



Appellate Reports and cases in brief

Cases of interest to members of the plaintiffs' bar

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Sonic-Calabasas A, Inc. v. Moreno

(2013) __ Cal.4th __ (Cal. Supreme).

Who needs to know about this case?

Lawyers handling cases in which arbitration is sought.

Why it's important: Many observers believe that there is considerable tension in the California Supreme Court's rulings that find certain aspects of arbitration agreements are unconscionable, and therefore cannot be enforced, and the U.S. Supreme Court's broad construction of the Federal Arbitration Act ("FAA"), as applied in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ____, 131 S.Ct. 1740. The U.S. Supreme Court had previously vacated the California Supreme Court's decision in this case, which held that it was unconscionable for employers to require job applicants, as a condition of employment, to waive their rights to certain administrative procedures to recover lost wages ("Berman hearing"). This decision is the first post-*Concepcion* arbitration decision by the California Supreme Court.

Synopsis: In *In Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659 (*Sonic I*), the Court held that it is contrary to public policy and unconscionable for an employer to require an employee, as a condition of employment, to waive the right to a Berman hearing. The U.S. Supreme Court granted certiorari in *Sonic I*, and remanded for consideration in light of *Concepcion*. In *Sonic II*, the California Supreme Court held that, contrary to *Sonic I*, the FAA preempts a state-law rule categorically prohibiting waiver of a Berman hearing in a pre-dispute arbitration agreement imposed on an

employee as a condition of employment. But the Court further held that "state courts may continue to enforce unconscionability rules that do not interfere with fundamental attributes of arbitration." The Court remanded for a determination about whether the particular arbitration agreement at issue was so unfair or one-sided that it was nevertheless unconscionable.

The Court's decision in *Sonic II* is lengthy, and highly technical, and a full summary would take more than the space allotted to this entire column.

The Court's key findings are:

- It was well-established even before *Concepcion* that state-law rules must not facially discriminate against arbitration and must be enforced evenhandedly. *Concepcion* goes further to make clear that such 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."
- State-law rules that do not "interfere with fundamental attributes of arbitration do not implicate *Concepcion's* limits on state unconscionability rules."
- State-law rules may validly address issues that arise only in arbitration, and therefore that may have a disproportionate impact on arbitration agreements. Hence, an arbitration agreement that functionally allowed the party imposing arbitration to choose a biased arbitrator would remain unconscionable even after *Concepcion*.
- There are other ways an arbitration agreement may be unconscionable that have nothing to do with fundamental

attributes of arbitration. The Court listed as examples, a \$50,000 threshold for an arbitration appeal, which favored defendants in employment contract disputes; an arbitration agreement with a damages' limitation that would prevent the plaintiff from ever being made whole; and an arbitration agreement that allowed the employer to recover its attorney's fees from an employee, but not vice versa.

- The core concern of the unconscionability doctrine is the absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Even after *Concepcion*, California courts may continue to apply the unconscionability doctrine to arbitration agreements.
- The unconscionability doctrine does not mandate the adoption of any particular form of dispute resolution mechanism, and courts may not decline to enforce an arbitration agreement simply on the ground that it appears to be a bad bargain or that one party could have done better. Unconscionability doctrine is instead concerned with whether the agreement is unreasonably favorable to one party, considering in context "its commercial setting, purpose, and effect."

Mt. Holyoke Homes, LP v. Jeffers Mangels, Butler, et al.

(2013) __ Cal.App.3d __ (2d Dist., Div. 3.)

Who needs to know about this case?

Lawyers handling cases in arbitration.

Why it's important: Holds that an arbitrator's failure to disclose that he had listed one of the principals of the parties involved in the arbitration as a reference 10 years earlier would cause an objective observer to doubt the arbitrator's ability to be impartial, requiring that the arbitration award be vacated.



Synopsis: Mt. Holyoke Homes and its principal (“Plaintiffs”) filed a legal-malpractice action against its former counsel, Jeffers, Mangels, Butler & Mitchell (“JMBM”). The case was ordered to arbitration based on an arbitration clause in the JMBM retainer. The parties agreed to retired Superior Court Judge Eli Chernow as the arbitrator. Judge Chernow’s disclosures did not reveal any conflict that concerned the parties. He ruled in favor of JMBM, and awarded it its unpaid legal fees, attorney’s fees, and costs, totaling over \$450,000. After the award was issued, but before it was confirmed, Plaintiffs searched the Internet for evidence of arbitrator bias, and discovered a previously undisclosed, 10-year-old resume on an Internet site for the “National Academy of Distinguished Neutrals.” The resume listed Robert Mangels, a principal in JMBM, as a reference. Plaintiffs filed a petition to vacate the award based on Judge Chernow’s failure to disclose his relationship to Mangels.

Both Judge Chernow and Mangels filed declarations in support of the opposition to the motion to vacate. Judge Chernow stated, “I have no relationship with Mr. Mangels other than as a neutral involved in mediation, adjudication, and discovery and other reference proceedings. The cases in which Mr. Mangels appeared before me occurred in the 1990s and early 2000s.” He also stated that he had listed Mangels as a reference only because Mangels was a well-known and highly regarded litigator who was familiar with his abilities as a neutral, and that he had never discussed with Mangels naming him as a reference. Mangels’s declaration stated that he had appeared before Judge Chernow as a judge, mediator and arbitrator, but not within the past five years, and that the two had no professional or personal relationship. He stated that he had never discussed acting as a reference for Judge Chernow.

The trial court denied the motion to vacate, stating in its order, “From the declarations of Judge Chernow and Mangels, it is clear that the parties have

virtually no relationship beyond Mangels having appeared before Judge Chernow in the past. Simply listing Mangels, amongst other named partners, on a 10-year-old resume is insufficient to trigger [Code Civ. Proc., § 1281.9(a)(6)]. Further, the Court finds that a person aware of the facts would not entertain a doubt as to the impartiality of the arbitrator.” Reversed.

The question is not whether Judge Chernow actually was biased, but whether a reasonable person aware of the facts reasonably could entertain a doubt that he could be impartial in this case. The court concluded that the answer to this question was yes. “Judge Chernow had listed Mangels as a reference on a resume that was publicly available on the Internet at the time of his selection as an arbitrator in this matter. Judge Chernow presumably believed that Mangels had a favorable opinion of his abilities as a neutral and would speak positively about him if asked. An objective observer reasonably could conclude that an arbitrator listing a prominent litigator as a reference on his resume would be reluctant to rule against the law firm in which that attorney is a partner as a defendant in a legal malpractice action. To entertain a doubt as to whether the arbitrator’s interest in maintaining the attorney’s high opinion of him could color his judgment in these circumstances is reasonable, is by no means hypersensitive, and requires no reliance on speculation. We believe that an objective observer aware of the facts reasonably could entertain such a doubt.”

The court expressly rejected JMBM’s argument that because the resume was readily discoverable on the Internet Judge Chernow had no obligation to disclose the fact that he had listed Mangels as a reference. A party to an arbitration is not required to investigate a proposed neutral arbitrator in order to discover information, even public information, that the arbitrator is obligated to disclose. Instead, the obligation rests on the arbitrator to timely make the required disclosure.

Short(er) takes:

Punitive damages; definition of clear-and-convincing standard; jury instructions: *Nevarrez v. San Marino Skilled Nursing and Wellness Center* (2013) __ Cal.App.4th __ (2d Dist. Div. 4) (after rehearing).

Nevarrez filed a complaint against San Marino for elder abuse, negligence, and other claims, and prevailed. At trial, San Marino requested that the trial court supplement CACI No. 201, which defines “clear and convincing evidence” as evidence showing that it is highly probable that a fact is true, with instructions explaining that “Clear and convincing evidence requires a finding of high probability that the evidence be so clear as to leave no substantial doubt; sufficiently strong as to command the unhesitating assent of every reasonable mind.” This language was used by the California Supreme Court to define clear-and-convincing evidence in *In re Angelica P.* (1981) 28 Cal.3d 908, 919.

California courts had rejected the same arguments with respect to BAJI No. 2.62, which defined clear and convincing evidence similarly to CACI No. 201. (See, e.g., *People v. Mabini* (2001) 92 Cal.App.4th 654, 662; *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847.) The trial court correctly rejected the supplemental definitions proposed by San Marino, which bring the clear-and-convincing standard of proof too close to the “beyond a reasonable doubt” standard used in criminal cases. CACI No. 201 should not be augmented with the supplemental language from *In re Angelica P.*

Legal malpractice; in-house counsel: *Yanez v. Plummer* (2013) __ Cal.App.4th __ (3rd Dist.).

Yanez worked for the Union Pacific Railroad. He saw a co-worker injured on the job, and wrote a witness statement, which said that he had witnessed the accident as it happened. The injured worker



sued the railroad, and Yanez was deposed. He was represented by Plummer, the railroad's in-house attorney, who was representing the railroad in the case. In a pre-deposition meeting, Yanez told Plummer that he had not actually seen the entire incident. He expressed concern about his job status, because his testimony was likely to be unfavorable to the railroad. He asked Plummer to "protect" him in the deposition. Plummer told him that, as long as he testified truthfully, his job would not be affected by his testimony. In the deposition, Plummer elicited testimony from Yanez in which he admitted that he had not actually seen the accident. Yanez was later fired by the railroad because of this testimony, because it violated

its policy against dishonesty. Yanez sued Plummer for legal malpractice, and the trial court granted summary judgment for Plummer. Reversed.

Plummer did not advise Yanez that he had a potential conflict of interest that resulted from his representation of both Yanez and the railroad, and he falsely told Yanez that as long as he testified truthfully, he would not be fired. And Plummer elicited the testimony from Yanez that contradicted his prior witness statements, and did not give him an opportunity to clarify or explain the discrepancy. Accordingly, there were triable issues of fact about whether Plummer's conduct was a substantial factor leading to Yanez's termination.



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