articulated by the Supreme Court in *Concepcion*. The court rejected this argument, stating that the FAA only preempts state law that withdraws the power to enforce arbitration agreements. But if the state law is not inconsistent with the FAA's policies, choice-of-law clauses are viewed as incorporating the state's laws governing the enforcement of arbitration agreements. The court pointed out that the *Warfield* court specifically found that Massachusetts law requiring a clear and unmistakable waiver of antidiscrimination rights did not interfere with the purposes of the FAA. Furthermore, the court observed that the holding in *Warfield* was supported in cases decided by the Supreme Court. Finally, the *Harris* court noted that language in a footnote in *Concepcion* was supportive of this interpretation.

This case illustrates that employers, in particular national employers, must use due care in drafting arbitration and choice-of-law clauses in arbitration agreements and employee handbooks. Casually including a choice-of-law provision without consideration of relevant state law on such issues can result in unintended and undesirable consequences for an employer, as the *Harris* case illustrates. Thoughtful consideration must be given to the potential differences between the standards for enforcing arbitration agreements in the states where employment disputes are likely to arise and the applicable law in the state of choice for choice-of-law purposes. Moreover, because state laws concerning enforcement of arbitration clauses continue to change, it is incumbent on employers to have their legal counsel periodically review their arbitration agreements and choice-of-law provisions, if any, to determine whether revisions are necessary to accomplish the employer's goals respecting arbitration of employee claims.

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