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Franchisors may have tougher time arbitrating
A 9th Circuit ruling on 'unconscionable' agreements is cited

By Amanda Bronstad, Staff reporter

LOS ANGELES - Two rulings in California could make it harder for franchisors to enforce their arbitration agreements with franchisees, according to several lawyers who specialize in franchise contracts.

Both cases cite the U.S. Supreme Court's decision last year in Buckeye Check Cashing Inc. v. Cardegna, 546 U.S. 440 (2006). That decision found that under the Federal Arbitration Act, contract disputes involving arbitration agreements must take place before an arbitrator, not a judge, unless the claims specifically target the arbitration clause.

In one California case, the 9th U.S. Circuit Court of Appeals ruled that a California franchisee had the right to go to court to dispute an arbitration agreement she found "unconscionable," or exceptionally unreasonable.

Nagrampa v. MailCoups Inc., 469 F.3d 1257 (9th Cir. 2006). The ruling came down in December, but was finalized in March.

Several cases have cited Nagrampa in recent months, most notably a Los Angeles case involving a Cold Stone Creamery franchise. Meyers v. Conehead Investments Inc., No. BC358836 (Los Angeles Co., Calif., Super. Ct.). In that case, decided on April 18, a judge denied a motion to compel arbitration in finding the arbitration agreement to be unconscionable.

"The law is now becoming very clear in California," said James Mulcahy of MulcahyReeves in Irvine, Calif., who represents the plaintiff in the Cold Stone Creamery case. "Franchisors need to look at the arbitration provision in their agreements, all of which are then subject to the possibility that they will not be enforced and they will not be able to pursue arbitration."

The Supreme Court's Buckeye decision set a "strong presumption that arbitrators will be deciding many of the issues regarding the enforceability of contracts," said Eric Tuchmann, general counsel and corporate secretary for the American Arbitration Association. As a result, the 9th Circuit's Nagrampa ruling was "striking to many people," he said.

In that case, an en banc panel of the 9th Circuit found that a judge, not an arbitrator, should decide a franchisee's claims. In allowing the franchisee to take her claims to court, the 9th Circuit opinion cited Buckeye, noting that "nowhere in her complaint does she seek rescission or invalidation of the entire contract." The appellate court also found that the arbitration agreement in the case was unconscionable because it allowed the franchisor to go to court, but not the franchisee, who was forced to arbitrate her claims thousands of miles away.

The ruling "gives parties a chance to fight overreaching arbitration clauses in court," said Michael Quirk, an associate at Philadelphia-based Williams Cuker Berezofsky who represented the plaintiff in the Nagrampa case while working at Trial Lawyers for Public Justice.

Glenn Plattner, a partner in the Los Angeles office of Bryan Cave who represents MailCoups, disagreed. "We consider the 9th Circuit opinion to be contrary to the Supreme Court and a lot of other circuit courts," he said.