



Despite Public Policy Favoring Arbitration, Not All Agreements Are Enforceable

by Jennifer Parda

A recent opinion by Division I of the Washington State Court of Appeals serves as an important reminder to employers that, while Washington's public policy generally favors arbitration agreements, they are not always upheld when challenged by an employee. In [Rodriguez v. Windermere Real Estate/Wall St. Inc.](#), 175 P.3d 604 (2008), the court refused to enforce an arbitration agreement that gave the employer the right to select the arbitrators from a pool of other employer-franchisee owners, brokers, managers and sales associates. In light of the *Rodriguez* opinion, now is a good time for employers to review and revise arbitration agreements used in employment contracts to ensure enforceability under current Washington law.

Reported Facts. When joining Windermere as a real estate agent in 2003, the plaintiff signed a broker/sales associate agreement, which required him to arbitrate any disputes with Windermere pursuant to Windermere's internal arbitration procedure entitled the "Windermere Way." The Windermere Way arbitration procedure, established by the Windermere parent franchisor, called for a three-person arbitration panel to be chosen by the Windermere franchisor's service coordinator. The pool from which potential arbitrators could be chosen included other Windermere franchisee owners, brokers, managers and sales associates. Each party was allowed to strike one arbitrator for cause and could make unlimited challenges for cause.

While at Windermere, the plaintiff frequently listed homes jointly with another Windermere agent and shared the listing agent's commission fee equally. In January 2005, the plaintiff and the other agent jointly sold a property which, according to the commission disbursement form, entitled them each to 50 percent of the listing agents' commission. Five months after the sale closed, but before the plaintiff received his commission, Windermere terminated the plaintiff's employment but simultaneously acknowledged that he was entitled to the 50 percent commission. Upon final closing of the sale in December 2005, however, Windermere informed the plaintiff that he was only entitled to a 20 percent referral check. The plaintiff subsequently discovered that the commission disbursement form had been changed, awarding the full listing agent commission to the other Windermere agent.

In an effort to recoup the commission he alleged was owed him, the plaintiff requested that Windermere submit to binding arbitration before a single, independent, nonpartisan arbitrator. When Windermere failed to respond to the plaintiff's request, he filed suit against Windermere and the other listing agent alleging willful withholding of wages, violations of the Washington Consumer Protection Act, breach of contract and unjust enrichment. Windermere responded with a motion to compel arbitration pursuant to the Windermere Way arbitration clause contained in the plaintiff's employment contract. The trial court refused to compel arbitration, finding the Windermere Way arbitration procedure to be inherently unfair due to the manner in which the arbitrators were selected. Windermere appealed.

The Rodriguez Opinion. In considering Windermere's appeal, the court recognized that strong public policy favors arbitration, which "serves as a beneficial alternative to litigation that can provide a more expeditious and less expensive resolution of disputes." Nonetheless, Washington law specifically prevents those with "known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party," from serving as a neutral arbitrator. Thus, the court cautioned that arbitration can *only* substitute for litigation if the selected arbitrators have the ability to make fair and unbiased decisions.

In evaluating the Windermere arbitration procedure, the court noted that the procedure required arbitrators to be chosen *solely* from current employees within the "Windermere franchise family," each of whom has a continuing, mutually beneficial relationship with Windermere, the franchisor. Further, the arbitrators were expected to reflect the "Windermere Way," which the court recognized "may mean that it is in the interests of Windermere . . . to have the commission in dispute paid to a continuing employee rather than to someone whose employment it ha[d] terminated." For these reasons, the appellate court upheld the trial court's opinion, concluding that, because the arbitrators had a known, existing and substantial relationship with Windermere, the arbitration procedure was not sufficiently neutral to be enforceable under Washington law.

How Employers Should React to *Rodriguez*. Arbitration agreements, when carefully crafted, can be a cost-effective way to resolve workplace disputes. *Rodriguez* serves as a useful reminder to review and revise arbitration agreements periodically to ensure that they remain enforceable. In light of the court's holding in *Rodriguez*, to ensure that an agreement does not "violate the spirit of neutrality" required under Washington law, arbitrators should be selected from a pool of individuals *unrelated* to the employer. Employers should also consider the importance of the following when drafting and executing arbitration agreements:

- All language contained in the arbitration agreement should be clearly stated.
- Provisions should be reasonable and balanced. Courts will not enforce provisions that are so one-sided as to be unconscionable.
- Time periods for asserting a claim may be shorter in an arbitration agreement than provided for by statute but employers should not seek to limit damages/remedies below those allowed by statute, as this may cause the court to deny enforcement.
- Agreements should include a severability clause, enabling a court to strike unenforceable provisions while preserving the contract's essential term of arbitration.
- Employees should be provided with an opportunity to review and ask questions about the agreement before executing it.

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