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Employment Law Alert

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California Supreme Court Takes a Narrow View of *AT&T Mobility, LLC v. Concepcion*

In April 2011, the U.S. Supreme Court issued its decision in *AT&T Mobility, LLC v. Concepcion,* ___ U.S. ___, 131 S.Ct. 1740 (2011), holding that the Federal Arbitration Act ("FAA") preempts California's rule that invalidates arbitration agreements in which the parties waive the right to class-wide proceedings (see our alert dated May 11, 2011). Since then, courts in California have wrestled with applying *AT&T* in the employment context, with confusing and often conflicting results for employers. It's not too surprising, then, that the California Supreme Court granted review last fall in *Iskanian v. CLS Transportation Los Angeles, LLC*, 206 Cal. App. 4th 949 (2012), *review granted* 147 Cal.Rptr.3d 324 (Sept. 19, 2012), to address whether class action waivers in the employment context are valid and the related question whether employees may waive their rights to bring a representative action under the Private Attorneys' General Act ("PAGA").

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In the meantime, however, the California Supreme Court has decided *Sonic-Calabasas A. Inc. v. Moreno*, No. S174475 (October 17, 2013), which provides insight into the California Supreme Court's view of *Concepcion* and may foreshadow the Court's resolution of the issues raised in *Iskanian*. At issue in *Sonic-Calabasas* was the enforceability of an arbitration agreement that waived an employee's right to first seek relief for wage claims before the labor commissioner (known as a *Berman* hearing). This is the Court's second opinion in the case. The first decision, (*Sonic Calabasas I*), which predated *Concepcion,* held that the arbitration agreement was unenforceable as contrary to California public policy to the extent it waived a *Berman* hearing. The Court did not, however, invalidate the arbitration agreement, but instead held that it could be enforced *provided* the arbitration was preceded by the option of a *Berman* hearing at the employee's request. The United States Supreme Court later vacated that decision and remanded for further consideration in light of *Concepcion.*

Now, in *Sonic Calabasas II*, the Court has held that the FAA preempts the main holding of *Sonic-Calabasas I:* "[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."

By itself, this might sound like a vindication for employers and the use of arbitration agreements. However, the Court also explained (in a rather lengthy discussion) that while a rule categorically barring enforcement of an arbitration agreement absent a *Berman* hearing was preempted, there may still be circumstances where such an agreement is nonetheless unconscionable. In what appears to be an attempt to cabin the U.S. Supreme Court's decision in *Concepcion* (and its later decision in *American Express Co. v. Italian Colors Restaurant,* ___ U.S. ___, 133 S.Ct. 2304 (2013)), the California Supreme Court held that the FAA, as applied in *Concepcion*, does not preempt state unconscionability rules so long as they do not interfere with the fundamental attributes of arbitration. Further, this no-preemption result holds even if the rules would have a disproportionate impact on arbitration agreements or would arise in the unique context of arbitration.

While the Court went on to discuss the contours of the unconscionability doctrine, it did little to clearly define or limit the standard, variously describing it as whether the terms are "overly harsh," "unfairly one-sided," "unreasonably favorable to the more powerful party," or were such as to "shock the conscience." According to the Court, when assessing whether an arbitration agreement is unconscionable, trial courts must examine the agreement's features (including not only what it contemplates, but also what it eliminates) and determine whether it imposes costs and risks that would effectively block a plaintiff from seeking redress in any forum.

With these amorphous instructions, the Court remanded the case to the trial court to re-examine the arbitration agreement and determine whether it is enforceable or "unconscionable." Although parts of *Sonic Calabasas II* state that the unconscionability doctrine cannot be used to deny enforcement of an arbitration agreement on the ground that it merely appears to be a bad bargain, the loose language the Court uses to describe the doctrine will provide fodder for arguments that FAA preemption has had only a limited impact on California unconscionability law. As a result, employers should continue to exercise caution and seek the advice of counsel when deciding to implement arbitration agreements.

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