CASE ALERT: CALIFORNIA SUPREME COURT CLARIFIES UNCONSCIONABILITY STANDARD APPLICABLE TO CONSUMER ARBITRATION AGREEMENTS

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Subsequent to its 2011 decision in *AT&T Mobility v. Concepcion*, the California Supreme Court has reminded us that the Federal Arbitration Act ("FAA") preempts state law when it is applied in a manner that disfavors arbitration. *See Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109 (2013). Nonetheless, in *Sanchez v. Valencia Holding Co., LLC,* No. S199119, the California court of appeal invalidated an arbitration agreement in a form contract for the sale of a used car on unconscionability grounds, finding that it unfairly favored the defendant car dealer.

In a closely watched case, California law fell soundly in line with the Supreme Court's pro-arbitration stance yesterday when the California Supreme Court reversed the appellate court decision in *Sanchez*, and confirmed that a one-sided contract, or a "bad bargain," is not necessarily unconscionable. The Court further confirmed that statutory anti-waiver provisions, such as that found in the CLRA, are also preempted by the FAA.

In *Sanchez*, Plaintiff purchased a pre-owned vehicle using a form sales contract that contained an arbitration provision. The arbitration provision contained several provisions that the appellate court found objectionable. It allowed an appeal of awards of $0 or over $100,000 as well as grants (but not denials) of injunctive relief. The arbitration agreement also required the appealing party to front the costs of appeal. Last, the arbitration agreement carved out the right for either party to pursue relief in small claims court or pursue self-help remedies. When Plaintiff brought a putative class action for violations of the CLRA, UCL, and other state statutes, the Defendant moved to compel arbitration. Both trial and appellate courts found the arbitration agreement unenforceable. The California Supreme Court reversed.

Regarding the CLRA's anti-waiver provision, the Court reasoned that although "class actions are among the provisions of the CLRA that may not be waived," *Concepcion*'s proscription against state laws that interfere with the fundamental attributes of arbitration is equally applicable to statutory rules. Thus, it concluded that the FAA preempts the CLRA's anti-waiver provision.

Regarding unconscionability, the Court confirmed that the doctrine cannot be applied in a manner that disfavors arbitration: "*Concepcion* goes further to make clear that [unconscionability] rules, even when facially nondiscriminatory, must not disfavor arbitration *as applied* by imposing procedural requirements that interfere with fundamental attributes of arbitration especially its lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."

While practitioners hoped that the Court would clarify California's test for unconscionability, it declined to do so. Instead, it stated simply that the various iterations of the test used by lower courts—"overly harsh," "unduly oppressive," "so one-sided as to shock the conscience," "unfairly one-sided"—all mean the same thing.

What does this mean in practice? As with all arbitration decisions, we have to look at the agreement at issue to see the type of provisions the Court upheld. In *Sanchez*, the Court found:

- The merchant was not obliged to highlight the arbitration provision or specifically call it to the consumer's attention.
- The contractual right to appeal did not unfavorably favor one side because presumably the plaintiff would be in the position to appeal an award of $0 and defendant to appeal an award over $100,000 and there was no evidence to suggest that one is more likely to be invoked that the other.
- The contractual right to appeal an award of injunctive relief was not substantively unconscionable because either party could seek injunctive relief and such relief could extend beyond the specific transaction at issue.
- Requiring the appealing party to pay the costs of appeal would not make the agreement substantively unconscionable absent a showing that a particular fee arrangement would specifically deter the plaintiff because CPP §1284.3 sets forth an "ability to pay" approach.

- A self-help carve out is not substantively unconscionable because unconscionability is viewed in the context of the "rights and remedies that otherwise would have been available to the parties" and self-help was not only expressly authorized by statute, but also is sought outside of litigation.

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