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The California Supreme Court Kicks Up Dust Storm on the Road to Enforcing Employment Arbitration Agreements

by Erin Leach and Kevin Jackson, Attorneys, Snell & Wilmer

The U.S. Supreme Court has continued to pave the road to finding arbitration agreements enforceable. Over the years, this road has weathered numerous and frequent attacks by plaintiffs' attorneys and courts, but has remained relatively clear. However, the California Supreme Court, not content with arbitration's rise to the forefront of dispute resolution, appears resolved to kick up dust storms in enforceability's path. In Oct. 2013, it issued a decision in *Sonic-Calabasas v. Moreno* (*Sonic*) that went to great lengths to recognize vaguely defined reasons for trial courts to allow employees to escape enforcement of their agreement to arbitrate employment disputes. In this article, we will help decipher the meaning of *Sonic* and propose strategies for companies to consider when drafting their employment arbitration agreements in order to safely navigate the road to enforcement.

First, some background: In 2011, the U.S. Supreme Court issued a seminal arbitration decision in *AT&T Mobility LLC v. Concepcion* (*Concepcion*). On appeal was the California Supreme Court's rule that class action waivers in consumer arbitration agreements were categorically unconscionable and unenforceable. The U.S. Supreme Court held that the general purpose of arbitration is to promote efficient, streamlined procedures for resolving disputes and that a class action would run contrary to that purpose. As a result, the U.S. Supreme Court reversed the California Supreme Court and struck down its unconscionability rules with respect to class action waivers in consumer arbitration agreements.

Prior to *Concepcion*, the California Supreme Court had issued a similar decision in what is now called *Sonic I*. In that case, the California Supreme Court held as a categorical rule that it is against California public policy and unconscionable for an employer to require an employee to waive the right to bring wage claims in an administrative hearing with the California Labor Commissioner (a so-called "Berman hearing"). Since this original decision preceded *Concepcion*, *Sonic I* was appealed to the U.S. Supreme Court. The U.S. Supreme Court sent *Sonic I* back to the California Supreme Court with instructions to reconsider its decision in light of *Concepcion*. In other words, the U.S. Supreme Court was telling the California Supreme Court to correct its mistaken view on arbitration and come in line with current federal law.

Following *Concepcion*, the California Supreme Court had no choice but to reverse its prior decision in *Sonic I*, and it did just that. In Oct. 2013, in a decision that is referred to as *Sonic II*, the California Supreme Court begrudgingly reversed itself, holding that its decision in *Sonic I* was inconsistent with *Concepcion*. But it did not stop there.

Instead, the California Supreme Court served up long, discursive and ultimately inconclusive alternative reasons why courts could reject arbitration agreements based on their "unconscionability." It raised the question of whether a finding of unconscionability can still be made based on an employee's waiver of the "protections" of the Berman hearing. However, as with its prior arbitration jurisprudence, the California Supreme Court failed to articulate a clear standard for when this may constitute unconscionability, but rather raised it as a "factor" that a trial court can consider in determining the validity of an arbitration agreement under a "totality of the circumstances" test. The court simply stated that a Berman hearing waiver is permissible only if the legal process available to the employee is "accessible, affordable, low-cost, speedy and effective." *Sonic II* thus provides little guidance as to how much weight a trial court should give to the Berman hearing waiver in applying an unconscionability analysis. Indeed, this prompted the dissent to denounce the majority's unconscionability holding as "hopelessly vague, uncertain, and subjective… unworkable, and inconsistent with California law" and inconsistent with controlling federal law.

A fair interpretation of this section of *Sonic II* is that the California Supreme Court is encouraging lower courts to find reasons — however subjective and ill defined — to reject arbitration agreements by subjecting them to extremely strict scrutiny. Since established law is clear that arbitration agreements must be evaluated on exactly the same basis as any other contract, the California Supreme Court's clear suggestion to apply a higher standard is bound to bring California courts back into conflict with the U.S. Supreme Court on this important policy difference.

It seems certain that lower appellate courts will be called upon to interpret the meaning and scope of *Sonic II* in the next few years. However, there is a strong argument that *Sonic II* is limited to the circumstances at issue — i.e. where an arbitration agreement blocks an employee from pursuing a Berman hearing. Unlike the plaintiff in *Sonic II*, employees frequently elect to skip the administrative Berman hearing altogether and initiate their wage claims in court, whether individually or collectively. In those instances, employers can argue that the employee has already foregone the "protections" and "benefits" of a Berman hearing — i.e. the employee waived it by his or her own choice. Therefore, the lack of those features in arbitration is irrelevant and *Sonic II* does not apply. More simply, why should an employee be permitted to object to losing the benefits of a Berman hearing that the employee did not even attempt to utilize in the first place?

Regardless of how the intricacies of *Sonic II* are ultimately determined, this is an excellent occasion to revisit your company's arbitration agreement. Notwithstanding the California Supreme Court's attempts to kick up a dust storm, arbitration is still a recommended mechanism for most companies to resolve disputes with their employees. Now more than ever, it is important that employment arbitration agreements be carefully drafted with the pronouncements of *Sonic II* in mind.

The California Supreme Court recognized that there "are potentially many ways to structure arbitration, without replicating the Berman protections, so that it facilitates accessible, affordable resolution of wage disputes." Without further elaboration, however, the California Supreme Court has left everyone wondering what will actually satisfy this ambiguous standard. Unfortunately, there is no clear answer. Most arbitration agreements do not contain an express waiver of a Berman hearing, and following *Sonic II*, it may be desirable to keep drafting agreements that way for several reasons.

First, even without an express waiver, employers can usually argue that an arbitration agreement would operate to prohibit an employee from having a Berman hearing. Most importantly, it leaves employers with flexibility to argue that the arbitration agreement waives, or does not waive, the right to a Berman hearing. One way to avoid objections to arbitration agreements caused by Sonic II is to simply allow employees to have a Berman hearing. The average claim in a Berman hearing for overtime and minimum wage violations is less than $10,000, and it will frequently be cheaper for the employer to have the claim resolved through the Berman hearing rather than in arbitration, which includes all of the costs, such as the arbitrator's fee, that must be borne by the employer. If an employee subject to an arbitration agreement files a wage complaint with the administrative agency, the employer could simply refrain from seeking to compel arbitration. Of course, as noted above, if the employee opts for immediate litigation instead of an administrative process, the employer could move to compel arbitration and argue that *Sonic II* does not apply because the employee chose not to pursue a Berman hearing.

To the extent that your company desires to have individual wage claims addressed in arbitration, most arbitration service providers provide expedited or streamlined procedures for low-dollar claims. Following *Sonic II*, we will likely see courts analyze these procedures to evaluate whether they facilitate "accessible, affordable resolution of wage disputes." *Sonic II* clearly recognized that arbitration could be structured in a manner that affords employees a speedy determination of their wage claims, and arbitration providers such as JAMS and AAA are already instituting procedures that may withstand the scrutiny of *Sonic II*. As a reminder, if a specific set of arbitration procedures is incorporated into the agreement, a copy of them should be provided to employees.

Employers should also avoid overreaching in their agreements in ways that unfairly disadvantage the employee. Some practical tips include:

- Ensure the arbitration agreement is a separate, stand-alone document signed by the employee.
- Make the arbitration agreement mutual – it should not be one-sided or unfair.
- Do not impose additional costs on employees or limit an employee's claims or remedies.
- State that the mutual agreement to arbitrate may not be unilaterally modified by the employer (unlike handbooks, which are unilaterally modified).

We will continue to see an abundance of collateral litigation regarding the enforceability of arbitration agreements. Employees will push the state courts to continue restricting arbitration agreements based on alleged unconscionability, and companies will argue that the U.S. Supreme Court's policy of enforcing arbitration agreements according to their terms should be followed. Your business can give itself a leg up in this battle by carefully crafting its arbitration agreement with the assistance of experienced counsel that understands how to navigate down this dusty road to enforcement.

Erin Leach

Erin Leach is an attorney in the Orange County office of Snell & Wilmer. Her practice is concentrated in employment litigation and counseling. She provides clients with ongoing counseling on a wide range of personnel matters including hiring and termination decisions, employment agreements, policy drafting, wage and hour issues and employee medical leave. She represents employers in state and federal courts and arbitration, as well as before administrative agencies, in disputes regarding wrongful termination, discrimination, sexual harassment, unfair competition, trade secrets, reasonable accommodation of disabilities, retaliation, wage and hour (individual and class actions) and other types of employment matters. Leach can be reached at 714.427.7008 or eleach@swlaw.com.

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