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IF THERE'S A WILL, THERE'S A WAY: THE CALIFORNIA SUPREME COURT'S SIDESTEP OF
THE U.S. SUPREME COURT

By
Ryan Cummins*

I. INTRODUCTION

Following the ruling in *AT&T Mobility LLC v. Concepcion*, the California Supreme Court held in *Sonic-Calabasas A., Inc. v. Moreno* (“*Sonic II*”) that an arbitration agreement containing the waiver of a Berman¹ hearing in an adhesive employment contract signed as a condition of employment was not per se unconscionable.² However, the court narrowed the ruling of *AT&T Mobility* and held that unconscionability was still a relevant defense to the enforcement of arbitration clauses.³ To do this, the court distinguished generally applicable state laws that did not undermine fundamental attributes of arbitration and those that did, and found that adhesive arbitration agreements that required the waiver of a Berman hearing had to provide for an available, reasonable determination of wage disputes.⁴ The holding leaves adhesive arbitration agreements in employment contracts open to inquiries by the courts as to their enforceability in contexts outside Berman hearing waivers. Practitioners in California would be wise to tailor their adhesive employment arbitration agreements to align with the procedures provided in Berman hearings as closely as possible, lest the agreements be found unconscionable. While this case initially seems like acquiescence by the California Supreme Court to the

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¹ The following is a summary of a Berman hearing:

“The Berman hearing procedure is designed to provide a speedy, informal, and affordable method of resolving wage claims. In brief, in a Berman proceeding the commissioner may hold a hearing on the wage claim; the pleadings are limited to a complaint and an answer; the answer may set forth the evidence that the defendant intends to rely on, and there is no discovery process; if the defendant fails to appear or answer no default is taken and the commissioner proceeds to decide the claim, but may grant a new hearing on request. The commissioner must decide the claim within 15 days after the hearing. Within 10 days after notice of the decision any party may appeal to the appropriate court, where the claim will be heard de novo; if no appeal is taken, the commissioner's decision will be deemed a judgment, final immediately and enforceable as a judgment in a civil action.”

Cuadra v Millan, 72 Cal.Rptr.2d 687, 689 (Cal. 1998).

² *Sonic-Calabasas A, Inc. v Moreno*, 311 P.3d 184, 188 (Cal. 2013) [hereinafter *Sonic III*].

³ *Id.* at 188.

⁴ *Id.*

United States Supreme Court's ruling in *AT&T Mobility v Concepcion*,⁵ the California Supreme Court again refused to accept defeat with regards to unconscionability.

II. BACKGROUND FACTS

Frank Moreno, an employee of Sonic-Calabasas A, Inc. ("Sonic"), was required to sign, as a condition of his employment, among other things, an agreement⁶ to arbitrate employment disputes.⁷ In December 2006, Mr. Moreno left his job with Sonic and began the first step in obtaining a Berman hearing by filing an administrative wage claim in California with the Labor Commissioner, claiming he was owed unpaid vacation wages.⁸

In February 2007, arguing that Mr. Moreno had waived his right to a Berman hearing in the arbitration agreement, Sonic "petitioned the superior court to compel arbitration of the wage claim and to dismiss the pending [Berman hearing]."⁹ The Superior Court denied the motion, reasoning that arbitration could not be compelled until

⁵ *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011).

⁶ *Id.* at 188-89. The important aspects of the arbitration agreement are copied below.

"The agreement also contained a paragraph governing dispute resolution, which required both parties to submit employment disputes to "binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec. 1280 et seq...)." The arbitration provision applied to "all disputes that may arise out of the employment context ... that either [party] may have against the other which would otherwise require or allow resort to any court or other governmental dispute resolution forum[,...] whether based on tort, contract, statutory, or equitable law, or otherwise." The provision specified that it did not apply to claims brought under the National Labor Relations Act or the California Workers' Compensation Act, or to claims before the Employment Development Department. The provision further stated that the employee was not prevented from "filing and pursuing administrative proceedings only before the California Department of Fair Employment and Housing or the U.S. Equal Opportunity Commission." In addition, the agreement provided that arbitration is to be conducted by a "retired California Superior Court Judge" and that "to the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure section 631.8." At the request of either party, an arbitration award may be reviewed by a second arbitrator who will, 'as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following court trial.'"

⁷ *Id.* at 188.

⁸ *Sonic II*, 311 P.3d at 188. Moreno claimed he was owed sixty-three days of unpaid vacation wages, totaling \$441.29 per day.

⁹ *Id.*

after a hearing and decision by the Labor Commissioner.¹⁰ The Court of Appeals held that the arbitration agreement was a proper waiver of a Berman hearing and that it was not against public policy.¹¹

The Supreme Court of California reversed the Court of Appeals and held in *Sonic-Calabasas A, Inc., v Moreno* (“*Sonic I*”) that the waiver of a Berman hearing in a pre-dispute adhesive arbitration was against public policy¹² and unconscionable.¹³ The Court held that such a waiver was against public policy because the protections given by the Berman hearing were public and could not be waived by a private contract.¹⁴ The Court also held that such a waiver was unconscionable because, as an adhesive contract, it was predicated upon acceptance in order to gain employment, making it procedurally unconscionable.¹⁵ Further, the Court held the waiver only favored the employer, making it substantively unconscionable.¹⁶ The Court, however, did not invalidate the arbitration agreement; instead, it simply severed the Berman waiver. After the Berman hearing concluded, the parties were free to arbitrate.¹⁷ The Court found that the Federal Arbitration Act (“FAA”)¹⁸ did not preempt this holding because the state law rule against a Berman hearing waiver did not discriminate against arbitration agreements generally; the rule applied to non-arbitration contracts also.¹⁹

The Supreme Court of the United States granted certiorari in *Sonic I*, and in light of the holding in *AT&T Mobility LLC v. Concepcion*,²⁰ vacated the judgment and remanded the case for reconsideration to the California Supreme Court.²¹ The Supreme Court held in *AT&T Mobility* that a class action waiver within a consumer arbitration agreement was not unconscionable.²² The Supreme Court held that the FAA preempted a

¹⁰ *Id.* at 188-89.

¹¹ *Id.*

¹² *Sonic-Calabasas A, Inc. v. Moreno*, 51 Cal.4th 659, 684 (Cal. 2011) [hereinafter *Sonic I*].

¹³ *Id.* at 686.

¹⁴ *Id.* at 679.

¹⁵ *Id.* at 686.

¹⁶ *Id.*

¹⁷ *Sonic I*, 51 Cal.4th at 676.

¹⁸ Federal Arbitration Act, 9 U.S.C. § 2 (2013).

¹⁹ *Id.* at 689.

²⁰ *AT&T Mobility*, 131 S.Ct. at 1740.

²¹ *Sonic-Calabasas A, Inc. v. Moreno*, 132 S.Ct. 496 (2011).

²² *AT&T Mobility*, 131 S.Ct. at 1753.

California state law that made class action waivers unconscionable because it went against the emphatic federal policy in favor of arbitration.²³ The holding in the current case represents the California Supreme Court’s reconsideration of the issue in light of *AT&T Mobility*, on remand from the Supreme Court.

III. COURT REASONING

A. *AT&T Mobility v. Concepcion*

In *Sonic II*, the California Supreme Court overruled their holding in *Sonic I* and held that the FAA, as interpreted in *AT&T Mobility*, preempted their *Sonic I* ruling that waiver of a Berman hearing was per se unconscionable.²⁴ To understand this fully, it is important to summarize the holding in *AT&T Mobility* briefly, as applicable to this case. In *AT&T Mobility*, the Concepcions agreed to an adhesive arbitration agreement, which contained a class action waiver, with AT&T.²⁵ They later had a dispute with AT&T and attempted to bring a class action suit against AT&T.²⁶ Lower courts relied on the *Discover Bank* rule²⁷ to invalidate the class action waiver contained in the arbitration agreement.²⁸ The Supreme Court held that “courts cannot impose unconscionability rules that interfere with arbitral efficiency, including rules forbidding waiver of administrative procedures that delay arbitration.”²⁹ The Court held that “[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”³⁰ Stated more broadly, the Supreme Court held that per se rules of unconscionability are preempted by the FAA.³¹ The FAA

²³ *Id.*

²⁴ *Sonic II*, 311 P.3d at 198.

²⁵ *AT&T Mobility*, 131 S.Ct. at 1744.

²⁶ *Id.*

²⁷ See *Discover Bank v. Superior Court*, 30 Cal.Rptr.3d 76, 87 (Cal. 2005). In *Discover Bank*, the California Supreme Court held that consumer arbitration class action waivers are unconscionable if the arbitration agreement is adhesive in nature, the weaker party alleges the stronger party is intentionally trying to defraud the weaker party, and disputes are likely to be small dollar amounts.

²⁸ *A&T Mobility*, 131 S.Ct. at 1745.

²⁹ *Sonic II*, 311 P.3d at 199 (summarizing *AT&T Mobility*, 131 S.Ct. at 1749).

³⁰ *AT&T Mobility*, 131 S.Ct. at 1747.

³¹ *Id.*

preempts a state's rule that is "inconsistent with the FAA, even if it is desirable for unrelated reasons."³²

B. The California Supreme Court's Application of AT&T Mobility v. Concepcion on Remand

The California Supreme Court, prompted by the holding in *AT&T Mobility*, found that a per se rule prohibiting waiver of Berman hearings was preempted by the FAA: "[b]ecause a Berman hearing causes arbitration to be substantially delayed, the unwaivability of such a hearing, even if desirable as a matter of contractual fairness or public policy, interferes with a fundamental attribute of arbitration—namely, its objective to achieve streamlined proceedings and expeditious results."³³ The Court held that requiring a Berman hearing before commencement of arbitration would go against one of the fundamental attributes of arbitration: to achieve quick results.³⁴

Although the FAA preempted California's law categorically prohibiting waiver of a Berman hearing,³⁵ the California Supreme Court found that unconscionability was still a viable defense after *AT&T Mobility*.³⁶ According to the Court, the ruling in *AT&T Mobility* let stand the savings clause in FAA Section 2. The savings clause states arbitration agreements are to be unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract."³⁷ These grounds include "generally applicable contract defenses, such as fraud, duress, or unconscionability."³⁸

The Court then narrowed the holding of *AT&T Mobility*, stating that it only limited unconscionability; the holding did not abolish it as an available defense.³⁹ The Court acknowledged the Supreme Court's reasoning that some state-law rules are preempted by the FAA not only if they discriminate against arbitration on their face, but, when facially neutral state-laws are applied, they interfere with fundamental attributes of arbitration.⁴⁰ However, the court used this idea to justify the idea that "state-law rules that do not interfere with fundamental attributes of arbitration do not implicate

³² *Id.*

³³ *Sonic II*, 311 P.3d at 200.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 201.

³⁷ 9 U.S.C. § 2.

³⁸ *Sonic II*, 311 P.3d at 201 (citing *AT&T Mobility*, 131 S.Ct. at 1746).

³⁹ *Sonic II*, 311 P.3d at 201.

⁴⁰ *Id.* at 203.

Concepcion's limits on state unconscionability rules."⁴¹ The Court's argument was that unconscionability does not always interfere with fundamental attributes of arbitration, and if it does not, it would be allowed.⁴²

The Court used this reasoning to find that a Berman hearing waiver could still be unconscionable.⁴³ The Court stated that "[w]aiver of [Berman hearing] protections does not necessarily render an arbitration agreement unenforceable...but waiver of these protections in the context of an agreement that does not provide an employee with an accessible and affordable arbitral forum for resolving wage disputes may support a finding of unconscionability."⁴⁴ The rule set by the Court "simply requires an adhesive arbitration agreement that compels the surrender of Berman protections as a condition of employment to provide for accessible, affordable resolution of wage disputes."⁴⁵ The rule set forth by the Court was a state-law rule that did not undermine fundamental attributes of arbitration, allowing it to survive the holding of *AT&T Mobility*.⁴⁶

C. How Courts are to Determine Unconscionability

The California Supreme Court explained that courts must look to the terms of the agreement and the process in practice to determine unconscionability.⁴⁷ If, on the whole, the arbitration agreement provided for an affordable, effective means of resolving wage disputes, the agreement would not be found unconscionable.⁴⁸ If the agreement made it difficult or expensive for an employee to resolve a wage dispute, then the agreement would be found unconscionable.⁴⁹ The Court noted that there were some things that went against the arbitration agreement in the current case, such as the trial like process the arbitration agreement created: the arbitration was to be run by a retired California Superior Court Judge, inclusion of discovery, depositions, application of the rules of evidence, and review of the arbitration award.⁵⁰ While the arbitration agreement did

⁴¹ *Sonic II*, 311 P.3d at 201 (citing *AT&T Mobility*, 131 S.Ct. at 1748).

⁴² *Id.* at 203.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 206.

⁴⁶ *Sonic II*, 311 P.3d at 206.

⁴⁷ *Id.* at 203.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

contain these features that were not tailored toward quick and affordable resolution of wage claims, the Court found it necessary for courts to look to the arbitral institution rules agreed to and the actual process undertaken to determine if those features promoted fundamental attributes of arbitration.⁵¹ The Court acknowledged that there was no one way to administer a wage dispute, and that arbitration could achieve the goals of a Berman hearing.⁵² The Court also found that the way the contract was formed would be important to the unconscionability question, such as whether the Berman waiver was freely negotiated by a party with similar bargaining power.⁵³

In the end, the Court laid out guidance for lower courts to determine unconscionability in an adhesive employment contract that contained a Berman waiver, but did not resolve the inquiry in the current case.⁵⁴ It remanded this to the lower court to determine, given the totality of the circumstances set out in the opinion, whether the arbitration agreement was unconscionable.⁵⁵

IV. SIGNIFICANCE

Sonic II is significant because it is an acceptance, albeit mandatory, by the California Supreme Court of the holding in *AT&T Mobility*. It does, however, contain an important caveat. The California Supreme Court accepted that their previous ruling, that Berman hearing waiver was per se unconscionable, was untenable, but they nevertheless went to great lengths to narrow the holding in *AT&T Mobility*. The California Supreme Court refused to give into the Supreme Court, and the holding in *Sonic II* could bring a challenge by that judicial body. This holding once again shows the California judiciary's hostility to arbitration.⁵⁶

While this case only dealt with the waiver of a Berman hearing, a broad reading of the holding, that state-law rules that do not undermine fundamental attributes of arbitration are acceptable, could open Pandora's box. This holding potentially allows disaffected parties to bring unconscionability challenges to arbitration agreements that waive other state-law rules that promote speed and affordability. Parties who want to

⁵¹ *Sonic II*, 311 P.3d at 204.

⁵² *Id.*

⁵³ *Id.* at 204-05.

⁵⁴ *Id.* at 205.

⁵⁵ *Id.* at 203.

⁵⁶ See McLaughlin on Class Actions §2.14. Limitations on applicability of class action device – Class certification in arbitration – Enforceability of consumer contract provisions barring class actions. Courts applying California law were conspicuously hostile to "no class action" clauses in arbitration agreements, reasoning that in actions involving small sums such clauses can be exculpatory in practice. See also Alan S. Kaplinsky, Business Lawyer, Arbitration Developments: Conception – The Supreme Court Decisively Steps In. In the wake of Conception, both state and federal courts have enforced arbitration agreements containing class action waivers, even in states previously hostile to arbitration such as California.

delay arbitration would be able to litigate such claims in court, which in the end would neither promote speed nor affordability, as the litigation would take more time and more money.

Practitioners who represent employers that impose adhesive arbitration agreements on their employees as a condition of employment in California should pay close attention to how this case is handled on remand and to any subsequent proceedings. In the interim, practitioners should tailor their arbitration agreements to this ruling to defeat any unconscionability suits. In *Sonic I*, the waiver of a Berman hearing was found to be unconscionable, which if it had prevailed, would have meant that the parties would have gone through a Berman hearing before they could arbitrate. Therefore, practitioners should look to the California Supreme Court's analysis on how to determine unconscionability to avoid that outcome.

The Court's analysis focused on a few key factors to determine unconscionability. To avoid a court finding waiver of a Berman hearing as unconscionable based on one's arbitration agreement, practitioners should first and foremost provide for a forum that promotes speed and affordability.⁵⁷ While there is no one way to do this, as the Court points out,⁵⁸ practitioners would be wise to provide protections similar to Berman hearings.⁵⁹ This includes implementing a system to pay for attorney's fees because Berman hearings call for employers to pay their employees' attorney's fees on appeal if the employee wins more than zero dollars.⁶⁰ Practitioners could adopt this rule, which would go towards promoting the affordability of the arbitration process. If a practitioner is worried about excessive fees, the practitioner can give the arbitrator the power to determine reasonable attorney's fees. The employer should also agree to pay the arbitrator costs and administrative fees, making access to resolution of a wage dispute even more affordable. Practitioners must not be penny wise and pound foolish, as the ability to avoid class arbitration still makes arbitration more valuable in the long run.

Practitioners might also look into promoting document-only arbitration with regards to wage disputes. Document-only arbitration is a quick and affordable process in which the parties submit documents and do not conduct oral hearings.⁶¹ Document-only arbitration would allow for a quick and affordable disposition of the wage dispute. The process is quick because parties need only send in documents supporting their position,

⁵⁷ *Sonic II*, 311 P.3d at 203.

⁵⁸ *Id.* at 204.

⁵⁹ *Id.*

⁶⁰ *Id.* at 191-92.

⁶¹ Document-only proceedings are offered by one of the more well-known arbitration institutions, American Arbitration Association ("AAA"). Here is a link to a description of their documents only proceeding.
http://webcache.googleusercontent.com/search?q=cache:n46AFW97HNQJ:https://www.adr.org/cs/idcplg%3FIdcService%3DGET_FILE%26dDocName%3DADRSTG_009429%26RevisionSelectionMethod%3DLatestReleased+&cd=1&hl=en&ct=clnk&gl=us

with no need for drawn out judicial processes, like discovery or cross-examination.⁶² Document-only arbitration is also affordable because the fees are smaller and it does not necessarily require an attorney; if it does, the attorney's involvement is muted compared to the typical trial or arbitration proceedings, therefore their fees are lessened.⁶³ If practitioners can integrate document-only arbitration into their arbitration agreements, it has the ability to not only save them from an unconscionability defense, but also to save money and time.

The ruling in *Sonic II* creates jurisdictional variability. The holding sanctions a case-by-case assessment of arbitration agreements. It has the potential to create a way out of arbitration for disgruntled employees, and hope that they get a judge who will liberally apply unconscionability review. One easy fix to this problem would be the inclusion of a delegation of jurisdictional authority (*Kaplan* clause) within the arbitration agreement. In *First Options of Chicago, Inc. v Kaplan*, the Supreme Court ruled that if the parties agreed to submit jurisdictional issues to the arbitrator, then the arbitrator had the authority to rule on them.⁶⁴ This would give arbitrators the power to rule on the arbitrability of the issues, such as unconscionability, themselves.⁶⁵ The successful insertion of a *Kaplan* clause into the arbitration agreement would take the analysis of the court on the unconscionability of the waiver of a state-law rule out of the court's hands and place it in the hands of the arbitrator.⁶⁶ This case theoretically could have been avoided if there had been a *Kaplan* clause included in the arbitration agreement.

V. CRITIQUE

The Court's overruling of the holding in *Sonic I* was inevitable considering the Supreme Court's holding in *AT&T Mobility*, but the Court's determination that unconscionability remained viable is cause for concern within the arbitration community. The biggest consequence of the holding is that the Court increased the ability of the judiciary to supervise arbitration agreements. This increased judicial supervision can be seen as a good or bad thing depending on the party. We will look at the ruling in *Sonic II* from the perspective of both an employer and an employee.

The ruling in *Sonic II* is bad for employers who have Berman waivers within their arbitration agreements because it creates uncertainty with regards to their arbitration

⁶² *Id.*

⁶³ *Id.* The total cost of the AAA's document-only proceeding is \$1,300.

⁶⁴ *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 941-42 (1995).

⁶⁵ *See Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772, 2777 (2010).

⁶⁶ Here is the successful delegation of jurisdictional authority from *Rent-A-Center*, 130 S.Ct. at 2777:

“[t]he Arbitrator...shall have exclusive authority to resolve any dispute relating to the...enforceability...of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.”

agreements. It is impossible for employers to know if the arbitration agreement they draft today is going to be enforceable down the road. This uncertainty increases the costs of arbitration. A court ruling that a Berman hearing waiver is unconscionable leads to longer resolutions of wage disputes because parties need to go through a Berman hearing before getting to arbitration. This makes arbitration less attractive to employers than it previously would have been because it allows employees two bites at the apple. If the employee does not get what they want from the Berman hearing, they have the recourse to arbitration, drawing out the final resolution of the dispute in question. Because employers will not know if their arbitration agreement is unconscionable, they cannot effectively plan for future litigation costs. Instead of going to arbitration with their disputes, the employer may have to endure litigation on the unconscionability of the Berman hearing waiver, and if it is inadequate, proceed through a Berman hearing, then potentially go to arbitration. The employer had hoped to go through one process, arbitration; instead it potentially goes through three different judicial processes, all to settle a wage claim.

On the other side of the equation is the employee. The *Sonic II* holding favors employees because it tips the scales of the adhesive contract. The employer wrote the arbitration agreement, and as a self-interested party, they will more likely than not tailor it toward their needs and not an employees. The employer already has the ability to impose terms favorable to themselves, such as class action waiver; the court is just giving the employee some protection. States argue that they should be able to regulate this, within their police powers, as a way to protect employees and grant them basic protections. By ruling that state-law rules can pass unconscionability muster as long as they do not interfere with fundamental attributes of arbitration, allows states to regulate arbitration without being preempted. This holding forces employers to write arbitration agreements in a way that is less one-sided. Agreements will need to be written in a way that lines up with the expectations of the employee: that if wronged, the employee will have state sanctioned recourse available.

The holding in *Sonic II* runs contrary to the emphatic federal policy favoring arbitration. While those wishing to compel arbitration do not normally need to prove to the court that the arbitration agreed to is equal to the recourse to litigation, they are forced to prove that arbitration is just as quick and affordable as a Berman hearing. The holding in *Sonic II* allows courts to postpone arbitration agreements in favor of state-law rules. It also runs counter to the idea of freedom of contract. The parties agreed to waiver of Berman hearings and the Court has decided it knows better than the parties and will not allow it. The Court points to unconscionability as the reason, but the Court's analysis is not whether the arbitration proceeding itself is unconscionable, but whether the arbitration process is comparable to a Berman hearing. This is classic judicial hostility to arbitration. If a contract had provided for a Berman hearing waiver, and provided for the parties to go to court, the California Supreme Court would not have called that agreement unconscionable. However, because arbitration is involved, an employer has to prove that his process is up to the courts' liking. This is the type of judicial hostility the Supreme Court has fought against, and which they ultimately might take up in the future.