Counsel's Advisory

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CALIFORNIA COURT SETS UNIFORM "SUBSTANTIVE UNCONSCIONABILITY" STANDARD IN ARBITRATION DECISION

by
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In an effort to ensure more uniform and predictable results, the California Supreme Court recently sought to clarify the standard used by judges who declare an agreement to be "unconscionable." In a case arising from a dispute over the sale of a used luxury car, *Sanchez v. Valencia Holding Co., LLC*, 61 Cal.4th 899 (2015), the California Supreme Court addressed whether a class-action waiver in an arbitration agreement is unconscionable after the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

While *Sanchez* is not the first California Supreme Court case to address *Concepcion*, or even the first to address the specific issue of class-action waivers and unconscionability, it is the first to address whether a single, unifying standard should be used to define substantive unconscionability, given the various formulations courts have used to describe the standard. Also, given California courts' previous reluctance to adhere to *Concepcion* and uphold the Federal Arbitration Act faithfully, the decision signals that the U.S. Supreme Court's message has finally registered.

Applying California's sliding-scale approach, the court in *Sanchez* determined that the adhesion contract at issue presented some degree of procedural unconscionability, because there were elements of oppression and surprise in obtaining assent. However, it did not find that any of the four contract terms identified by the Court of Appeal were substantively unconscionable and, in light of *Concepcion*, neither was the class-action-waiver provision.

The *Sanchez* court also considered whether to define a single "short-hand" formula for determining whether an arbitration provision is substantively unconscionable. In fact, it requested supplemental briefing on the issue to determine whether it should choose among formulations used in prior cases, such as "unreasonably favorable" to one party, "so one-sided as to shock the conscience," "unfairly one-sided," "overly harsh," and "unduly oppressive." To avoid undermining prior decisional authority, the Supreme Court held that there is no "higher" or "lower" standard, and explained that "these formulations, used throughout our case law, all mean the same thing."

It remains to be seen whether this pronouncement will reduce confusion and unify prior case law, especially since lower courts, and even the dissenting Supreme Court justice in *Sanchez*, viewed some formulations as more stringent than others. In the end, the Supreme Court may have inadvertently (or more likely intentionally) set forth a single, unifying standard not only by announcing that all the formulations mean the same thing, but also by annunciating that standard's meaning: "courts, including ours, have used various nonexclusive formulations to capture the notion that

unconscionability requires *a substantial degree of unfairness beyond 'a simple old-fashioned bad bargain.' "*

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