

Sonic-Calabasas A, Inc. v. Moreno (2013) 57 Cal. 4th 1109

California rule prohibiting waiver of Berman hearings was preempted by the Federal Arbitration Act. Such waivers may still be held invalid if found to be unconscionable.

FACTS AND PROCEDURAL POSTURE

Plaintiff, Frank Moreno, filed an administrative wage claim in 2006 after leaving his job with Sonic-Calabasas A, Inc. (a car dealership). Moreno claimed that he was owed pay for 63 days of vacation time that he accrued over a 4 year period. Sonic petitioned the superior court to compel arbitration and to dismiss the administrative action on the grounds that Moreno had waived his right to a Berman hearing in the arbitration agreement he signed when he was hired by Sonic. The superior court denied the petition, but on appeal the court held that Moreno had waived his right to a Berman hearing.

In *Sonic I*, The Supreme Court held that Moreno could be compelled to arbitrate, but that he had not waived his right to a Berman hearing. The court explained that prompt payment of owed wages is not merely an individual right, but an important public policy goal. Thus, the protection of a Berman hearing could not be waived as a condition of employment because although one may waive an individual right, one may not waive a right conferred by a law established for a public policy reason. The court further held that not only may a Berman hearing not be waived, but such a waiver is unconscionable because of the pressure on the employee to sign the waiver. Most employees are not in a position to refuse a job because of an arbitration requirement, and such clauses exist solely for the benefit of the employer at the expense of the employee.

Sonic sought review by the US Supreme Court. The US Supreme Court vacated the California Supreme Court's judgment and remanded the case for further consideration in light of *AT&T Mobility LLC v. Concepcion* (U.S. 2011) 131 S. Ct. 1740, a US Supreme Court case decided 2 months after *Sonic I*. In *Concepcion*, the US Supreme Court held that the Federal Arbitration Act ("FAA") preempted California's rule that class waivers in arbitration clauses were unconscionable. The court explained that permitting class actions in arbitrations would contravene the FAA's purpose of ensuring the enforcement of arbitration agreements so as to facilitate streamlined proceedings. Essentially, the *Concepcion* rule is that a state contract law rule is preempted by the FAA where the rule is applied in a fashion that interferes with the fundamental aspects of arbitration.

DISCUSSION

On remand, the California Supreme Court overruled its ruling in *Sonic I* prohibiting all waivers of Berman hearings. A rule *requiring* an administrative hearing before arbitration would at the very least delay the "streamlined proceedings and expeditious results" that are a prime objective of arbitration, thus the *Sonic I* rule is preempted by the FAA.

The court then explained that even though a rule *requiring* an administrative hearing before arbitration is preempted by the FAA, a Berman hearing waiver may still be held invalid if the waiver is unconscionable. California's unconscionability doctrine may be applied to arbitration as long as it does not interfere with the fundamental attributes of arbitration. In evaluating whether a waiver is unconscionable the court should consider the protections offered by a Berman hearing, and the specific arbitration procedures in a given agreement; where there is a loss of benefits, or where the arbitration

agreement is unreasonably favorable to one party, the agreement may be found unconscionable. Because the parties had not fully explored these issues at trial, the court remanded the case to the trial court to determine whether the waiver was unconscionable.

Held: A categorical rule prohibiting waivers of Berman hearings is preempted by the FAA. However, such a waiver may still be found unconscionable. “The rule we adopt today, which makes clear that the Berman hearing is waivable, does not delay arbitration or otherwise interfere with fundamental attributes of arbitration. It simply requires an adhesive arbitration agreement that compels surrender of Berman protections as a condition of employment to provide for accessible, affordable resolution of wage disputes.”

Dissent: In a lengthy dissent, Justice Chin agreed that the FAA preempted the *Sonic I* rule, but argued that as to the unconscionability claim, Moreno had forfeited the issue by not raising it at trial, and had not, and could not, meet his burden of showing unconscionability. Justice Chin also disagreed as to the proper application of the unconscionability doctrine, arguing that the majority failed to adequately define “unconscionability” and contending that the proper test should be whether the contractual provision is “so one-sided as to shock the conscience.” Applying this test, Justice Chin would find that the arbitration clause was not unconscionable.