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Recent Decisions Reflect Continuing Resistance To Arbitration In California

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In the last two weeks, the California Supreme Court and the Ninth Circuit issued three important arbitration decisions which reflect continuing efforts by the plaintiffs' bar to resist arbitration using unconscionability theories. Two of the cases are helpful to them.

In *Sonic-Calabasas A, Inc. v. Moreno* (No. S174475, Oct. 17, 2013), the California Supreme Court took the position that, notwithstanding the United States Supreme Court's decisions in *AT&T Mobility v. Concepcion* and *American Express Co. v. Italian Colors Restaurant*, the Federal Arbitration Act continues to allow arbitration clauses to be invalidated based on unconscionability theories. The majority opinion provided a roadmap for challenging arbitration provisions on unconscionability grounds, and then remanded for a determination of whether the arbitration agreement at issue is unconscionable.

On October 28, 2013, without citing *Sonic-Calabasas*, the Ninth Circuit issued a similar decision in *Chavarria v. Ralphs Grocery Co.* (No. 11-56673), finding an arbitration provision in an employment agreement to be unconscionable. The facts the court relied on for this finding were that (1) employees were required to agree to arbitration when applying for employment, but were not given the terms of the arbitration agreement until weeks later; (2) the arbitrator selection provisions favored the employer and would not ensure appointment of a true neutral; and (3) the arbitration provision required the arbitrator to apportion fees at the outset, and precluded the employee from recovering those fees, making many claims impracticable.

On the same day it decided *Chavarria*, the same Ninth Circuit panel decided another arbitration case, *Ferguson v. Corinthian Colleges Inc.* (No. 11-56965), this time following the clear direction of recent United States Supreme Court precedent. In *Chavarria*, the court confirmed that California's *Broughton-Cruz* rule, which exempted claims for "public injunctive relief" from arbitration, was abrogated by *Concepcion* and other U.S. Supreme Court cases.

Absent a change in composition of the United States Supreme Court, it is likely that *Sonic-Calabasas* and *Chavarria* will be overruled or significantly limited in the near future. In the meantime, however, unconscionability theories will continue to be used to challenge arbitration provisions in California. It therefore remains important to draft arbitration clauses with that in mind.

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