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THE NINTH CIRCUIT GRAPPLES WITH THE ARBITRABILITY AND UNCONSCIONABILITY OF MMWA CLAIMS

Amanda Miller*

I. INTRODUCTION

In the Federal Arbitration Act (FAA), Section two states that arbitration agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹ Despite this clear statutory mandate requiring the enforcement of arbitration agreements, parties constantly resist the arbitral process. Often, parties endeavor to use state contract law in attempts to prevent the court from compelling arbitration as required by FAA § 2. To preclude arbitration, parties frequently argue that they are not bound by the agreement because the underlying claims lack substantive arbitrability. While arbitrability challenges are slowly becoming more futile,² the former route has flourished. By applying unconscionability doctrine, parties often persuade the court that the terms of the arbitration agreement shock the conscience and are unenforceable.³

In *Kolev v. Euromotors*, the Plaintiffs sought to defeat a motion to compel arbitration and presented the Ninth Circuit court with unconscionability and substantive inarbitrability defenses.⁴ The Ninth Circuit ruled that Magnuson Moss Warranty Act (MMWA) warranty claims are not arbitrable and ignored the unconscionability claim.⁵ In *Sanchez v. Valencia Holding Co.*, a similar case involving state statutes, the California Court of Appeal held that the arbitration clause was unconscionable.⁶ In response to the California Supreme Court granting review in *Sanchez*, the Ninth Circuit issued a *sua sponte* withdrawal of the *Kolev* opinion and will issue a new opinion light of the California Supreme Court decision in *Sanchez*, which will likely address unconscionability, as opposed to substantive inarbitrability. While unconscionability challenges

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¹ Federal Arbitration Act, 9 U.S.C. § 2 (2006).

² See *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012); see also *14 Penn Plaza v. Pyett*, 129 S. Ct. 1456 (2009).

³ See *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1 (Mont. 2002) (setting out factors for unconscionability in arbitration agreements); see also *Gutierrez v. Autowest, Inc.*, 114 Cal. Rptr. 3d 267 (Cal. Ct. App. 2003) (holding that the arbitration clause was procedurally unconscionable); see also *Bruni v. Didion*, 73 Cal. Rptr. 3d 395 (Cal. Ct. App. 2008) (holding that a home purchasers’ warranty agreement had adhesive arbitration provisions that involved surprise, violated the purchasers’ reasonable expectations and could not be severed); see also *Rent-A-Center, West, Inc. v. Jackson* 130 S. Ct. 2772 (2010) (holding that unconscionability/enforceability was a decision for the arbitrator); see also *In re Checking Account Overdraft Litigation* 2011 U.S. Dist. Lexis 118462, at *46, 2011 WL 4454913, at *4 (S.D. Fla. 2011) (“*Concepcion* did not completely do away with unconscionability as a defense to the enforcement of arbitration agreements under the FAA.”).

⁴ *Kolev v. Euromotors West/The Auto Gallery*, 658 F.3d 1024 (9th Cir. 2011), *withdrawn and vacated by* 2012 WL 1194177, ___ F.3d ___ (9th Cir. Apr. 11, 2012).

⁵ *Id.*

⁶ *Sanchez v. Valencia Holding Co., LLC*, 132 Cal. Rptr. 3d 517 (Cal. Ct. App. 2011), *vacated and review granted by* 135 Cal. Rptr. 3d. 19 (Cal. 2012).

have survived and seem to thrive post-*AT&T Mobility*,⁷ it is clear that challenging motions to compel on arbitrability grounds is fruitless.

II. BACKGROUND

The courts have established a liberal policy favoring arbitration agreements and require enforcement of agreements to arbitrate according to their terms.⁸ Despite this policy of favoring the arbitral, the courts were originally hesitant to arbitrate certain statutory claims.⁹

In *Mitsubishi Motors v. Soler*, the Court held that international arbitrators have authority to rule upon statutory claims that arose in the performance of an international contract.¹⁰ When initially rendered, the holding was limited to international commercial arbitration matters. The courts later began to ignore the international specificity of the holding and integrated the policy of arbitrating statutory claims into domestic law. Precedent prohibiting domestic recourse to arbitration of certain statutory claims was reversed.¹¹

The Supreme Court has also promulgated a policy of enforcing agreements to arbitrate even when the claims at issue are federal statutory claims, unless the FAA's mandate has been "overridden by a contrary congressional command."¹² In *Kolev*, the Ninth Circuit court held that Congress delegated MMWA rule-making authority to the FTC, who interpreted the statute's intent to preclude mandatory and binding pre-dispute arbitration clauses.¹³ This decision was controversial, as the Fifth and Eleventh Circuit Courts have both held that the MMWA does not preclude arbitration of MMWA warranty claims.¹⁴ The opinion of the Ninth Circuit Court was vacated, and a new opinion will be rendered after the California State Supreme Court issues an opinion in *Sanchez*, which addresses unconscionability of arbitration clauses.

While arbitration contracts are binding, Courts may sometimes hold that these agreements are unenforceable when the arbitration clause is unduly oppressive and unconscionable.¹⁵ In *Gutierrez v. Autowest, Inc.*, the court held that oppression may exist and an arbitration provision in a sales contract can be procedurally unconscionable when "[the buyer]

⁷ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (holding that California state contract law deeming class-action waivers in arbitration agreements unenforceable, is preempted by the Federal Arbitration Act).

⁸ *See Moses H Cone v. Mercury*, 461 U.S. 1, 24 (1983) (holding that courts should resolve any doubts about arbitrability in favor of arbitration); *see also Dean Witter v. Byrd*, 470 U.S. 213, 221 (1985); *see also Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1774-75 (2010).

⁹ *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 233 (1987) ("[T]he mistrust of arbitration that formed the basis for the *Wilko* [*v. Swan*, 346 U.S. 427 (1953),] ... is difficult to square with the assessment of arbitration that has prevailed since that time.").

¹⁰ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (1985) (holding that international arbitrators have authority to rule on statutory claims in international contracts).

¹¹ *See Shearson*, 482 U.S. at 242; *see also 14 Penn Plaza v. Pyett*, 129 S. Ct. 1456 (2009) (holding that there is no subject matter inarbitrability of civil rights claims as long as the agreement clearly submits disputes to arbitration); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

¹² *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (holding that federal statutory claims are arbitrable unless express congressional command says otherwise).

¹³ *Kolev v. Euromotors West/The Auto Gallery*, 658 F.3d 1024, 1025 (9th Cir. 2011).

¹⁴ *See Walton v. Rose Mobile Homes L.L.C.*, 298 F.3d 470 (5th Cir. 2002); *see also Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002).

¹⁵ *See Kloss v. Edward D. Jones & Co.*, 54 P.3d 1 (Mont. 2002) (setting out factors for unconscionability in arbitration agreements).

asserts the Contract was presented to him on a ‘take-it-or-leave-it’ basis, ... and he did not have an opportunity for meaningful negotiation...No one pointed out the Arbitration Clause or discussed it with [the buyer] at any time ...”¹⁶ In *Sanchez*, the California Court of Appeal held that the arbitration clause was unconscionable because the provision was adhesive, involved oppression and surprise, and contained one-sided terms that favored the car dealer to the detriment of the buyer.¹⁷ While the *Kolev* court chose not to address the unconscionability claims in their first opinion, they may discuss the Plaintiffs unconscionability claims once the California Supreme Court renders an opinion in *Sanchez*.¹⁸

III. COURT’S ANALYSIS

In *Kolev v. Euromotors West*, Diana Kolev brought suit against Euromotors West/The Auto Gallery, Motorcars West LLC (“the Dealership”) and Porsche Cars North America (“Porsche”), when the pre-owned automobile she bought from the Dealership developed serious mechanical issues during the warranty period.¹⁹ The Dealership refused to honor her warranty claim and Kolev alleged breach of implied and express warranties under the MMWA, breach of contract, and contract unconscionability.²⁰

The sales contract contained a mandatory arbitration clause, which the District Court enforced when the Dealership made a motion to compel arbitration.²¹ The arbitration resulted in an arbitral award favoring the Dealership.²² Kolev appealed, arguing that the MMWA barred binding arbitration of her warranty claims. Kolev maintained that while the MMWA did not specifically address arbitration, Congress delegated MMWA rulemaking authority to the Federal Trade Commission (“FTC”).²³ Kolev claimed that the FTC construed the MMWA to bar pre-dispute mandatory binding arbitration clauses in warranty agreements, and as prohibiting enforcement of arbitration clauses in claims brought under the MMWA.²⁴

The Ninth Circuit originally held that MMWA warranty claims were not subject to compulsory arbitration.²⁵ While the courts in the Fifth and Eleventh Circuits have both held that the MMWA does not preclude arbitration of warranty claims,²⁶ the Ninth Circuit disagreed, finding that Congress delegated MMWA rule-making authority to the FTC, who interpreted the statute’s intent to preclude mandatory and binding pre-dispute arbitration clauses.²⁷ Because they

¹⁶ *Gutierrez v. Autowest, Inc.*, 114 Cal. Rptr. 3d 267 (Cal. Ct. App. 2003) (holding that the arbitration clause was procedurally unconscionable).

¹⁷ *Sanchez v. Valencia Holding Co., LLC*, 135 Cal. Rptr. 3d 19, 22-23 (Cal. Ct. App. 2011).

¹⁸ *Kolev v. Euromotors W./The Auto Gallery*, 2012 WL 1194177 (9th Cir. Apr. 11, 2012).

¹⁹ *Kolev v. Euromotors W./The Auto Gallery*, 658 F.3d 1024, 1025 (9th Cir. 2011).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *See Walton v. Rose Mobile Homes L.L.C.*, 298 F.3d 470 (5th Cir. 2002); *see also Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002), *cert denied*, 538 U.S. 945 (2003) (holding that MMWA warranty disputes are not precluded from arbitration).

²⁷ *Kolev*, 658 F.3d at 1030.

found warranty issues under the MMWA statutorily inarbitrable, the court decided it was unnecessary to address the unconscionability claims.²⁸ The Ninth Circuit recently withdrew their opinion for *Kolev*, and vacated the submission of the case, pending the issuance of a decision by the California Supreme Court in *Sanchez*.²⁹

In *Sanchez*, a consumer filed a class action claim against a car dealership, alleging violations of the Consumers Legal Remedies Act (CLRA),³⁰ the Automobile Sales Finance Act (ASFA),³¹ the Unfair Competition Law (UCL),³² the Song–Beverly Consumer Warranty Act (Song–Beverly Act),³³ and the California Tire Recycling Act (Tire Recycling Act).³⁴ The dealership then filed a motion to compel arbitration.³⁵ The California Court of Appeal held that the arbitration clause in a car dealership contract was both procedurally and substantively unconscionable, and the trial court was correct in denying the defendant’s motion to compel arbitration.³⁶ The Supreme Court of California granted the Defendant’s petition for review. This comment will focus on the issues decided in both the Federal and the State courts, and the effect the California Supreme Court decision will have on *Kolev*.³⁷

A. In *Kolev*, the Ninth Circuit held that Congressional Intent Precluded Binding Arbitration Clauses in MMWA Warranty Agreements

The court stated that traditional tools of statutory construction were used to determine whether Congress expressed clear intent on the issue of arbitration clauses in the MMWA.³⁸ The court found that while the MMWA did not specifically address binding arbitration agreements, Congress expressly delegated authority to the FTC to make rules regarding informal dispute settlement procedures for warranty agreements.³⁹ The FTC stated in Rule 703 that, “[d]ecisions of [any] Mechanism shall not be legally binding on any person.”⁴⁰ Rule 703 also stated that if a consumer is dissatisfied with a Mechanism’s holding or a warrantor’s actions, then legal remedies may be pursued.⁴¹ The FTC concluded that any written warranty containing binding, non-judicial remedies was prohibited.⁴²

²⁸ *Id.* at 1031.

²⁹ *Kolev v. Euromotors West/The Auto Gallery*, 2012 WL 1194177 (9th Cir. Apr. 11, 2012).

³⁰ CIV.CODE, §§ 1750–1784.

³¹ CIV.CODE, §§ 2981–2984.6.

³² BUS. & PROF.CODE, §§ 17200–17210.

³³ CIV.CODE, §§ 1790–1795.8.

³⁴ CA PUB RES D. 30, Pt. 3, Ch. 17 §§ 42860–95; *Sanchez v. Valencia Holding Co., LLC*, 135 Cal. Rptr. 3d 19, 22 (Cal. Ct. App. 2011).

³⁵ *Id.*

³⁶ *Id.* at 22–23.

³⁷ *Sanchez v. Valencia Holding Co., LLC*, 2012 WL 1159303 (Cal. 2012).

³⁸ *Id.* at 2.

³⁹ *Id.*

⁴⁰ See 16 C.F.R. § 703.5(j); see also *Kolev*, 658 F.3d at 1025.

⁴¹ See 16 C.F.R. § 703.5 (g).

⁴² *Kolev*, 658 F.3d at 1026.

1. *The Court Interpreted Rule 703 to Preclude Arbitration Clause in Warranty Agreements.*

The court provided three reasons why the interpretation precluding pre-dispute mandatory binding arbitration was a reasonable interpretation of the MMWA.⁴³ First, the court stated that Rule 703 implemented congressional intent, evidenced by a House Subcommittee Staff Report that stated “[c]ongressional intent was that the decisions of Section 110 Mechanisms not be legally binding.”⁴⁴ Second, the court stated that the FTC’s interpretation of the MMWA, barring pre-dispute mandatory binding arbitration, advanced the statute’s purpose of protecting consumers from adhesive involuntary agreements.⁴⁵ Third, the court stated that FTC regulations represented a longstanding and consistent interpretation of the statute; therefore it should have been accorded deference.⁴⁶

The court referenced the FTC’s 1999 statement as evidence that the Commission deemed the ability of warrantors to require consumers to submit to binding arbitration as contrary to Congress’s intent.⁴⁷ The court interpreted that statement as implying that a mechanism could not be legally binding, as it would bar later court action.⁴⁸

2. *The Ninth Circuit Reasoning of How the Federal Policy Favoring Arbitration did not Render the FTC’s Interpretation of the MMWA Unreasonable.*

a. *Congressional intent was clear and the MMWA rebutted the Federal policy of enforcing arbitration agreements.*

The Ninth Circuit cited *Shearson/Am. Express Inc. v. McMahon*, stating that the FAA mandate to enforce arbitration agreements may be overridden by congressional command.⁴⁹ The court pointed out that the FAA was enacted fifty-one years prior to the enactment of the MMWA and later-enacted statutes, which are more specific, should be given greater deference than older, more general statutes.⁵⁰

The court expressly disagreed with holdings of the Fifth and Eleventh Circuits, which found that the MMWA did not overcome the FAA’s presumption to enforce arbitration agreements.⁵¹ The court stated that the FTC has reaffirmed its interpretation of the MMWA

⁴³ *Id.* at 1027–28.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 1028–29.

⁴⁸ *Id.*

⁴⁹ See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (holding that claims under § 10(b) of the Securities Exchange Act were arbitrable under pre-dispute arbitration agreements, and customers could effectively vindicate their RICO claim against broker in arbitral forum).

⁵⁰ *Kolev*, 658 F.3d at 1029.

⁵¹ *Id.* at 1030.

prohibiting binding, non-judicial arbitration, even after *McMahon* established a policy favoring the enforcement of arbitration agreements.⁵²

b. The MMWA was different from every other federal statute that the Supreme Court has found unable to rebut the FAA’s pro-arbitration presumption.

In the past, the Supreme Court has found no statute to meet the standard for rebutting the FAA’s policy of enforcing arbitration agreements.⁵³ The court stated that the MMWA is unlike all the previously examined statutes in four ways. First, none of the other statutes had an authorized agency that interpreted the statute to prohibit pre-dispute mandatory binding arbitration.⁵⁴ Second, in the past, Congress has never discussed informal, non-judicial remedies and barred binding procedures such as mandatory arbitration, as it did with the MMWA.⁵⁵ Third, only in the MMWA has Congress explicitly preserved the consumer’s right to pursue claims in civil court.⁵⁶ Finally, the MMWA is the only statute with the stated purpose of protecting consumers by prohibiting vendors from imposing binding, non-judicial remedies.⁵⁷ The court pointed out that this differed from the FAA’s policy of expediting disputes without regard to the interests of consumers and referenced *AT&T Mobility v. Concepcion*.⁵⁸

c. The Dissenting Opinion Finding how the MMWA did not Prevent Parties from Agreeing to Binding Arbitration as a Remedy to Warranty Disputes.

Judge Smith began his dissent by pointing out that the majority mistakenly confused “Informal Dispute Settlement Procedures,”(IDSM) or “Mechanisms” which were discussed under the MMWA, with alternative dispute resolution remedies adopted in private contracts.⁵⁹ Judge Smith stated that arbitration was not a Mechanism, and the FTC acknowledged that private parties were free to agree to some alternative to Mechanisms, if they deemed it more appropriate.⁶⁰ Judge Smith further argued that “Mechanism” is a narrowly defined legal term, which refers to only IDSMs authorized by the MMWA.⁶¹ A binding arbitration remedy is not an IDSM because it is an alternative to litigation as opposed to a “pre-requisite” to litigation.⁶² As

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 1031; *see also* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (holding that class action waivers were acceptable in arbitration agreements, as efficiency is goal of arbitration, and contracts of adhesion are permissible).

⁵⁹ *Id.* at 1032.

⁶⁰ *Id.* at 1033.

⁶¹ *Id.*

⁶² *Id.*

binding arbitration clauses are not included in the category of IDSMS, the FTC lacks authority to regulate them.

The dissent further found that the majority's holding banning binding arbitration in all warranty disputes was unsupported by the language of the statute, administrative rules, FTC opinions and judicial authority.⁶³

In addition, Judge Smith argued that the FAA established a federal policy that favored the enforcement of arbitration contracts; therefore, any FTC regulations that prohibited binding arbitration by warranty dispute resolution procedure would be unreasonable.⁶⁴ Judge Smith stated that the FAA's mandate could only be overridden by contrary congressional command.⁶⁵ The party opposing arbitration carries the burden of proving that Congress intended to create an exception to the FAA.⁶⁶ Judge Smith concluded his dissent by stating, "[t]he FTC's ban on arbitration cannot reasonably be read to apply to anything other than a MMWA 'Mechanism'. Even if it could, this view would be incompatible with the clear federal policy favoring arbitration under the Arbitration Act."⁶⁷

B. In *Sanchez*, the California Court of Appeal held that the Sales Contract Signed was unconscionable, and the Trial Court Correctly Refused to Compel Arbitration

In *Sanchez*, the Plaintiff filed this class action against a car dealer, alleging violations of several state statutes, including the CLRA, ASFA, UCL, Song-Beverly Act, and the Tire Recycling Act.⁶⁸ The Dealer filed a motion to compel arbitration pursuant to a provision in the sales contract, which also contained a class action waiver.⁶⁹ The arbitration provision in the sales contract stated that if the class action waiver was declared unenforceable, "the entire arbitration provision was not to be enforced. Pursuant to this 'poison pill' clause, the Trial Court denied the petition to compel arbitration."⁷⁰

The Dealer appealed. The California Court of Appeal held that the arbitration provision was unconscionable because it was adhesive (involving oppression and surprise), and contained harsh one-sided terms that favor the Dealer.⁷¹ Because the provision was permeated by unconscionability, the court determined it was unenforceable regardless of the validity of the class action waiver.⁷²

⁶³ *Id.*

⁶⁴ *Id.* at 1036.

⁶⁵ *Id.*

⁶⁶ *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

⁶⁷ *Kolev*, 658 F.3d at 1036.

⁶⁸ *Sanchez v. Valencia Holding Co., LLC*, 135 Cal. Rptr. 3d 19, 22 (Cal. Ct. App. 2011).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 24.

⁷² *Id.* at 22–23.

1. AT&T Mobility v. Concepcion found to be inapplicable

The California Court of Appeal stated that *Concepcion*, “does not preclude the application of the unconscionability doctrine to determine whether an arbitration provision is unenforceable.”⁷³ *Concepcion* overruled *Discover Bank*, which stated that: class-action waivers in adhesive arbitration agreements are unconscionable under California law and should not be enforced.⁷⁴ The court in *Concepcion* held that “[r]equiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”⁷⁵

The FAA permits arbitration agreements to be declared unenforceable “upon such grounds as exist at law or in equity for the revocation of any contract.”⁷⁶ This savings clause permits agreements to arbitrate to be invalidated by typical contract defenses, such as unconscionability, but not by defenses that apply solely to arbitration.⁷⁷ In *Rent-A-Center v. Jackson*, the Court held that the arbitrator should decide whether the agreement was unconscionable and therefore unenforceable.⁷⁸ The *Sanchez* court held that *Concepcion* is inapplicable because the parties are addressing unconscionability claims and not the enforceability of a class action waiver that is inconsistent with the FAA.⁷⁹

2. The arbitration provision satisfied both elements of procedural unconscionability: oppression and surprise

The procedural element of unconscionability focuses on two factors: oppression and surprise.⁸⁰ “Oppression” occurs when there is an inequality of bargaining power, and no real negotiation occurs.⁸¹ When the supposedly-agreed-upon terms of the contract are hidden by the party seeking to enforce the disputed terms, “surprise” exists.⁸²

In *Gutierrez v. Autowest, Inc.*, the court found the arbitration provision to be oppressive.⁸³ The facts in *Sanchez* are similar to those in *Gutierrez* in that the buyer asserted the contract was presented on a “take it or leave it” basis, there was no opportunity for meaningful negotiation, the buyer had no opportunity to read the contract prior to signing it, and no one

⁷³ *Id.* at 28.

⁷⁴ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (holding that class action waivers were acceptable in arbitration agreements, and not necessarily unconscionable).

⁷⁵ *Id.*

⁷⁶ 9 U.S.C. § 2.

⁷⁷ *Sanchez* at 29; *see also Concepcion* at 1746; *see also In re Checking Account Overdraft Litigation* (S.D. Fla. 2011) 2011 U.S. Dist. Lexis 118462, at *46, 2011 WL 4454913, at *4 (“*Concepcion* did not completely do away with unconscionability as a defense to the enforcement of arbitration agreements under the FAA.”).

⁷⁸ *Rent-A-Center, West, Inc. v. Jackson* 130 S. Ct. 2772 (2010) (holding that unconscionability/enforceability was a decision for the arbitrator).

⁷⁹ *Sanchez*, 135 Cal. Rptr. 3d at 29.

⁸⁰ *Id.* at 30; *see also Bruni v. Didion*, 73 Cal. Rptr. 3d 395 (Cal. Ct. App. 2008) (holding that a home purchasers’ warranty agreement had adhesive arbitration provisions that involved surprise, violated the purchasers’ reasonable expectations and could not be severed).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Gutierrez v. Autowest, Inc.*, 7 Cal. Rptr. 3d 267, 585 (Cal. Ct. App. 2003) (holding that a similar arbitration clause was procedurally unconscionable).

pointed out the Arbitration Clause or discussed it with the buyer.⁸⁴ Additionally, surprise exists when the Arbitration Clause was hidden in the lengthy form contract.⁸⁵ In *Sanchez*, the arbitration clause was found at the end of the contract, after the last signature, making it unnoticeable to the buyer who was not given time to read the contract.⁸⁶

The court held that as the Plaintiff demonstrated surprise in addition to oppression, the arbitration clause was procedurally unconscionable.⁸⁷ While Valencia argued that the clause lacked procedural unconscionability because Sanchez had the opportunity to buy a car elsewhere, the court cites *Gatton v. T-Mobile USA*, stating “courts are not obligated to enforce highly unfair provisions that undermine important public policies simply because there is some degree of consumer choice in the market.”⁸⁸ Additionally, the California Court of Appeal has held that the availability in the marketplace of a substitute alone is unable defeat a claim of procedural unconscionability.⁸⁹

3. *The arbitration clause was substantively unconscionable*

Enforcement of an arbitration clause may only be denied if it is also substantively unreasonable.⁹⁰ Substantive unconscionability exists when the provision is overly harsh or one-sided, falls outside reasonable expectations, or is unduly oppressive.⁹¹ The court held that four clauses in the arbitration provision were substantively unconscionable:

First, a party who loses before the single arbitrator may appeal to a panel of three arbitrators if the award exceeds \$100,000. Second, an appeal is permitted if the award includes injunctive relief. Third, the appealing party must pay, in advance, “the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs.” Fourth, the provision exempts repossession from arbitration while requiring that a request for injunctive relief be submitted to arbitration.⁹²

The court stated that while these provisions may appear neutral on their face, they have the effect of placing an unduly oppressive burden on the buyer.⁹³

⁸⁴ *Id.*; see also *Sanchez*, 135 Cal. Rptr. 3d at 30.

⁸⁵ *Sanchez*, 135 Cal. Rptr. 3d at 31.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*; see also *Gatton v. T-Mobile USA, Inc.* 585, 61 Cal. Rptr. 3d 344 (Cal. Ct. App. 2007) (holding that the adhesive nature of the agreement created a minimal degree of procedural unconscionability, and when combined with a high degree of substantive unconscionability, as existed with the class-wide arbitration waiver, was sufficient to rule the provision unenforceable).

⁸⁹ *Sanchez*, 135 Cal. Rptr. 3d at 31; see also *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1283 (9th Cir. 2006) (en banc) (stating that other opportunities, alone, is insufficient to defeat a procedural unconscionability claim).

⁹⁰ *Sanchez*, 135 Cal. Rptr. 3d at 32.

⁹¹ *Id.*

⁹² *Sanchez*, 135 Cal. Rptr. 3d at 33.

⁹³ *Id.*

4. The court has authority to void the entire arbitration provision, as it is permeated by unconscionability that cannot be removed through severance restriction

The trial court has discretion to refuse enforcement an entire agreement or clause if it is ‘permeated’ by unconscionability.⁹⁴ An arbitration clause may be considered permeated by unconscionability if it contains more than one unlawful provision.⁹⁵ Courts should also consider whether the interests of justice would be furthered by severance of the unconscionable provisions.⁹⁶

The California Court of Appeal cites *Armendariz*, stating that Courts lack the authority to reform contracts.⁹⁷ When severance or restriction is inadequate, and reformation of an arbitral clause is needed to remove the unconscionable taint from the provision, it must void the entire arbitration clause.⁹⁸

The court in *Sanchez* held that the arbitration provision was procedurally and substantively unconscionable.⁹⁹ Because the provision was permeated by unconscionability that cannot be removed through severance or restriction, the trial court properly denied the motion to compel arbitration.¹⁰⁰

C. The California Supreme Court Granted Review of Sanchez, the Ninth Circuit’s Opinion in Kolev was withdrawn, and submission of the case is vacated Pending the issuance of a Decision in Sanchez

The California Supreme Court granted Valencia’s petition for review.¹⁰¹ In response to this, the Ninth Circuit withdrew their opinion for *Kolev*, stating that it may not be cited as precedent.¹⁰² The Ninth Circuit stated that submission of the *Kolev* is vacated pending the issuance of a decision by the California Supreme Court in *Sanchez*.¹⁰³

⁹⁴ CIV.CODE, § 1670.5(a).

⁹⁵ *Sanchez*, 135 Cal. Rptr. 3d at 40; *see also* *Lhotka v. Geographic Expeditions, Inc.*, 104 Cal. Rptr. 3d 844 (Cal. Ct. App. 2010) (holding that when an agreement is so permeated by unconscionability, severances is improper).

⁹⁶ *Id.*

⁹⁷ *Sanchez*, 135 Cal. Rptr. 3d at 41; *see also* *Armendariz v. Found. Health Psychcare Serv., Inc.*, 6 P.3d 669 (Cal. 2000) (stating that Civil Code § 1670.5 and arbitration statutes do not authorize reformation of arbitration clauses by augmentation, and Code of Civil Procedure § 1281.2 authorizes the court to refuse arbitration if grounds for revocation exist, not to reform the agreement to make it lawful).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Sanchez v. Valencia Holding Co., LLC*, 2012 WL 1159303 (Cal. Mar. 21, 2012).

¹⁰² *Kolev v. Euromotors West/The Auto Gallery*, 2012 WL 1194177 (9th Cir. Apr. 11, 2012); (citing *Carver v. Lehman*, 558 F.3d 869, 878–79 (9th Cir. 2009) (holding a panel may withdraw an opinion *sua sponte* before the mandate issues)).

¹⁰³ *Kolev v. Euromotors West/The Auto Gallery*, 2012 WL 1194177 (9th Cir. Apr. 11, 2012).

IV. SIGNIFICANCE

The Ninth Circuit's decision to withdraw its opinion for *Kolev* is significant, especially considering the fact that they are withholding a replacement opinion until the California Supreme Court reaches a decision in *Sanchez*. At first glance, these two cases appear to be about completely different issues. While *Kolev* addresses statutory inarbitrability, *Sanchez* involves avoidance of arbitration clauses due to rampant unconscionability.

While the Plaintiffs in *Kolev* did bring an unconscionability challenge, the Ninth Circuit chose not to address this, and instead rendered a controversial opinion regarding the arbitrability of all MMWA warranty claims. This opinion was significant because it contradicted statutory inarbitrability trends,¹⁰⁴ and the court held that the MMWA prohibited the enforcement of mandatory pre-dispute arbitration clauses.¹⁰⁵ This decision directly contrasted with holdings from the Fifth and Eleventh Circuit Courts,¹⁰⁶ and could have decreased the adjudicatory efficiency of arbitration as a whole.

In addition, the original holding in *Kolev* undermined FAA Section two. FAA Section two creates a federal right to arbitration, maintaining that arbitration agreements are "valid, irrevocable, and enforceable."¹⁰⁷ By finding statutory inarbitrability in MMWA warranty disputes, the court eliminated the simplicity of the arbitral process, and transformed it into a litigious and unworkable system, which could lead to its deterioration as an efficient alternative to the court system.¹⁰⁸

Because the Ninth Circuit's opinion in *Kolev* was so controversial, its withdrawal could be motivated by pressures to conform to the established policy favoring arbitration.¹⁰⁹ While statutory inarbitrability grounds have no successful precedence in attacking motions to compel arbitration, the courts are more willing to entertain the theory of unconscionability. If the California Supreme Court affirms the California Court of Appeal's decision that *Concepcion* was inapplicable, and the Trial Court was correct in voiding the arbitration clause in *Sanchez*, the Ninth Circuit may release a new opinion addressing *Kolev*'s previously ignored unconscionability claims and exclude any holding regarding the arbitrability of MMWA warranty disputes.

V. CONCLUSION

The Supreme Court has established a strong policy favoring the enforcement of arbitration agreements.¹¹⁰ The Ninth Circuit Court's holding in *Kolev* proved to be contradictory

¹⁰⁴ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (holding that international arbitrators have authority to rule on statutory claims in international contracts).

¹⁰⁵ *Kolev v. Euromotors West/The Auto Gallery*, 658 F.3d 1024, 1031 (9th Cir. 2011).

¹⁰⁶ *Id.*; see also *Walton v. Rose Mobile Homes L.L.C.*, 298 F.3d 470, 479 (5th Cir. 2002) (holding that arbitration of the MMWA was not inconsistent with the statutory purposes of the MMWA and compelling arbitration of MMWA claims was consistent with FAA Section two's policy of favoring arbitration); see also *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268, 1274 (11th Cir. 2002) (finding that the Supreme Court had consistently upheld arbitration in consumer protection claims, and the FAA did not conflict with the legislative purpose of the MMWA).

¹⁰⁷ See 9 U.S.C. § 2.

¹⁰⁸ See *Kolev*, 658 F.3d at 1031.

¹⁰⁹ See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (stating that courts should resolve any doubts about arbitrability in favor of arbitration).

¹¹⁰ *Id.*

to extensive precedence, as the Courts have found no statute that exhibited congressional intent clearly and unambiguously enough to preclude arbitration.

In addition to contravening the federal policy favoring arbitration,¹¹¹ this court's holding directly contradicts Fifth and Eleventh Circuit Court holdings.¹¹² The Fifth and Eleventh Circuits both found that the arbitration of warranty claims was consistent with the statutory purpose of the MMWA, and followed the federal policy of favoring arbitration.¹¹³ These courts also held that arbitration of MMWA claims was a fair remedy for consumers, and as the Supreme Court had consistently upheld arbitration in consumer protection claims, the FAA did not conflict with the legislative purpose of the MMWA.¹¹⁴

Despite this glaring precedence, the Ninth Circuit is clearly resisting arbitration. The withdrawal of the *Kolev* opinion should not be looked at as a change of heart on behalf of the Ninth Circuit, but instead an attempt to find a savvier means of avoiding arbitration. While attacking motions to compel arbitration on substantive inarbitrability grounds is not viable, unconscionability attacks pose a more amorphous standard. The courts are more willing to void arbitration clauses due to unconscionability, as it is a standard contract defense. This poses a potential issue for arbitration. If the Ninth Circuit continues to seek creative ways to bypass federal policy, precedence, and the FAA, holding against arbitration, it would decrease the efficiency of the entire arbitral system.

¹¹¹ *Id.*

¹¹² See *Walton v. Rose Mobile Homes L.L.C.*, 298 F.3d 470, 479 (5th Cir. 2002); see also *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1280 (11th Cir. 2002) (holding that MMWA warranty disputes are not precluded from arbitration).

¹¹³ *Id.*

¹¹⁴ *Id.*