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California Court Holds That Certain Unconscionability Theories Survive *Concepcion*

Notwithstanding the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, some California courts are continuing to use unconscionability theories to invalidate arbitration agreements. Most recently, in *Natalini v. Import Motors, Inc.*, No. A133236 (Feb. 5, 2013), the First District Court of Appeal rejected a car dealer's attempt to enforce an arbitration clause, finding that one-sided aspects of the clause were unconscionable. The court reasoned that unconscionability theories such as lack of mutuality still may be used after *Concepcion* because they do "not rely on any 'judicial policy judgment' disfavoring arbitration."

In *Natalini,* the court found the arbitration provision at issue to be procedurally unconscionable because it was contained in a form contract and "particularly inconspicuous, printed in eight-point typeface on the opposite side of the signature page of the lease." The court found the provision substantively unconscionable because it (1) permits an appeal of any award of injunctive relief or damages greater than $100,000, and such an appeal would likely only be sought by the car dealer, and (2) exempts repossession, a remedy which only the car dealer would seek.

Natalini creates a split among California courts, as the Second District reached a different result on similar facts in *Flores v. West Covina Auto Group*, 212 Cal. App. 4th 895 (2013). The split may be resolved by the California Supreme Court in *Sanchez v. Valencia Holding Co.*, No. S199119, *rev. granted*, Mar. 21, 2012, which is fully briefed but not yet scheduled for oral argument. Given the continuing hostility of many California courts towards arbitration, it would be prudent for companies to continue to draft their arbitration provisions on the assumption that they will be attacked on unconscionability grounds.

By: *Scott M. Pearson* and *Joseph A. Escarez*

Scott M. Pearson is a partner and co-chair and *Joseph A. Escarez* is an associate in Seyfarth's Consumer Financial Services Litigation practice group. If you woud like further information, please contact your Seyfarth attorney, Scott M. Pearson at *spearson@seyfarth.com* or Joseph A. Escarez at *jescarez@seyfarth.com.*

www.seyfarth.com

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