Sanchez v. Valencia Holding Company
Oral Argument of May 6, 2015 before the Supreme Court

Parties: For Appellant (Bob Olson), For Respondent (Hal Rosen), and Rebuttal For Appellant with Seven Justices (? separated as to males and females only)

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| Olson | Your Honors may it please the Court. I would like to address two broad issues. What is the standard for unconscionability and why under any reasonable standard this contract is not unconscionable. Note that I have said, framed the issue as what is the standard for unconscionability not what is the standard for the unconscionability of an arbitration provision. I say that because it is one and the same. We know that from the Federal Arbitration Act. We know that from the US Supreme Court that there cannot be a different differential standard to be applied to arbitration provisions than is applied to any other provision. So I think when we talk about the unconscionability standard we need to speak in general enough terms to cover any type of agreement. And you know from our briefing that the standard we proffer is a single unitary one of shocks the conscience. And we do so for multiple reasons. It is the traditional standard. It is the generally accepted standard. It is in fact, I think we have demonstrated, the standard that the other standards have been derived from.  |
| Werdegar | May I interrupt you for a moment. You say it is the traditionally generally accepted standard. Do you mean with respect to arbitration or with respect to drawing blood without a warrant or across the board in the law? Or in what context? |
| Olson | In the context of contract determining contract unconscionability. |
| Werdegar | So shocks the conscience you are telling us is the standard accepted universally used standard? |
| Olson | Not universally but |
| Werdegar | You didn’t say that. |
| Olson | Primarily. |
| Werdegar | Right. |
| Olson | The vast majority of jurisdictions for unconscionability not of arbitration provisions but of any type of provision, be it a interest clause, a penalty clause, whatever. The standard is shocks the conscience. And I think shocks the conscience conveys something very important, something that this court has repeatedly said, which is that to be unconscionable a contract provision has to be more than just a hard bargain, has to be more than just an allocation of risk. It is something beyond that, and I think shocks conveys that.  |
| Cuellar | So just let me try to follow up on that and |
| Chief Justice | What is it exactly. I mean you, there are, before you get to Justice Cuellar’s question there are different formulations and are you saying to us that those, and you indicated they are derivative of the standard of shocks the conscience, so aren’t those, so your argument is those others are just explanatory of what shocks the conscience means? |
| Olson | I think they are derivative of, I think there should be one single standard because I agree that if one uses different language it suggests different meaning. We do that with contracts, we do that with statutes, we say different parts of the contract for different parts of the statute use different language which we infer different meaning is intended. I think there should be a single standard, and I think what that standard is, one of the amicus briefs said this, what matters is less what the two or three-word phrase is than what the underlying standard is.  |
| Cuellar  | Well, counsel I want to ask you precisely about, picking up where the Chief Justice left off because in *Sonic-Calabasas v. Moreno*, just a couple of years ago we said, and I quote, “the core concern of the unconscionability doctrine is the absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” So I just want you to connect the dots and tell me how that relates to your formulation. |
| Olson | I think the formulation is and should be so unreasonably favorable as to shock the conscience which is the language this court used in *Pinnacle* which is the, and the court’s request for supplemental briefing here asks for what standard to use. I think it is that standard and what it means I believe is that a result which is outside the norm of the results, the broad norm of the results that might be expected in circumstances with normal negotiation. I say the broad norm because negotiations result in lots of different results, all of which are, all of which can be acceptable. There is not one  |
| Cuellar | Totally different from what we said in *Sonic-Calabasas*, so in other words are you saying what you said in *Sonic-Calabasas* is not meaningfully different from, shocks the conscience, or are you saying what was said in *Sonic-Calabasas* is wrong? |
| Olson | I think I am saying what is said in *Sonic-Calabasas* should be revised to say this all falls within shocks the conscience because the problem with things like unreasonably one sided, unduly harsh is, I am not sure I know what duly harsh is or reasonably how one-sided it is.  |
| Liu | Counsel, are you asking for a change in the law? |
| Olson | If *Sonic-Calabasas* is considered definitive on the standard, then I would say, yes, I am asking for a change in the law. |
| Liu | What I am asking is are you asking for a change in the law as in the application of these prior terms, unduly oppressive, unfairly one-sided, whatever, overly harsh. Did they reach the wrong result? |
| Olson | I don’t know that they necessarily reached the wrong result. |
| Liu | You are not asking for a change in the law? |
| Olson | I am asking for a change in how the law is expressed as to what the standard is so it is clear that there is one single standard, not a multitude of standards to be picked |
| Liu | I am wondering why you are asking for that though. I mean if it doesn’t make any difference to the results that have been generated by these multiple standards then why should we adopt your single formulation? |
| Olson | Because I think a uniform standard is important because it conveys that we will be applying a single test, not multiple tests. The problem with one of the, one of the problems with multiple tests |
| Liu | Tests, we have just been using a variety of words to convey the same concept that you are urging upon us, but I’m a little confused whether you are urging a change in the law or just a terminological change, cosmetic terminological. |
| Olson | I think I am urging a return to the expression of the law as it has been previously expressed and I believe that some of the other terms that may have been used as synonyms have been, have the possibility for creating differential standards. |
| Liu | Can you give me an example of a case, either from our precedent or even a hypothetical case where you think your term makes a substantive difference, as opposed to unreasonably one-sided, unfairly one-sided, overly harsh, unduly oppressive. What would be a case of a contract that satisfied one of, that did not satisfy the shock of consciousness test but would have satisfied these other tests. |
| Olson | Certainly the Court of Appeal here thought it was applying one of those lesser tests and I believe it does not meet the shocks the conscience test. Obviously, I argue that it doesn’t meet those other tests as well but it is an example of one that is outside I believe the realm of shocks the conscience that was viewed as unfair and unreasonable and that that was enough because I don’t think that unduly adds |
| Liu | I don’t think that’s what you argue. Are you arguing that this contract, though unreasonably one-sided, though unreasonably one-sided, may not shock the conscience?  |
| Olson | No, I am not arguing that because I believe this contract suffices under any of the standards. |
| Liu | Right, so it doesn’t make a difference in this case, in your own view. |
| Olson | I think that in my view it would not and should not make a difference but this court asks the question of what the standard should be. |
| Corrigan | Mr. Olson, I take your argument to be that you are simply asking for the law to be clear. You can live with any legitimate test, you would just like us to have a test that gives you clarity. |
| Olson | That is absolutely correct Your Honor. |
| Corrigan | Doesn’t it seem that there, it is one thing to say however we say it won’t make a difference here at the California Supreme Court but that it may make a real difference in the trial court when people are trying to apply that test or to business people who are trying to conduct their affairs by dividing what the test is. |
| Olson | That is absolutely correct. I could not have said it better. Now, ……… ha ha. To some extent I don’t care if you call the test a blue duck test as long as the standard  |
| Corrigan | Now there’s an idea. |
| Cuellar | I would like to follow up on the blue duck test. But just to make sure I understand I hear you saying to Justice Corrigan you want clarity from us, you think that will be helpful to the lower courts, it will be helpful in this case, but just would ask you whether in this case particular case you think it makes a difference whether we use shocks the conscience or not. And it sounds to be like your answer is no, it doesn’t because you think that ultimately the argument you are making works just fine under  |
| Olson | I think I win under any of those standards. I think it may be easier for me to win under shocks the conscience, but I win under any of those standards.  |
| Cuellar | Then I’ll accept that, but then just to follow up, let’s just suppose hypothetically that somebody is looking at *Sonic-Calabasas* and again goes back and looks at this language. The core concern of the unconscionability doctrine is the absence of meaningful choice on the part of one of the parties to together with contract terms which are unreasonably favorable to the other party. Now I understand your position to be that you think that is much less clear than shocks the conscience although people could argue it either way perhaps, but just under this particular formulation tell me why you win. |
| Olson | I win because amongst other things under that formulation *Sonic-Calabasas* goes on to explain that unreasonably unfavorable is more than we think one side or the other might like it better that it is more than just a hard bargain. I think I win under this standard because I kind of do a thought exercise and say, if this were a negotiated contract, it is not, we don’t have, we have standard form contracts because it makes life work. If I would have to negotiate my car rental contract every time I showed up at the airport, I wouldn’t get out for days. But if there was, could this be a reasonable result that rational people might reach, and I think the answer is yes. People negotiating a contract like this one side or the other or maybe both might come to dispute resolution and say we should arbitrate. I think that is a reasonable choice, certainly federal law says we need to presume that is a reasonable choice.  |
| Chief Justice | I just want to be clear on one thing. All of these other standards that have been used to fully fill out the shocks the conscience standard you are saying basically are not sufficient, they weaken it. It is not the same. Those other standards unreasonably, unduly oppressive, unfairly one-sided, those are not equal. Those are not equal to shock the conscience. |
| Olson | I think they weaken it by causing confusion and by suggesting that there are multiple standards when there either is or should not be multiple standards.  |
| Chief Justice | May I ask how you square your position with, we have adopted a sliding scale approach on unconscionability cases that looks to a combination of procedural unconscionability and substantive unconscionability. How do you select a single standard for substantive unconscionability that takes the sliding scale approach into account? |
| Olson | I think the sliding scale approach, and I agree that is the standard, you take it, I think it is taken into account by the degree of certainty a court requires that something is out of bounds. If there is massive procedural uncertainty, I think one looks at, you know, maybe it is only clear and convincing or somewhat more than more probable than not that it is out of balance. If there is more minimal procedural issues, and by that I mean I think any standard form contract crosses the threshold on the procedural ground, then I think you need to be really certain that the terms are outside the bounds of what normally would  |
| Liu | Have we ever described it that way? That is an interesting way of describing the sliding scale approach, but have we ever described it that way?  |
| Olson | I don’t know that that has, that it has been described that way. It is certainly the position that we took in our briefing but I don’t know that I could cite you chapter and verse of  |
| Liu | I guess I would like to go back to the Chief Justice’s question. You did describe the other standards as lesser a minute ago. So you are asking for a higher standard, is that correct? You don’t want to say that but I think that is what you are saying. |
| Olson | I want the existing, I want the existing shocks the conscience standard. I think that  |
| Liu | Well, I want you to compare it to what this court has done because that is what we have to contend with. We have a whole body of precedent in this area. You are asking us to clean up this precedent by adopting a single formulation and I want to know what we are getting ourselves into. Are we adopting a higher standard if we go with what you urge? |
| Olson | I don’t think you are adopting a higher standard I think you are adopting the existing, what is and should be the existing standard. I don’t know that any of this court’s  |
| Liu | Why did you then describe the other standards as lesser standards? |
| Olson | Confusing standards might be a better way to put it.  |
| Chief Justice | I think you indicated |
| Olson | I think they lead to confusion |
| Chief Justice | I, I don’t know if my notes are accurate but when I asked you about the multiple formulations you said that they weaken the standard or shocks the conscience by creating different approaches and objecting of security, well objecting of security into contract negotiations and trial court treatment.  |
| Olson | I think that is fair. They, they weaken the standard. To answer in a slightly different way Justice Liu’s question, I don’t think this court’s prior precedence would be any different if they all simply used the shocks the conscience standard. |
| Chin | Are you asking us to adopt the same standard that we used in *Pinnacle*?  |
| Olson | Yes. |
| Corrigan | Isn’t part of the problem that as lawyers, as you have eluded to, when we use words differently, when we use different words we are tempted to think they must be different? If you used the blue duck test and then we say or we could use the red cat test someone would say well they must be different tests.  |
| Olson | Absolutely.  |
| Corrigan | So we can all say, if we choose, that all the tests mean the same thing and here’s what they mean, but the problem is in real life not to be confused with what happens in this room, people may argue that they mean different things. |
| Olson | That is correct, Your Honor. And to get back to my example what the true meaning is with Justice Quiard’s question where I said in a negotiation someone says let’s arbitrate, the dealer says that sounds great, but I’d like some comfort on the risk of outlier results, someone can say that’s fine, outlier results that may really affect my business, injunctive relief over $100,000, that fine, but if you want that second look, you pay for it, well I should have some option for that as well, okay, you get it on a zero dollar amount and you know I would like some comfort on the cost of arbitration. Well, okay, we’ll pick up your first $2,500. Is that a reasonable, rational negotiation that could take place and result in this arbitration provision? I think the answer is yes, and if the answer is yes, I think this provision passes the unconscionability muster.  |
| Liu | Could I direct you to a couple of other provisions. Let’s go into the contract a little bit, if you wouldn’t mind. Could you talk a little bit about the one that deals with appeals from a grant of injunctive relief, but not a denial of injunctive relief. Can you explain like what the, what the thinking is behind a term like that. |
| Olson | The thinking behind a term like that and I say rearbitration because it is not an arbitration appeal unlike little this is a full de novo rearbitration and so the party pursuing it stands to lose more than they have already lost in the first round. But the idea behind the rearbitration is that, particularly for the dealer, if there is injunctive relief that injunctive relief can be very intrusive in the sense that it could require that the dealer completely redo all of their operations and how they do business because they are under an injunction to change and perhaps that may be a legitimate change, perhaps it may be a change that they have to spend hundreds of thousands of millions of dollars in changing how they do business that is not warranted. You’d want, they legitimately can want a second look on that. Now the example I have where in another context where one might want to have something like that is if one had an employment agreement and the employee or union had the superior bargaining power and said all right any employment grievance is going to be arbitrated but if the result of the arbitration is that the employee is to be terminated or suspended for more than 15 days we are going to have a second look at that because that is such a important result to the  |
| Liu | Why not then a denial of the injunctive relief? Why only a grant? I mean if it is important to the one party certainly it is equally important to the other to say, you know, you sketch out a hypothetical where there is some very important injunctive relief that is burdening the clients you represent but that is precisely why the plaintiff in such a situation wants an injunctive relief, because they think that something serious has happened and they want a serious measure. A denial of that is the denial of something quite serious. So why don’t they get a second look?  |
| Olson | That triggers two thoughts. One is that it is somewhat an asymmetrical situation because the person buying the car, this isn’t their livelihood, the dealer it is their livelihood, so it is in that sense they do have an asymmetrical interest and simply in an asymmetrical provision is not in and of itself unconscionable and I think we have to also look at arbitration provisions and say courts should not be in any provision in a contract. Courts should not be second guessing them and saying this is less than perfect, this is less than the way I would have done it. Arbitration provisions, any contract provisions with warts that aren’t the ideal are still and should be still enforceable just because it is not the way we as lawyers, courts as jurists, might frame it in hindsight. They do not, an arbitration |
| Liu | That is a point well taken. Let me just ask, do you think that this particular provision I focused on is more favorable to the party not here? That seems to be the tenor of your hypothetical. I am not saying that is dispositive, I am just asking, the practice is that |
| Olson | I am not so sure because there are times that there could be injunctive relief against the buyer and injunctive relief to return the car, injunctive relief if the buyer were someone who was buying automobiles and selling them overseas in a grey market manner that was contrary to some contract provision. There are, I think that typically the injunctive claims, I would agree that typically the injunctive claims are probably brought against the dealer, but not  |
| Liu | But not exclusively. |
| Olson | Not exclusively |
| Liu | Are there provisions that you think cut the other way in this contract which is to say they, you might say they are asymmetrical in the other direction, meaning, tending to favor the buyer? |
| Olson | Well certainly paying the consumers, the consumers costs of the first arbitration, paying that first $2,500 in costs essentially covers the cost of a first arbitration. I looked last night, Triple A charges $1,500 a day for an arbitrator fee, and charges $200 a filing fee for a consumer. Well, the consumer is only responsible for its half, $7,500, that’s three days of arbitration. That certainly cuts in favor of the consumer and frankly I think arbitration in and of itself cuts in favor of the consumer because the consumer has a greater interest in a fast determination than I think than the dealer does.  |
| Chief Justice | Can I ask you before you time runs out. The trial court here didn’t decide this case based on unconscionability but on the invalidity of the arbitration of the class waiver. The Court of Appeal, while it changed by then, determined that the four components, four components of the arbitration provisions were unconscionable under a different a different standard than shocks the conscience, if we were to remand the matter, would there need to be or would we need to remand it. Is there additional procedures, evidence to be taken. What is your view of this going forward? |
| Olson | My view of this is that it is the plaintiff who is challenging unconscionability. It is their burden, it was their burden to present whatever their best case was in the trial court on this. The only thing they presented was the face of the contract and a claim that the plaintiff didn’t read the contract even though he signed it twice a week apart. I think on those facts there is nothing to remand. This is completely valid and enforceable. If, I agree that if somehow the court were to think that those facts alone could suffice to show unconcionability, then a remand would be required but given the plaintiff’s burden of proof and really the absence of any evidence of unconcionability, no evidence of this plaintiff’s financial condition, although I think the Court of Appeal was off base on that given that Triple A and every arbitration provider in California under CCP 1284.3 is required to provide relief to indigent consumers, but there is no evidence of any of that. They had their opportunity. I think this is a straight reversal and remand with directions to compel arbitration.  |
| Chin | You did not concede below that this contract was adhesive.  |
| Olson | I think I would concede now that it is adhesive in the sense that it is a, yes, it is a form contract. I think that meets the definition of adhesive in California, but I think adhesive without more does not get you, does not get one unconscionability. With that I reserve the remainder of my time and I don’t want to run into it unless the court has further questions. Thank you Your Honors. |
|  | OPPOSITION |
| Rosen | I don’t see a white button about starting, but  |
| Chief Justice | Nope, feel free.  |
| Rosen | Thank you very much. May it please the court. Good morning Your Honors. I was struck by how dramatically the appellant’s argument changed from their briefing. If you recall in their briefing they said shock the conscience is the same as in 1770 standard from England that only those contracts and no person that it was not almost satanic in nature  |
| Chin | What standard would you have us adopt? |
| Rosen | I believe that the *Sonic-Calabasas* standard is probably about as good as we can get. |
| Chin | Is that then shock the conscience? |
| Rosen | Absolutely. |
| Chin | How is it? |
| Rosen | At least as they are shock the conscience |
| Corrigan | We don’t want to know what they urge, we want to know what you urge. In your judgment counsel are they different? |
| Rosen | The shock the conscience brings in I believe a moral element and a, that is very difficult to deal with because conscience differs so dramatically among people |
| Corrigan | Well, let me ask you this? |
| Rosen | In modern America how do you shock a conscience anymore? |
| Corrigan | Let me ask you this. Do you discern a difference between a standard that would say that you can’t enforce the contract, that’s what we’re talking about. We are talking about a legal circumstance in which the courts will not enforce a contract, right? |
| Rosen | Right. |
| Corrigan | Okay, do you discern a difference between that standard being described as unfairly one sided, unreasonably favorable, or shocks the conscience? Is there a difference among those formulations? |
| Rosen | As urged by them, yes. |
| Corrigan | Okay, counsel, I want to know what you say. I heard them. I want to know in your judgment |
| Rosen | I can understand unreasonably favorable, I can understand unduly harsh, shocks the conscience, I can’t understand because it brings in the moral element of a person’s belief. It can be, maybe something as horrific, the most horrific things may not shock the conscience in a modern day society, so I believe that is probably the worst of all choices and brings in a moral element that is improper.  |
| Corrigan | Are you suggesting that there is difference because there is a difference in degree? Or are you suggesting that there is a difference because one is more easily applied and understood? |
| Rosen | I think one is more easily applied and understood. I also think that shock the conscience opens the door to a difference in degree because I do have a problem with what shocks the American conscience today, what shocks an individual’s conscience. Just because something doesn’t shock the conscience doesn’t mean it is illegal.  |
| Liu | Is shocks the conscience of a very widely used standard in the law? |
| Rosen | It isn’t. And it was very, it was never cited before |
| Liu | It was a term like reasonable, which is a very common term in the law. |
| Rosen | Absolutely, and if you look at the case that was cited some, excuse me for getting empinical. That case did not say shock the conscience alone. It said shock the conscience or as part of the same sentence it said or overly harsh. We have lots of case law developing unreasonably unfavorable, overly harsh, unduly oppressive, but we have very little case law on shock the conscience and the point I made is where they urged the 1770 English standard that shows how far you can twist shocks the conscience. Sorry, shock the conscience to me is a wolf in lamb’s clothing. And I think he gave it away when he said, it is a lesser standard, the lesser you refer to the lesser standards that he wants a new rule that will make it easier to pass improper contracts.  |
| Liu | Do you think that our court or the courts of appeal in the state have been applying different standards based on these different linguistic formulations? |
| Rosen | Whether we look at *Armendariz, Little, Purdue,* and go all the way to *AM Produce*, there has been a certain consistency here. The only change I’ve seen is that originally from *Graham v. Scissortail* we had more of a two-part test. We had the outside the reasonable expectations of one party or unconscionable, and the outside the reasonable expectations of the weaker party test, it seems to kind of float in and out a little bit more. It kind of goes into disfavor. We found it in the *Purdue* case which is interesting because it is a non-arbitration case. That’s the excessive bank fee cases. But in general we have seen a basic sliding scale consistency that has been applied in the law that was applied in the *Sonic-Calabasas* case that has allowed us to examine arbitration in an ever-changing world in context that we are faced.  |
| Cuellar | So counsel you may get more questions about the consistency in the standards reviewed but I want to take you to the *Sonic-Calabasas* standard and ask you to apply it in this case, if we are talking about trying to understand whether the contract here was unreasonably one-sided, presented the absence of meaningful choice, how does that actually play out with respect to this contract, what if anything is procedurally unconscionable, what is substantively unconscionable? |
| Rosen | I thank you very much for that. The lack of meaningful choice, I believe counsel inadvertently misstated the lower court record that we presented. What we presented was the declaration of the plaintiff, but not only that, we took the deposition of the general sales manager as the person most knowledgeable at the dealership. That general manager admitted that he doesn’t show the back of the contracts to the consumers, that he doesn’t tell them that there is arbitration. He admitted that he doesn’t understand the arbitration clause himself so he couldn’t explain it to anyone. He admitted he didn’t know what the rules and procedures and procedure were. |
| Corrigan | Did your client sign this contract? |
| Rosen | Yes. |
| Corrigan | And did he initial the arbitration clause. |
| Rosen | There was no place to initial the arbitration clause. |
| Corrigan | Okay, so the answer is no. |
| Rosen | No. And on this contract there is 2,000 words on the front page, arbitration appears one time. He was completely unaware of it, not only initially, they were trained, they did not call attention to it or explain it because as they admitted the dealership itself did not understand this clause, how it works and what it was.  |
| Cuellar | But does the dealer counsel have a responsibility to draw attention to the arbitration clause? |
| Rosen | To avoid surprise, it certainly would make it hard to argue as adhesive or you had undue surprise if you did call attention to it. And yes they now changed all the arbitration clauses. |
| Chin | Counsel, was the arbitration clause hidden somewhere deep in the contract? |
| Rosen | It was on the back of the contract in small print. That back that when you are getting if any of you have bought a car  |
| Chin | It, wasn’t the paragraph arbitrating capitalized bold faced?  |
| Rosen | No, there is one word arbitration on the front side of the contract. It appears one word in a place where  |
| Chin | Doesn’t the contract say on the front that the person has read both sides of this contract in front of you? initial that acknowledgment? |
| Rosen | In the 2000 words it has, there is nine places to initial and there is an initial that I read everything which is as we all know when we look at the recent CFPB standards that isn’t actually the reality of it when you are signing what would take actual studies show nine hours to read everything a car dealer gives you and the dealer doesn’t flip over the contract. That was part of the deposition. They don’t give |
| Chin | Argued unconscionability below, correct? |
| Rosen | Yes, Your Honor. |
| Chin | And you submitted evidence to support that claim? |
| Rosen | Yes, Your Honor. |
| Chin | And you submitted evidence to support that claim? |
| Rosen | Yes, Your Honor. |
| Chin | Have you submitted all the evidence on that claim? |
| Rosen | Well, all the evidence |
| Chin | Have you submitted all the evidence that you have on the claim of unconscionability? |
| Rosen | Well obviously things have changed dramatically. You could always come up with more evidence. I can’t really say that looking back to a contract. |
| Chief Justice | I find that hard to believe his unconscionability is determined at the time the contract is signed. So I understood it to be that the trial court the defense, the objection to the motion to compel arbitration was unconscionability and I think the question is what evidence did you provide or did plaintiff provide at the trial court level that there was procedural unconscionability apart from the adhesive nature of the contract and the failure to sign, or no knowledgeable signing. Was there evidence of substantive specific unconscionability as to the four provisions at issue here in the court of appeal decision? |
| Rosen | Yes, Your Honor, and they used that evidence in the appellate court … |
| Chief Justice | So let me ask you then, that’s the case, answer is yes.  |
| Rosen | Yes. |
| Chief Justice | That evidence was relief upon at the court of appeal level. If this case were to be remanded, would there be more and if so why would there be more? |
| Rosen | No, there would not be more, Your Honor. Nor, do we believe |
| Chief Justice | I understood you earlier to say yes, there is always more, you can always determine more. |
| Rosen | Are we going, yes, but I don’t believe that you need to, in a remat, more than adequate evidence, because the contract itself is the very best evidence we have here of the substantive unconscionability. This is an anti-arbitration contract. |
| Chief Justice | So can I ask you just a question. So you and the other side agree that there is no need to remand this case?  |
| Rosen | Absolutely. This contract itself is anti-arbitration. Car dealers aren’t comfortable with arbitration. They don’t like arbitration. They had a federal law passed that they don’t have to arbitrate their disputes with manufacturers. So what they did here is they did a permissive arbitration clause, permissive, not mandatory, that lets them not arbitrate any of the disputes they want to bring and if you go to arbitration there is no finality of arbitration because if they lose they get it, an oppressive, an appeal rights. I want to address the question we talked about the injunction provision. If a consumer creates a right in the defendant for a de novo three panel review any time they seek an injunction what you are basically telling consumers is don’t seek injunctions as you might get a really nice damage verdict. But if you seek an injunction you are going to lose your right, your finality. So the car dealers first of all they exclude repossession, they exclude self-help, they put in the contract that they can sue the consumer, but if the consumer cross-complains against them, they can force the case into arbitration. It is a very anti-arbitration clause where they hedge their bet. One of the values of arbitration’s finality if they create these appellate rights should they lose large, should they get an injunction, so, it is not even a finality provision. When you look at AT&T, and you look at AT&T what it did, every provision in AT&T that the supreme court found positive, that it found fair and descent, the car dealers have taken, twisted and made anti-consumer. AT&T didn’t have an appeal. AT&T had mandatory arbitration. They have permissive arbitration only when we want to arbitrate. And a car dealer wants $2500 does not cover the cost of arbitration. Counsel wants to bring up well he looked at the arbitration rules and Triple A for $1500. I’ll tell you why. Triple A eliminated all rates to discovery. You don’t even get testimony under oath any more in Triple A. They have created a farcical procedure in the last two months and they said that isn’t before you. There is a reason for the cheapness. If you want to go to an arbitration $2500 with arbitrators at $400 or $600 an hour doesn’t buy you a lot. But when we look at the various procedures it is hard to mention anything more unconscionable and they noted here the cost of a consumer having to front a three-arbitration panel. We didn’t deal with the issue that they can use all the remedies self-help repossessions. |
| Werdegar | Are you suggesting that this court can determine on the record whether or not it is unconscionable?  |
| Rosen | Yes. |
| Werdegar | You don’t need to remand it.  |
| Rosen | There is no need to remand it. We believe the appellate court used the record, we believe the appellate court opinion was extremely well thought out, well reasoned, well analyzed and we could confirm what Justice Melano did and his reasoning. There is no need to remand the case this contract should aimed to be unconscionable.  |
| Kruger | Can we focus for a minute on the provision that permits appeal of an award of either zero or above $100,000? How do we know based on the record as it exists now whether that provision, if it reasonably favors one side or the other?  |
| Rosen | I have to refer in many ways to Justice Milano’s analysis in that regard, and he looked at whether either side is bringing in the zero award he found to be mutual, a mutual award. But the consumer is never going to owe or lose an award from a car dealer in all practical circumstances for a $100,000, that’s solely a dealer protection clause that we are dealing with. And the reality is the dealers are free to sue and do for anything that they want. His analysis is the $100,000 clause was solely a dealer protection that lacked mutuality. And it lacked basic fairness and was put in a again to destroy the finality of arbitration and hedge the car dealer’s bet. And I thought he did a good job on doing his analysis as to why that was an inherently un |
| Cuellar | Your position counsel is that there is no scenario under which a consumer can win $100,000 award on arbitration, no scenario whatsoever? |
| Rosen | No, a consumer can win an award over $100,000, I said that it is unlikely that a car dealer is going to win over $100,000 against consumers. The reality is they generally use self-help, repossession, most vehicles aren’t in that range. Theoretically, yes. You could have a Lamborghini case where they sued for something but more than, we look at the more practical effects than we do theoretical. And I thought Justice Milano’s analysis was correct in that regard.  |
| Kruger | I understood the other side’s argument to the effect the provision about the zero dollar award is really sort of what balances this out, and how do we evaluate whether or not there is really a balance there on the record as it currently exists.  |
| Rosen | Well, I think you have to look at the provisions and I think just let’s take the classic case, the injunction, where you can appeal any injunction but you have no right to appeal a denial of injunction. There is on the record that’s not hard. That is unbalance, that has no justification other than favoring the car dealers and giving them again their out because as he stated they are not really comfortable with arbitration, they want the parts that they like, but they want to be protected. And I think when we get back to the idea that this is not a mandatory arbitration clause that they enacted……….. |
| Kruger | Then your opposing counsel has suggested that that injunction provision can also benefit the consumer in certain scenarios because there are certain forms of injunctive relief that a dealer might pursue against a consumer. How are we to evaluate the practical effects of that provision? In your own judgment or based based on facts and evidence. Or are there facts that you think might be irrelevant? |
| Rosen | I guess I take it on common sense that the scenarios under which a dealership would sue a consumer for injunction. I don’t know if there has ever been such a case brought in the State of California. One can be creative and come up with contexts of what might be’s but when we are dealing with all the deceptive practices against car dealerships I myself have both, have published and unpublished injunction decisions—*Thompson v. Ten Thousand RB* where I obtained injunctions against dealers’ practices, a published decision. It is common to give dealers engaging in unfair business practices that need to be stopped. Injunctive relief |
| Werdegar | This is a contract of adhesion. |
| Rosen | Yes, I would certainly agree. |
| Werdegar | Yes, and every contract where it is a take it or leave it situation is a contract of adhesion, correct? |
| Rosen | Yes. |
| Werdegar | But that in itself does not satisfy the requirement of unconscionability, correct?  |
| Rosen | Correct. You need both elements, substantive and procedure….. |
| Werdegar | So in this case is there procedural unconscionability because it is a contract of adhesion? |
| Rosen | It, that’s one of the factors, yes. |
| Werdegar | Now is there any other factor with respect to the procedural unconscionability? |
| Rosen | It was a take it or leave it form contract. It was placed on the back of the contract. It was placed in a situation that it was regulated according rules that were not provided.  |
| Werdegar | So that is part of the procedural and it goes just beyond the fact that it was a take it or leave it contract? |
| Rosen | Yes, Your Honor. |
| Werdegar | And substantively you have been telling us why it was unconscionable and no more evidence need to be taken, correct? |
| Rosen | Yes, Your Honor. |
| Werdegar | Thank you.  |
| Chief Justice | Are there just curiously degrees of adhesive contracts in the sense that this gentleman was buying a luxury car of $45,000 or beyond and there was room for negotiation in the sale price in the warranty, and a number of things. Is there, I am just curious, a sliding scale of adhesion on a take it or leave it basis or form contract adhesion move on? |
| Rosen | Well, I would, if I am going to do it, I look at form contracts in the consumer context, and, as put in by the amicus brief by the Cardio Association, this contract is used by virtually every car dealer in the State. At the time this was the standard form contract. So you have a uniform contract with the information on the backside. They basically recognize the legality of their own contracts and changed them dramatically since this contract. But, |
| Chief Justice | Well, I recognize what you are saying. This is a widely popular, regularly used contract. I am just wondering if there is a continuum of adhesion or adhesion because it is take it or leave it. There were some negotiable terms and important negotiable terms, probably in terms of a consumer’s interest at the time of buying a car preeminent concerns. A price, warranty, trade-in, a number of things, but |
| Rosen | I think the fact that the, you can negotiate certain terms within a car contract doesn’t change the basic nature of the form contract especially with regard to the arbitration provisions. Those were not negotiable terms and I think when you look in the context, especially of a car contract, anyone who has ever bought one you know it is sign here, sign here, sign there, sign there, and we took the deposition and that was important that we got the car dealer to state that is exactly what they did. We actually got the car dealer, how they handled the arbitration clause and they handled it, they ignore it and they don’t understand the very clause they are selling and, and that they are forcing people to sign, obviously it is drafted by the lawyers, but they admitted they don’t understand it, they don’t explain it, and they don’t even know what the rules or processes or what most of it needs. Either does the real, neither does the consumer and it subjects the consumer  |
| Corrigan | But if we give, if we carry that logical to its ultimate conclusion, then you would have a simply, disallow any of these clauses because they are hard to understand and lots of people, including maybe some of the people in this room don’t always read them. |
| Rosen | No, what I would say |
| Corrigan | And is that the end result of your argument? |
| Rosen | No. What, I want to be real clear. I believe in the sliding scale. We have a large degree of procedural unconscionability. The law has been consistent that the more procedural unconscionability, the less substantive unconscionability you need, but you still need substantive unconscionability. It could be the most adhesive contract in the world but without some substantive unconscionability it still is not rendered unenforceable.  |
| Cuellar | I want to you about that then because I was wondering about the same question Justice Corrigan was wondering about it in the procedural context, but now let me take you back substantive, and ask you about the different clauses that are at issue here. And I guess my question is, do you have an argument that leverages the cumulative nature of these clauses in any way? Or is it enough for you to win for us to find that one of those is problematic and in particular, for example, let’s about the one that Justice Kruger was asking you about involving the rearbitration/appeal? So is that one just on its face substantively unconscionable, and if it is, is that enough to win your case? |
| Rosen | Okay. And it really comes down to the issue of severance and I think saying it in another way. Can you sever that clause? I think what we have here is a contract permeated by unconscionability. In fact, the fact that the dealers are exempt and don’t have to arbitrate their claims, the fact that they have appellate rights for injunctions so there is no finality, the fact that they get a large verdict that they can appeal, the fact that if the consumer wants to appeal, they have to pay in advance for a three judge tribunal outside of their financial circumstances, the fact that the dealership select the arbitration tribunals, including one that had to stop arbitrating claims under a criminal investigation, it is so permeated with unconscionability, it is so inapposite, everything that was in AT&T. In AT&T it was mandatory arbitration. The company couldn’t get out of arbitration and in AT&T, they paid all the costs not just a portion, and these can cost a lot more than $2500, and in AT&T they made clear that any type of relief, in AT&T there was no appeal. In AT&T they had a penalty provision. And the car dealers took that and they twisted it to all its extremes here where they basically don’t have to arbitrate their claims, where there is not a finality of judgment, where they can keep their remedies of self-help, where they can sue the consumer. |
| Kruger | Do we need to agree with you that each and every one of these provisions is unconscionable for you to win? |
| Rosen | No. I think you need to find that it is unconscionable and that the provisions have in some effect permeated the contract. So I would definitely see that if you found that the appellate provisions because the appellate provisions apply to multiple parts of the contract are unconscionable certainly I believe you invalidate it. It think again that Appellate Justice Milano was correct when he looked at, when you look at the fact. When we refer, there is a general theme here. We refer to these a cardot exceptions. This case will be arbitrated except we can bring our claims all in court. Except that if we lose, we can appeal. They created carveouts, this is an anti-arbitration clause. They were not willing to accept arbitration themselves, they wanted to be able to sue. They wanted to have self-help. They wanted it to be that they sue you and you counterclaim that they can still force you to arbitration. And then if they force you to arbitration they want to have a get out of jail free card to do it all over again. How’s that cheap or fast for more expensive, before a three-judge panel? They wanted to retain, in AT&T, there is a specific provision that the company AT&T could not recover its attorneys’ fees. They reserve the right to recover their attorneys’ fees. They don’t want to follow the rules of the arbitration tribunal. Their clause says that our rules and what write in our contact is more important than what your rules are so Triple A regardless of what your rules say you have to follow ours if they conflict in the special rules we created for our favor. This is the ultimate twisting of arbitration. This is nothing like what was approved of or supported by the Supreme Court in AT&T. It’s basically, I call it sort of the Jekyll and Hyde. You have here Dr. Jekyll here and then basically which was the AT&T consumer friendly arbitration and we have Mr. Hyde. This is a twisted provision of a group that is not comfortable with arbitration and wants to pick and choose cardot exceptions when it applies and if it applies what finality is. This agreement is permeated by the great degree of unfairness and unconscionability and is not the type of clause that should be allowable. And in fact you have seen they know that. They know that, that’s why they changed all the clauses, the major clauses are contested here. Because they are not supportable. And that’s I think what we really come down to. The final note, I just did want to point out is that this contract provides in section 6 that it shall be governed by California law. There is a section of the contract that says applicable law. And this contract says it will be governed by California law. Now, in the arbitration clause, it says we will follow the procedures, it says that we will use the procedures of the FAA. That’s a lot different than a choice of law provision which appears in section 6, that says that this is governed by California law. In the end, what makes this all so tough is there exists I think in the American psyche that our forms of justice and dispute resolution should be as fair as what we can make them. It is a primary part of what makes our country great in function. And you know what this court does is sets those parameters so we have a business that says what can businesses do. And the problem to an extent is if it is unreasonably unfair, unreasonably favorable, well the businesses are just going to draft these clauses to just be favorable but not unreasonably favorable. Unfairly one sided, they are going to draft and be one sided but not unfairly one sided. Unduly oppressive, let’s just make them oppressive. And if they get shocked the conscience there is no barriers any more. There is no barriers as to what they will start inserting. An arbitration permeates every facet of our life. I went to a concert recently, and walked in and it said at the entrance into this facility it is an agreement to arbitrate. You know, it’s, it’s, we have just begun to experience how far arbitration is going to go and I understand the Supreme Court mandates we can’t treat it different than other contracts and so what I am saying is let’s use our A&M produce, let’s lose Purdue, non-arbitration cases, it sets some limitations because it’s offensive to have things drafted in an unfair method. And if a company wants to go to arbitration, they should have to go to arbitration as should the consumer. They shouldn’t be able to carve out all these exceptions like they did here. And everything we want to do we can sue for, but if you want to go, you have to go to arbitration. I did think it is amazing they, even if they file suit against the consumer, they can force the consumer to arbitrate if there is a cross-complaint. It’s just how much can we get away with clause. And I know that’s a very difficult test, the formulations are different and painted and that’s why we have used so many different words to describe it. Because the creativity to create unfair clauses, lawyers are very creative beings.  |
| Cuellar | Counsel, while I still have you here, just briefly going back to procedural unconscionability, you have mentioned on several occasions that the arbitration clause was printed on the back of the contract. |
| Rosen | Yes. |
| Cuellar | Now I just want to be clear what significance if any you contend we should attach to that bear facts.  |
| Rosen | Well, I think it is, it attaches the fact of surprise. Our client had no awareness whatsoever that there was an arbitration clause and that the procedures of the dealership were not to turn the contract over, and that the one word out of 2000 that shows arbitration is not something that anyone is going to catch on the front side. I testified before Congress on this, I gave them all a copy of a contract and I said let’s go look for the needle in the haystack, find the word arbitration.  |
| Corrigan | So is the problem that they didn’t turn over the contract or is the problem is that it is on the back of the contract? Because if it is a problem that it is on the back of the contract then I guess we could only have one-page contracts.  |
| Rosen | No, I think you could always, and the new contracts are different. In the new contracts there is a clause that says there is an arbitration clause on the back of the contract. You have been told about it and can read it. They would have you sign it. There is an acknowledgment on the front but they have you sign telling you there is something on the back. You can have something on the back but it certainly a lot fairer, especially when you are dealing, you see these contracts, the 18 x 24s? |
| Corrigan | Yes, we have been down that road before. We know they are big, we know they are long, we know that people don’t always read them. But so we are trying to focus in on the nature of your argument so if I understand what you are suggesting is it is not evil that it is on the back or the contract, but you have to have a process through which people are given fair notice. You can’t just say in your judgment I have read both sides of the contract, you have to say, by the way, here’s what’s on the other side of the contract. You may really want to read it. Is that right? |
| Rosen | Yes.  |
| Chief Justice | Okay. Thank you Mr. Rosen. Your time has expired.  |
| Rosen | Thank you very much, Your Honors. |
|  | REBUTTAL |
| Chief Justice | Mr. Olsen, five minutes you are on. |
| Olson | Thank you, Your Honor. To begin with counsel said let’s be practical here. Well let’s be practical. The practical point is that any word between zero and $100,000 is a single flat final arbitration. We are talking about the purchase of an automobile. I think we put in that the average cost of an automobile, I think in 2012, was about $30,000, 2008 when this was signed, we can figure it was probably $25,000, $27,000. This automobile was $40,000 to $50,000 depending how you adjust the trade-in. This is right within the realm, the vast practically the vast majority of our arbitrations under this provision are single, one-time, final one-arbitrator arbitrations. |
| Werdegar | Can you address opposing counsel’s assertion about carveouts, that anything, carveouts, you heard the phrase, that anything that is unfavorable to the dealer can go to appeal |
| Olson | That is not true at all.  |
| Werdegar | Then cite all the different provisions where it is true.  |
| Olson | It is true in some instances that there is a second look, but in many instances if the claim here is a $14,000 electrical repair and a $3700 warranty claim. If the arbitrator awards $95,000, there is not carveout, there is nothing that allows the dealer to do anything but pay the claim, so to say that it is littered with carveouts is simply untrue. And this is what I believe the Supreme Court in *Conception* meant that parties can tailor their arbitration provisions to their context. And they don’t have to be perfect in how they do it. You know, there is the phrase that the perfect is the enemy of the good. He says that the contract has evolved over time. Well, yes, with judicial decisions people try to evolve. You try to go from good to better than good, then you are told you may not have done that right. But the fact is this agreement is good enough and that’s the question. |
| Werdegar | Well, what about what consideration can we give the assertion that the contracts have been changed? that this particular contract I think one of your told us was standard in the industry has been altered.  |
| Olson | First of all, that change is not in the record.  |
| Werdegar | I understand that.  |
| Olson | And secondly, the fact that people change contracts with evolving judicial decisions or with evolving legislation is not surprising at all. It doesn’t mean that the initial contract is bad, is unenforceable, it just means that there are new standards to be met. |
| Werdegar | What notice was given the consumer about arbitration? |
| Olson | What notice was given the consumer about arbitration? I have a copy of the contract here. Yes, it is really long and as the Attorney General has said it is really long because 90% of what is in here by content and by typeface is required by statute. So the fact that this is a long complex |
| Werdegar | Arbitration provision and what is |
| Olson | The arbitration provision is on the back in this black square covering a third to one quarter of the back.  |
| Chin | And is the title of it in bold face in the center of the page? |
| Olson | The title is in boldface all caps centered of the page—Arbitration Clause. Please review. Important. Affects your legal rights. |
| Cuellar | Counsel opposing counsel had indicated that the individual representing the dealer did not understand that clause. What is your response to that? |
| Olson | My response to that is that I think many people were not legally trained, don’t understand the vast majority of what is in this contract. My guess is that if you asked that dealer about everything other than the negotiable terms of price and interest, they probably don’t understand that either, even though that language is required by statute.  |
| Liu | But counsel, I mean you began your rebuttal by saying let’s be practical. So I hear in the last two sentences that acknowledgment of the practicality here, which is that, look, I mean these are complicated documents that neither side really deeply understands in the moment of the transaction. Don’t you think that is a fair rendition of a reality here? |
| Olson | I think that’s a fair rendition of reality in many, many contexts. I don’t think most people understand the car rental contract that they signed at the airport. |
| Liu | All right, so if that is the case, then why is there not a judicial rule in leasing some of these possible excesses? I am not going to predetermine this particular one, but I am just saying why do you, you are asking us to stretch to the outermost limit of parties’ discretion in a situation where you candidly acknowledge which I think you must that the reality is that the parties neither side really know what they are doing.  |
| Olson | Well |
| Liu | That’s a really odd fit.  |
| Olson | Well, there are two answers to that. The first answer is the supremacy clause and the Federal Arbitration Act says that arbitration provisions are not to be disfavored. So, just because, to say, well, everyone doesn’t completely understand but it’s an arbitration. |
| Liu | That’s not the argument. This would be an argument that would apply to any contract. |
| Olson | I agree, and , and I would suggest that many people do not fully understand foreclosure rights.  |
| Liu | Or privacy waivers. Or any number of things. |
| Olson | I agree. But that, the standard that we apply to all of those is the same standard that we have to apply here, which is what is beyond the reasonable realm of what an expected result might be. Not a perfect result. |
| Werdegar | Describe whatever standard we might describe about unconscionability. Is there any place for us to remand the case to the trial court to apply that standard to the facts of this case? |
| Olson | I think that the plaintiff had their shot and that the record here this does not meet the level of unconscionability. |
| Werdegar | Okay, so, the trial court though didn’t rule on that.  |
| Olson | The trial court did not rule, did not reach unconscionable.  |
| Werdegar | Would it be for us to apply our standard or would it be for us to send it to the trial court to apply whatever standard we are taking? |
| Olson | Well, it is a question of law. This |
| Werdegar | The standard is the question of law, but applying it to the facts of this case. |
| Olson | I think applying it to the record of the case is also an issue of law. I just don’t think there is a record that supports unconscionability.  |
| Werdegar | I understand that. But insofar as who would make that determination, would there be new evidence taken below? |
| Olson | If it were remanded, arguably there could be new evidence. I don’t think this court has remanded other than in *Sonic-Calabasas.* Generally it has determined and with one exception when it has found unconscionability it is severed. |
| Werdegar | In this case once we determine what our standards are going to be you are saying on this record we can then apply it to the provisions that have been discussed. |
| Olson | Yes, I believe so.  |
| Werdegar | And make a decision of law whether under the facts of this case that they are unconscionable, however we define it. |
| Olson | Yes, I believe so. And on the issue of severance you know if we end up there there is only one case in which this court has not severed and that was *Armandarez*, and I would suggest that *Armendarez* was different because it limited substantive remedies. |
| Liu | Could I just follow on. Justice Werdegar’s question? Is there a difference you think between, suppose we agreed with you, that the terms on their face do not make out an unconscionable contract. But apropos Justice Kruger’s questions here, a friend on the other side, we don’t know exactly how these terms play out in practice so there is a sort of as applied versus on its face distinction, some of your arguments, both of your, both sides here, have been arguing about the terms themselves. Without any elaboration of what happens in actual practice with respect of these terms. |
| Olson | I think in the broad sense that that may be a troublesome road that every time one has a motion to compel arbitration there is then going to be a three or six months of trial or discovery as to how this particular clause is operating within this particular industry, I am not sure that there is a practical way to do what you are suggesting.  |
| Liu | Isn’t that important to know? |
| Olson | I think it is important to know but I think |
| Liu | In fact, I mean, on what, what, apart from a, a contract that is drafted so badly that it’s just unconscionable on its face, isn’t the crux of the matter how these things are implemented in practice. |
| Chief Justice | Mr. Olson you may answer that question, but then your time is expired. |
| Olsen | Thank you, Your Honor. It’s a practical conundrum because then you one completely defeats the whole idea of arbitration as a quick and less expensive remedy if every arbitration clause faces someone saying it is unconscionable, now we need a three-month trial figuring out how this applies throughout the industry. I do think that the question, that brings back to the question of are these terms on their face within the realm of what reasonable people, rational people, a result that could reach, not the result they necessarily would reach, but a result they could reach, and I think these terms fall within that broad category. |
| Chief Justice | Thank you counsel, thank you Mr. Rosen and Mr. Olson. |
| Olson | Thank you, Your Honors. |
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