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NOTES

Where Can Unconscionability Take Arbitration? Why the Fifth Circuit's Conscience Was Only Partially Shocked

*Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*¹

I. INTRODUCTION

As a means of countering the pro-arbitration stance taken by the Supreme Court, a number of lower courts have chosen to police the fairness of arbitration clauses in contracts by using the doctrine of unconscionability.² The Supreme Court has authorized the use of generally applicable contract law principles—including unconscionability—to invalidate arbitration agreements.³ Unconscionability provides courts with a flexible tool for coming to the rescue of parties who, if the court is sufficiently shocked, find themselves entangled in unfair arbitration clauses. This Note addresses the Fifth Circuit's use of unconscionability in respect to a particularly one-sided arbitration clause, and examines the court's failure to utilize unconscionability regarding other aspects of the contracts' arbitration clauses.

II. FACTS & HOLDING

In September 2001, a group of cellular telephone customers filed suit in Louisiana state court against four service providers and their respective local agents—Cingular Wireless (Cingular), Sprint Spectrum (Sprint), Centennial Beauregard Cellular (Centennial) and Telecorp Communications, Inc.⁴ The original suit included causes of action for breach of contract and violation of the Louisiana Unfair Trade Practices Act.⁵ Although some of the contracts included arbitration provisions and some did not, when the plaintiffs began to pursue claims that involved contracts containing arbitration clauses, Cingular, Sprint and Centennial filed motions to compel arbitration and stay the judicial proceedings.⁶

1. 379 F.3d 159 (5th Cir. 2004).

2. Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 802 (2004).

3. *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996).

4. *Iberia*, 379 F.3d at 162. However, Telecorp Communications was not a part of the appeal before the Fifth Circuit. *Id.* at 162 n.1.

5. *Id.* See also LA. REV. STAT. ANN. §§ 1401-1430 (West 2003).

6. *Iberia*, 379 F.3d at 162.

In 1999, the Iberia Parish Sheriff's Department, using Walter Dodge as its purchasing agent, opened a multi-telephone account with Centennial.⁷ The original agreement did not contain any arbitration clauses.⁸ During the next few years, extra phones were added periodically including a final phone added on October 24, 2002.⁹ To add this phone to the existing plan, Dodge signed a standard-form service agreement.¹⁰ The back of the form included an arbitration clause which stated:

Dispute Resolution; Waiver of Trial by Jury; Waiver of Class Actions— Please read this section carefully. It affects rights that you may otherwise have. It provides for resolution of *most disputes* through arbitration instead of court trials and class actions *You agree that instead of suing in court, you will arbitrate any and all disputes and claims arising out of this Agreement*¹¹

All other clauses contained in the arbitration provision used "you and we" language.¹² Plaintiff Sid Hebert, Sheriff of Iberia Parish, sued Centennial as a representative of the sheriff's department.¹³ Both Dodge and Hebert testified that they did not negotiate the terms and were not told of the arbitration clause, which had not been included in any of the previous agreements with Centennial.¹⁴ The Centennial contract also contained a severability clause the court deemed inadequate to repair the damage the arbitration clause had caused to the contract.¹⁵

As to the agreements with Cingular, plaintiffs Iberia Credit Bureau, Inc., Constance Louviere, and Wardell Gerhardt all signed standard form contracts, which explicitly incorporated Cingular's Terms and Conditions.¹⁶ The Terms and Conditions were printed on the back of the form or on a separate pamphlet that accompanied the form. The plaintiffs all signed the form agreeing to be bound to the Terms and Conditions.¹⁷ The agreement provided that "any and all disputes"

7. Iberia Credit Bureau, Inc., v. Cingular Wireless LLC, 379 F.3d 159, 162 (5th Cir. 2004).

8. *Id.*

9. *Id.* at 163.

10. *Id.*

11. *Id.* at 168 (emphasis added).

12. *Id.* The Centennial agreement continued as follows:

Even if applicable law provides otherwise, *you and we each waive* our right to a trial by jury and to participate in class actions By this agreement, *both you and we* are waiving *certain rights* to litigate disputes in court. If for any reason this arbitration clause is deemed inapplicable or invalid, *you and we both waive*, to the fullest extent allowed by law, any claims to recovery punitive or exemplary damages and any right to pursue any claims on a class or consolidated basis or in a representative capacity.

Id. (alteration in original).

13. *Id.* at 162.

14. *Id.* at 163.

15. *Id.* at 171. Centennial's severability clause provided that "if any portion of this arbitration agreement is determined by a court to be inapplicable or invalid, the remainder shall still be given full force and effect." *Id.* The court determined that it would be impossible to strike a "certain offensive term" from an otherwise valid agreement to arbitrate, which is the purpose of severability clauses. *Id.* In order to remedy the situation, the contract would have to be redrafted and new provisions added including the duty of Centennial to arbitrate. *Id.*

16. *Id.* at 163.

17. *Id.*

would be arbitrated, and that the parties “agree that no arbitrator has the authority to . . . order consolidation or class arbitration” and that neither party “may disclose the existence, content or results of any arbitration.”¹⁸ Furthermore, the Terms and Conditions also provided that Cingular could change any terms, conditions, rates, or fees at any time, although a customer had the option to cancel service if such a change was implemented, without being subject to an early termination fee.¹⁹ Lastly, the Terms and Conditions contained a severability clause.²⁰

Similarly, Sprint, in its agreement with Charles Landry, provided that “any claim, controversy or dispute” would be settled through arbitration as prescribed by the Terms and Conditions.²¹ Although the Terms and Conditions did not call for a signature, they were deemed accepted upon activation of the customer’s account.²² Sprint’s Terms and Conditions provided that no discovery would be permitted in the arbitration, except that the parties would exchange (thirty days prior to their hearing) the materials they were submitting to the arbitrator.²³ In addition, Sprint reserved the right to change the agreement at any time by publishing new Terms and Conditions, which were considered accepted when the customer paid a bill or used the Sprint services after the date of the change.²⁴ Finally, like the other companies, the Sprint agreement included a severability clause.²⁵

The companies removed the case from Louisiana state court to the United States District Court for the Western District of Louisiana on the basis of diversity.²⁶ Once in the district court, the companies moved to compel arbitration of the dispute through the agreed-upon arbitration clauses and the Federal Arbitration Act (FAA).²⁷ The district court denied the motions to compel arbitration on the grounds that the plaintiffs had not agreed to the arbitration clauses.²⁸ The court found that the agreements placed “all the benefit to the company and none to the consumer” thereby making them unconscionable under Louisiana law.²⁹ The companies brought an interlocutory appeal to the Fifth Circuit.³⁰

The Fifth Circuit affirmed the district court’s denial of Centennial’s motion to compel arbitration.³¹ In keeping with recent Louisiana appellate cases, the court

18. *Iberia Credit Bureau, Inc., v. Cingular Wireless LLC*, 379 F.3d 159, 163 (5th Cir. 2004).

19. *Id.* at 163-64.

20. *Id.* at 164.

21. *Id.*

22. *Id.*

23. *Id.* at 164 n.5. The court did not rule on this issue because Plaintiff Landry failed to raise this matter in the district court, and it could not be raised for the first time on appeal. *Id.* at 176.

24. *Id.* at 164.

25. *Id.*

26. *Id.* at 162.

27. *Id.*

28. *Id.* at 165.

29. *Id.*

30. *Id.* The Fifth Circuit has appellate jurisdiction over this interlocutory appeal pursuant to 9 U.S.C. § 16(a)(1), which “permits immediate appeals of district court orders denying requests to compel arbitration and to stay litigation.” *Id.* (citing *Am. Heritage Life Ins. Co. v. Lang*, 321 F.3d 533, 536 (5th Cir. 2003) and 9 U.S.C. § 16 (2004)). Plaintiffs filed a motion to dismiss the appeal, arguing that the Fifth Circuit lacks jurisdiction whenever the district court determines that the parties did not form a binding agreement to arbitrate. *Id.* However, the district court’s decision in this case being based on unconscionability and failure of mutual assent, combined with the statutory basis, resulted in the denial of the plaintiff’s motion to dismiss. *Id.*

31. *Id.* at 171.

found that the “one-sidedness of the duty to arbitrate raises a serious question as to the clause’s validity” when an arbitration clause binds only the customer to arbitration and leaves a loophole for the party that crafted the clause to pursue arbitration or to litigate the claim.³² However, the court found that the district court erred in denying Cingular’s and Sprint’s motions to compel arbitration.³³ In doing so, the court failed to find that any of the fine print arguments, change-in-terms clauses, bar on class actions and confidentiality agreements rose to the level to warrant the use of unconscionability.³⁴

Carefully noting that federal courts must exercise extreme caution when electing to invalidate arbitration clauses, the Fifth Circuit used the doctrine of unconscionability to invalidate a one-sided arbitration agreement, as to defendant, Centennial. Although the court declined to be so generous regarding the other clauses used by defendants, Cingular and Sprint.

III. LEGAL BACKGROUND

A major goal of the FAA was to eliminate the judicial system’s historic hostility toward arbitration agreements.³⁵ Section 2 of the FAA requires courts to treat arbitration agreements the same as any other contract. This requirement also applies to a court’s determination of unconscionability.³⁶ Section 2 requires that arbitration agreements “be enforced unless they are invalid under principles of state law that govern all other contracts.”³⁷ The United States Supreme Court, in *Doctor’s Associates v. Casarotto*, authorized that “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening section 2 [of the FAA].”³⁸

Simply because a court uses a general principle of contract law, such as unconscionability, to void an arbitration clause, does not guarantee that the state law decision is valid under the FAA.³⁹ Essentially, state courts cannot target arbitration provisions where they would not otherwise apply the same legal theory to other contract provisions.⁴⁰ In the little bit of guidance provided, the Supreme Court has warned lower courts that in examining arbitration agreements, the courts may not “construe that agreement in a manner different from that in which it otherwise construes non arbitration agreements under state law.”⁴¹ Similarly, the Court has also prohibited lower courts from concluding that “a contract is fair

32. *Iberia Credit Bureau, Inc., v. Cingular Wireless LLC*, 379 F.3d 159, 169 (5th Cir. 2004).

33. *Id.* at 162.

34. *Id.* at 172-76.

35. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995).

36. 9 U.S.C. § 2 (2004). The language of Section 2 states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract.

Id.

37. *Iberia*, 379 F.3d at 166.

38. 517 U.S. 681, 687 (1996). The court noted that, as an example, courts could not declare the clauses invalid unless they contained a special notice on the front page. *Id.*

39. *Iberia*, 379 F.3d at 167.

40. *Id.*

41. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause."⁴²

The Supreme Court's treatment of arbitration has not been consistent since the passage of the FAA in 1925.⁴³ From 1926-1960, arbitration received "only partial judicial support" with courts carving out exceptions to arbitration.⁴⁴ It was not until the 1960s and 1970s that the Court's support for arbitration began to slowly burgeon, albeit with some occasional setbacks.⁴⁵ By the mid-1980s, "a series of cases . . . changed both the 'meaning' of the FAA" and how it was applied.⁴⁶ This trend expressed the Court's move toward supporting arbitration as a means of dealing with what was perceived as the backlog of litigation in the courts.⁴⁷ In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, the Court justified the trade-off between arbitration and litigation, extolling the benefits of arbitration, noting that the plaintiff "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."⁴⁸ In the landmark arbitration case *Southland Corp. v. Keating*, the Supreme Court definitively held that the FAA applied in state as well as federal court.⁴⁹ Further,

42. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

43. Stempel, *supra* note 2, at 769, 773.

44. *Id.* at 773. See *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202-03 (1956). The *Bernhardt* court held that the FAA only applied to cases in federal court and that state courts were not bound to compel arbitration. *Id.* at 203. The court expressed its fear that, "If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the [s]tate." *Id.* Earlier, in *Wilko v. Swan*, the court found that a claim brought pursuant to the Securities Act of 1933 was not subject to arbitration. 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485 (1989). The Court, even "[r]ecognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies," concluded "that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the [Securities] Act." *Id.* at 438.

45. Stempel, *supra* note 2, at 773-775. See *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). In particular, the three cases of the Steelworker's Trilogy were considered a boost for arbitration because the Court held that uncertainties in the language of arbitration provisions were to be constructed in favor of arbitration. Stempel, *supra* note 2, at 773. But see *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56 (1974) (holding that the petitioner was not precluded from exercising his independent statutory rights under Title VII after an arbitrator had already ruled on the issue, and noting that federal courts were a better forum than arbitration for Title VII disputes).

46. Stempel, *supra* note 2, at 776.

47. *Id.* See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983). The *Moses H.* court noted that, "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Id.* See also *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (holding that in enacting Section 2 of the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration"); *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987) (invoking the Supremacy Clause to find that the FAA preempted a California statute that required a judicial forum for resolving wage disputes); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485 (1989) (holding that the FAA applied to statutory claims).

48. *Mitsubishi Motors Corp., v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

49. *Keating*, 465 U.S. at 10, 16 (referring to the FAA and noting that "[i]n creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements"). *Id.*

the Court noted that lower courts must heed the strong federal policy favoring arbitration and must resolve all ambiguities in favor of arbitration.⁵⁰ Throughout the 1990s and into the next decade, the Court continued to support arbitration provisions, “finding little that might invalidate [them].”⁵¹

In the late 1990s, while the Supreme Court adhered to its pro-arbitration stance, some lower courts began to apply general contract law as a way “of determining the force of arbitration clauses.”⁵² In 2000, the California Supreme Court decided *Armendariz v. Foundation Health Psychcare Services*,⁵³ which “is perhaps the best known of [the] new generation of cases.”⁵⁴ In *Armendariz*, the court determined that a one-sided arbitration provision was unconscionable in that it required employees—but not the employer—to arbitrate.⁵⁵ The California Supreme Court based its holding in *Armendariz* on lack of mutuality, but also named a number of other factors that could be examined to determine unconscionability, including: limitation of remedies, adequate discovery, judicial review of the arbitration decisions and payment of arbitration fees.⁵⁶ Although *Armendariz* was not the first case⁵⁷ to apply unconscionability to invalidate an arbitration agreement, it is considered one of the more notable cases at the forefront of this trend.⁵⁸

The California Supreme Court’s decision in *Armendariz* serves as a good example of the trend among other courts to use unconscionability as a way to invalidate arbitration clauses. For instance, the Ninth Circuit looked to *Armendariz* when deciding *Ingle v. Circuit City Stores*, concluding that, under California law, a one-sided contract to arbitrate between an employer and an employee “raises a rebuttable presumption of substantive unconscionability.”⁵⁹ This ruling suggests

50. *Id.* at 16.

51. Stempel, *supra* note 2, at 782. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (holding that class treatment of claims are permitted if the arbitrator determines such and the treatment is not prohibited by the text itself); *Pacificare Health Sys. v. Book*, 538 U.S. 401 (2003) (reversing the Eleventh Circuit’s decision which held that an arbitration agreement may not preclude arbitrators from considering a possible award of treble damages); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (giving the FAA a broad reading and enforcing an arbitration clause by finding that it applied to all disputes involving commerce and that language about interstate commerce in the FAA was not an exemption for states to apply anti-arbitration state laws); *Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 687-88 (1996) (reversing a judgment of the Montana Supreme Court and finding that it was in direct conflict with the FAA and that the FAA preempted conflicting state law).

52. Stempel, *supra* note 2, at 799.

53. 6 P.3d 669 (Cal. 2000).

54. Stempel, *supra* note 2, at 799-800.

55. *Armendariz*, 6 P.3d at 888-89.

56. See *id.* at 682-89.

57. *Broemmer v. Abortion Servs.*, 840 P.2d 1013 (Ariz. 1992) (en banc). The Arizona Supreme Court used unconscionability as a means of invalidating an arbitration agreement coupled with the coercive setting in which the agreement was signed, but declined to analyze the unconscionability of the contract specifically. *Id.* at 1017.

58. Stempel, *supra* note 2, at 799-800.

59. 328 F.3d 1165, 1174 (9th Cir. 2003). The Ninth Circuit went on to note that “[u]nless the employer can demonstrate that the effect of a contract to arbitrate is bilateral—as is required by California law—with respect to a particular employee, courts should presume such contracts substantively unconscionable.” *Id.* See also *Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256, 263 (3d Cir. 2003) (refusing to enforce one way trial de novo provisions in an arbitration clause drafted only in favor of the insurer if an award was in excess of \$20,000, and determining that such provisions violated public policy and were thus unconscionable); *McMullen v. Meijer, Inc.*, 337 F.3d 697, 705-06 (6th Cir. 2003) (finding that an employer’s exclusive control over the pool of potential arbitrators rendered the forum for arbitration so one-sided that it effectively prevented the employee from vindicating her statutory rights

one extreme of a court's willingness to take unconscionability to a new level. On the other hand, the Third Circuit, in *Harris v. Green Tree Financial Corp.*, found that an arbitration clause that bound only the plaintiffs was still enforceable because as long as consideration was present, mutuality was not a requirement.⁶⁰ Reflecting a different view, the Alabama Supreme Court determined that lack of mutuality is only a factor to be considered, among other things, in determining whether an arbitration clause is unconscionable.⁶¹

Unconscionability is generally recognized as an acceptable means of invalidating an arbitration provision. However, courts certainly vary from jurisdiction to jurisdiction in their use of the unconscionability doctrine to invalidate arbitration agreements.⁶²

IV. INSTANT DECISION

In the instant case, the Fifth Circuit was charged with determining whether four arbitration clauses were unconscionable and thereby unenforceable.⁶³ In determining whether unconscionability could be used to invalidate any of the arbitration clauses, the court noted that the clauses could not be subjected to any greater scrutiny than any other contract provision would normally receive under the FAA.⁶⁴ Thus, the court entered the analysis looking for violations under general provisions of Louisiana contract law.⁶⁵ The court also noted that although it assumed that state courts would follow federal law, as a federal court, it must be particularly careful "when applying state decisions that strike down arbitration clauses as unconscionable."⁶⁶

In examining whether an arbitration agreement might be unconscionable, both state and federal law must be considered.⁶⁷ The Fifth Circuit began this inquiry by examining the substantive Louisiana state law that governs unconscion-

under Title VII, thereby nullifying the enforcement of the pre-dispute agreement to arbitrate the statutory claims); *Ting v. AT&T*, 319 F.3d 1126, 1150-52 (9th Cir. 2003), *aff'd in part and rev'd in part*, 319 F.3d 1126 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 53 (2003) (holding that the legal remedies portion of the agreement was unconscionable under California law); *Samek v. Liberty Mut. Fire Ins. Co.*, 793 N.E.2d 62, 65-66 (Ill. Ct. App. 2003).

60. *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 182-84 (3d Cir. 1999). The Third Circuit also determined that the clause was not unconscionable because it was on the back side of the document or because the parties did not have equal bargaining power. *Id.* at 182.

61. *Ex parte Parker*, 730 So. 2d 168, 171 (Ala. 1999). Still, the court found that lack of mutuality of remedy alone was not sufficient to support a claim of unconscionability. *Id.* See also *Doctor's Assocs. v. Stuart*, 85 F.3d 975, 980-81 (2d Cir. 1996) (holding that there was no fraudulent inducement into arbitration and that the agreement was not unconscionable); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148, 1151 (7th Cir. 1997) (holding that a pre-printed insert that included an arbitration clause created an agreement to arbitrate when the package was opened and the customer used the product); *Farrell v. Convergent Communs., Inc.*, 1998 U.S. Dist. LEXIS 17314 at *14 (N.D. Cal. Oct. 29, 1998) (holding that adequate consideration existed to support an agreement to arbitrate when an employer's promise to continue to employ former employee was made in exchange for former employee's assent to the arbitration agreement).

62. *Stempel*, *supra* note 2, at 801.

63. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 165 (5th Cir. 2004).

64. *Id.* at 166.

65. *Id.* at 167.

66. *Id.*

67. *Id.* at 166.

ability in contracts.⁶⁸ Although there are no statutory provisions directly addressing the issue in the Louisiana Civil Code, Louisiana case law does recognize that contracts possessing both “adhesionary formation and unduly harsh substance” can be invalidated due to unconscionability.⁶⁹

The Fifth Circuit took the various clauses and grouped them together, so that they could examine the similar provisions in each defendant’s agreement.⁷⁰ Because it found Centennial’s one-sided clause the most troubling, the court examined it separately from the others.⁷¹ The court was particularly troubled by the language that set forth the consumer’s duty to arbitrate which said “you agree” that “you will arbitrate,” while the other sentences refer to “you and we.”⁷² The court notes that although Centennial argued in its brief that both parties were bound to arbitrate, the “plain meaning” binds only the customer.⁷³ The court was further convinced by the sentence that stated that “most disputes between the parties will be resolved through arbitration,”⁷⁴ and noted that “[i]f both parties were required to arbitrate ‘any and all disputes’ as Centennial claims, then one would wonder why the contract said that only ‘most disputes’ not *all* disputes, are subject to resolution through arbitration.”⁷⁵ The court rejected Centennial’s answer that the term “most” was used as a qualifier “in order to take into account the possibility that a customer could, for example, bring a tort suit after randomly being hit [by a company van].”⁷⁶

In looking to the applicable Louisiana law, the *Iberia* court noted that a Louisiana appellate case *Sutton’s Steel & Supply, Inc. v. BellSouth Mobility, Inc.*⁷⁷ was “on all fours with the present case.”⁷⁸ *Sutton’s* involved a standard-form cellular phone contract, similar to the one in the instant case, which generally required disputes to be arbitrated but expressly carved out an exception for attempts to collect debts from the customer, which BellSouth could pursue in court.⁷⁹ The court refused to enforce the clause.⁸⁰ Similarly, the court looked to another Louisiana appellate court case that found a one-sided arbitration clause invalid because it was written in such small print so as to be considered “unduly burdensome” to the consumer.⁸¹

The Fifth Circuit examined these two Louisiana appellate cases, and found that the district court did not apply different rules.⁸² The court also noted that the decision in the instant case follows in the same footsteps of *Banc One Acceptance*

68. *Id.*

69. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir. 2004).

70. *Id.* at 168.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* (emphasis added).

76. *Id.* at 169.

77. 776 So. 2d 589 (La. Ct. App. 2000).

78. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 169 (5th Cir. 2004).

79. *Sutton’s*, 776 So. 2d at 596-97.

80. *Id.* at 597.

81. *Posadas v. Pool Depot, Inc.*, 858 So. 2d 611, 614 (La. Ct. App. 2003), *writ denied*, 857 So. 2d 502 (La. 2003).

82. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 170 (5th Cir. 2004).

Corp. v. Hill,⁸³ in which the Fifth Circuit applied a Mississippi unconscionability holding where the state decision did not appear to discriminate against arbitration.⁸⁴

However, none of the other issues raised by other plaintiffs rose to a level to be considered unconscionable by the court.⁸⁵ Regarding the claims against both Cingular and Sprint, the Fifth Circuit reversed and remanded to the district court for entry of an appropriate order compelling arbitration.⁸⁶

First, the court rejected the “fine print” argument that the arbitration clauses were invalid because they were in small, hard-to-read print.⁸⁷ The court reasoned that the type size used for the arbitration clauses was no different than that used for the rest of the contract.⁸⁸ Likewise, the court found that although all of the contracts at issue contained a clause permitting the companies to change the terms of the agreement, these provisions did not render the agreements illusory or make the arbitration clause unconscionable.⁸⁹ Interestingly, a Louisiana appellate court had recently determined that a change-in-terms provision *did* render that contract’s arbitration clause one-sided and therefore unconscionable.⁹⁰ The Fifth Circuit, however, declined to follow the Louisiana appellate court’s reasoning and determined that the “notice of the change in terms can be understood as an invitation to enter into a relationship governed by the new terms” and that the arbitration clause as it stood was not unconscionable.⁹¹

Regarding consolidation or class action, the Fifth Circuit found that the provisions barring the arbitrator from ordering such did not leave the plaintiffs without remedies or oppress them to the extent that the clause would be considered unconscionable.⁹² In this discussion, the court diligently noted that “both federal and Louisiana policy favor arbitration as a method of dispute resolution.”⁹³ Moreover, the court noted that “a highly relevant” factor in their decision was the provision in the Louisiana Unfair Trade Practices Act (LUTPA) that bars individuals from bringing class actions.⁹⁴ The court concluded that individuals were not oppressed at an unconscionable level or left entirely without a remedy because LUTPA also permits the state attorney general to sue on behalf of the state.⁹⁵

Lastly, although Cingular’s contract included terms stating that the existence and result of any arbitration must be kept confidential, and the court agreed that the requirement is probably more favorable to the cellular companies than to the customers, the court still ruled that the plaintiffs failed to demonstrate that the requirement was “so offensive as to be invalid.”⁹⁶ Although noting that legal authority exists for finding confidentiality provisions unconscionable, the court

83. 367 F.3d 426 (5th Cir. 2004).

84. *Iberia*, 379 F.3d at 170.

85. *Iberia*, 379 F.3d at 172-74.

86. *Id.* at 176.

87. *Id.* at 172.

88. *Id.*

89. *Id.* at 173.

90. *Id.* at 172. See *Simpson v. Grimes*, 849 So. 2d 740 (La. Ct. App. 2003).

91. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 173-74 (5th Cir. 2004).

92. *Id.* at 174-75.

93. *Id.* at 174.

94. *Id.* at 174-75. See LA. REV. STAT. § 51:1409 (West 2004).

95. *Iberia*, 379 F.3d at 175.

96. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004).

concluded that an attack on the confidentiality provision is “an attack on the character of arbitration itself.”⁹⁷ The court adhered to the stance that confidentiality can help or hurt the plaintiff and refused to find that provision unconscionable.⁹⁸

In the instant case, the Fifth Circuit ultimately affirmed the district court’s use of unconscionability in only one scenario with Centennial—the one-sided arbitration clause.⁹⁹ The court used state law cases to apply general contract principles to invalidate only the Centennial arbitration clause.¹⁰⁰ The court declined to find the fine print, change-in-terms clauses, bar on class actions, or required confidentiality aspects of any of the arbitration agreements—between customers and the remaining two defendants, Cingular and Sprint—unconscionable, even in the midst of legal support to do so.¹⁰¹

V. COMMENT

In *Iberia*, the Fifth Circuit was presented with the opportunity to use Louisiana contract law in order to find arbitration provisions from various contracts unconscionable and unenforceable.¹⁰² However, only one arbitration clause at issue—the one-sided agreement with Centennial—managed to shock the conscience of the court enough for it to be rendered invalid.¹⁰³ As the opinion opens, the court appears willing and eager to use unconscionability as a tool to rescue unassuming plaintiffs from the snares of “unconscionable” arbitration agreements. However, this generosity abruptly ends when the court, albeit appropriately, flatly rejects the fine print argument.¹⁰⁴ The court continues, extolling the benefits of arbitration while dismissing the bar on class action and confidentiality arguments—both legal issues that are far from settled.¹⁰⁵ Nevertheless, this seemingly schizophrenic attitude is simply an example where federal appellate courts find themselves—caught between the opportunity to affirm lower courts’ use of un-

97. *Id.*

98. *Id.*

99. *Id.* at 169.

100. *Id.* at 166-71.

101. *Id.* at 171-76.

102. *Id.* at 171-75. The reasons include: one-sidedness, fine print, change-in-terms clauses, bars on class actions and confidentiality. *See id.*

103. *Id.* at 171.

104. *Id.* at 172.

105. *Id.* at 174-76. Regarding the bar on class actions, the court noted the split of authority and referred to a recent decision within the circuit that “rejected an argument that an arbitration clause prohibiting plaintiffs from proceeding collectively was unconscionable under Texas law.” *Id.* at 174. *See Carter v. Countrywide Credit Indus.*, 362 F.3d 294, 298, 301 (5th Cir. 2004). For a case ruling in the opposite, the court also referenced *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003), *Ting v. AT&T*, 319 F.3d 1126, 1150-52 (9th Cir. 2003), *aff’d in part and rev’d in part*, 319 F.3d 1126 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 53 (2003) wherein the Ninth Circuit concluded that a class-action ban violates California’s unconscionability law. *Id.* As for confidentiality provisions, the *Ting* court also determined that “[a]lthough facially neutral, confidentiality provisions usually favor companies over individuals . . . if the company succeeds in imposing [the] gag order, plaintiffs are unable to mitigate the advantages inherent in being a repeat player.” 319 F.3d at 1151. *See Susan Randall, Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 218-219 (2004) (noting that the majority of courts find confidentiality provisions unconscionable and only a few courts have found otherwise.)

conscionability to police arbitration agreements, while being careful not to offend the Supreme Court's pro-arbitration stance.

The doctrine of unconscionability serves as an interesting tool for courts to negate arbitration clauses. Unconscionability has existed in contract law for centuries and is widely accepted.¹⁰⁶ The Uniform Commercial Code's (UCC) treatment of unconscionability is perhaps the most famous—although it fails to actually define the term.¹⁰⁷ The UCC's official comments attempt to give a little more guidance to the term, stating that in determining unconscionability, a court can look to whether “the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract The principle is one of the prevention of oppression and unfair surprise.”¹⁰⁸ Although hard to define, the abundance of case law presents an adequate indicator for what courts will generally find sufficient for a contract provision to be worthy of the term “unconscionable.”

In *Iberia*, the Fifth Circuit looked to relevant Louisiana law regarding the theory of unconscionability.¹⁰⁹ The court noted that no section of the Louisiana Civil Code directly addressed the doctrine of unconscionability or adhesionary contracts in general.¹¹⁰ Still, the court determined that Louisiana jurisprudence uniformly recognized that “an unconscionable contract or term can be thought of as lacking the free consent that the Code requires of all contracts.”¹¹¹ Furthermore, “in order to be invalidated, a provision must possess features of both adhesionary formation and unduly harsh substance.”¹¹²

Therefore, unconscionability serves as a useful tool for courts to take care of the “little guy.” One commentator suggests that, “The Supreme Court's arbitration jurisprudence, with its emphasis on formal agreement to contract terms, underplays the fairness side of contract law. When the parties . . . have disparate bargaining power, disparate knowledge, and disparate interests, both the moral and economic bases of contracting demand attention”¹¹³ Unconscionability allows courts to deal with this dilemma and introduce fairness into contracts that may have been shockingly unfair in the first place.

Prior to the increase of arbitration agreements after the passage of the FAA, unconscionability was rarely invoked by courts.¹¹⁴ Interestingly, as the number of

106. Stempel, *supra* note 2, at 792-93.

107. *Id.* at 793. Section 2-302 of the UCC reads:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

U.C.C. § 2-302 (2004).

108. U.C.C. § 2-302, cmt. n.1.

109. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir. 2004).

110. *Id.*

111. *Id.*

112. *Id.*

113. Elizabeth Thornburg, *Contracting with Torfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 LAW & CONTEMP. PROBS. 253, 269 (2004).

114. Randall, *supra* note 104, at 194.

arbitration agreements rose, so did the use of unconscionability as a means to find contracts unenforceable.¹¹⁵ The doctrine has been praised for its “flexibility and adaptability to a variety of situations.”¹¹⁶ Part of the reason why unconscionability works so well is its lack of a formal definition.¹¹⁷ This gives courts the ability to apply unconscionability on an ad-hoc basis.¹¹⁸ At the same time, this presents the opportunity for courts to use the doctrine in an unwieldy fashion, increasing the potential for invalidation based specifically on arbitration provisions, a result that would fly in the face of Section 2 of the FAA and the rule proscribed in *Doctor's Associates*.¹¹⁹

Again, the Supreme Court has not provided much guidance for lower courts in their “policing” of arbitration agreements.¹²⁰ Regarding the positive aspects of the new “situation specific” unconscionability doctrine, it gives courts an opportunity to examine arbitration clauses on the basis of their fairness to the parties, which the Supreme Court has left to the discretion of the lower courts.¹²¹ Further, as this area of law continues to develop, certain provisions of arbitration clauses that are repeatedly deemed unconscionable create categories that drafters of arbitration clauses can avoid.¹²² However, this same “pigeonholing” presents the potential for a situation in which a court may miss an arbitration clause’s fundamental unfairness because nothing in its terms matched the list of unconscionability indicators.¹²³

The *Iberia* court’s decision reflects the dilemma between using unconscionability as a rescue doctrine and staying within the confines of the FAA and the rule in *Doctor's Associates*.¹²⁴ In *Iberia*, the opportunity existed for the court to push the doctrine of unconscionability to its limits. All the court had to do was affirm the decisions of the district court, which found that all of the arbitration agreements were unconscionable for various reasons.¹²⁵ However, the Fifth Circuit did not go that far. Rather, the court carefully applied state law, as it had in *Banc One*, in order to use unconscionability only in the right set of circumstances.¹²⁶ Of all the challenged clauses in the *Iberia* decision, the court noted that only the clause drafted by Centennial possessed “a significant feature that the

115. *Id.* Randall asserts that:

[I]n 2002-2003, litigants raised issues of unconscionability in 235 cases, and courts found contracts or clauses to be unconscionable in 100 of those cases, or 42.5%. Of those 235 cases, 161, or 68.5%, involved arbitration agreements. Significantly, courts were much more likely to find arbitration agreements, [compared with] other sorts of contracts, unconscionable. Courts found 50.3% of the arbitration agreements unconscionable, as opposed to 25.6% of other types of contracts.

Id. Although it should be noted that even though federal and state courts in California “decided a significant number of these cases, a total of seventeen state courts and fifteen federal courts found provisions in arbitration agreements unconscionable.” *Id.* at 194-95.

116. *Id.* at 221.

117. *Id.* at 221-22.

118. *Id.* at 222.

119. *Id.* at 222-23.

120. Stempel, *supra* note 2, at 809.

121. *Id.*

122. *Id.* at 810.

123. *Id.*

124. See 9 U.S.C. § 2 (2004); *Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996).

125. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 165 (5th Cir. 2004).

126. See *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426 (5th Cir. 2004).

others lack” and the court correctly rendered Centennial’s one-sided arbitration clause unconscionable.¹²⁷

However, regarding the other challenged aspects of the clauses, the court backed away from its “rescue” mentality. First, regarding the “fine print” argument, the court noted that while type size would “seem to bear most directly on the question whether the contracts were formed in an adhesionsary manner . . . the type-size argument does not by itself show that the arbitration clause is invalid.”¹²⁸ Interestingly, the court failed to mention the type-size argument from *Sutton’s*, in which the Louisiana appellate court *did* determine that the type was small enough to be considered an aspect of unconscionability.¹²⁹ Instead, the *Iberia* court emphasized that the arbitration provisions were not printed in any smaller type than the rest of the contract.¹³⁰ The court again repeated, as a safeguard of sorts, that “[t]he FAA prohibits states from passing statutes that require arbitration clauses to be displayed with special prominence” (even though this was not even an issue) and that “courts cannot use unconscionability doctrines to achieve the same result.”¹³¹ Albeit likely decided correctly, the “fine print” argument served as the turning point in the opinion.

In much the same way, the Fifth Circuit shied away from following a recent intermediate state appellate court’s decision when it failed to agree with the district court that the “change-in-terms” clauses did not render the agreements either illusory or unconscionable.¹³² This is significant considering that the court could have easily followed *Simpson* in the same way that it followed both *Sutton’s* and *Simpson* regarding the one-sided clause. According to the state appellate court in *Simpson*, the change-in-terms clause (upon written mailing to the customer), allowed the securities dealer to achieve “through clever subterfuge” a one-sided arbitration clause.¹³³

The Fifth Circuit not only had before it the ruling in *Simpson*, but also some federal cases that invalidated arbitration agreements that give the company the right to alter the terms of the agreement at any time.¹³⁴ Still, the court had noted earlier that “a decision by an intermediate appellate state court ‘is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide

127. *Iberia*, 379 F.3d at 168.

128. *Id.* at 172.

129. *Id.* at 169. See *Sutton’s Steel & Supply, Inc. v. BellSouth Mobility, Inc.*, 776 So. 2d 589 (2000).

130. *Iberia*, 379 F.3d at 172.

131. *Id.*

132. *Id.* See *Simpson v. Grimes*, 849 So. 2d 740 (La. Ct. App. 2003).

133. *Simpson*, 849 So. 2d at 748.

134. See *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002) (joining with other circuits in holding that “an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement’s existence or its scope is illusory”); *Floss v. Ryan’s Family Steak Houses, Inc.*, 211 F.3d 306, 315-16 (6th Cir. 2000) (stating that an agreement is illusory when one party has reserved the right to choose the nature of the forum and alter the applicable rule and procedures without an obligation to notify the other party); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 939-40 (4th Cir. 1999) (finding that the promulgation of one-sided rules, including the employer’s right to modify the arbitration rules “in whole or in part” breached the agreement to settle claims via arbitration); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1133 (7th Cir. 1997) (Cudahy, J., concurring) (determining that it would be “unfair to impose arbitration unilaterally” on one party when the other party retained the right to alter any of the terms without notice at any time).

otherwise.”¹³⁵ Apparently the court was “convinced by other persuasive data” that the Louisiana Supreme Court, if faced with this decision, would not choose to follow the lead of *Simpson*, but would choose to enforce the arbitration provisions even if they contain change-in-terms clauses. The distinguishing factor for the court in this decision was that the change-in-terms clauses required some sort of notice to the consumers.¹³⁶ The court determined that this was sufficient to prevent the terms of the contract from being considered illusory or unconscionable.¹³⁷

The court chose not to use unconscionability in this circumstance. Although there was precedent on both sides, it is likely that the court was fearful of offending Section 2 of the FAA. The court noted the defendant’s point that “the economy is saturated with contracts containing change-in-terms provisions [similar to those] involved here.”¹³⁸ Thus, for the court to strike a change-in-terms clause that dealt with an arbitration provision, it would need to be prepared to strike *all* change-in-terms provisions, since under Section 2 of the FAA a court cannot single out arbitration provisions for stricter scrutiny.¹³⁹ Not surprisingly, the Fifth Circuit was not prepared to make such a ruling. However, this seemingly schizophrenic behavior is really an example of the court using unconscionability responsibly. This is an example of the situation that appellate courts, especially federal appellate courts, find themselves in. They are left to reign in lower court rulings where unconscionability can tend to run amok, reserving the use of unconscionability for only the most dire circumstances. Unless the Supreme Court gives some definitive guidance on some of the particulars of these issues, this is the position in which appellate courts will continue to find themselves. Still, that may not necessarily be a bad thing. A bright line list of factors in arbitration clauses that have the potential to be found unconscionable by the Supreme Court could prove more detrimental than helpful.¹⁴⁰ At least without particulars from the Supreme Court, appellate courts can afford to be more lenient with the doctrine when they deem it appropriate.

However, with regard to class actions, the Fifth Circuit in *Iberia* uses an escape hole to avoid this issue.¹⁴¹ Granted, the court again has little guidance from the Supreme Court on class-wide arbitration. The Supreme Court had the opportunity in *Green Tree Financial Corp. v. Bazzle*¹⁴² to settle the debate over class-wide arbitration, but failed to do so.¹⁴³ Although there is authority on both sides of this debate as well, the *Iberia* court, in keeping with earlier precedent from within the circuit, declined to find that the bar on class actions rendered the arbi-

135. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 169 (5th Cir. 2004) (quoting *Tex. Dep’t of Hous. & Cmty. Affairs v. Verex Assurance, Inc.*, 68 F.3d 922, 928 (5th Cir. 1995)).

136. *Id.* at 173.

137. *Id.* at 173-74.

138. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 173 (5th Cir. 2004).

139. 9 U.S.C. § 2 (2004).

140. See generally Stempel, *supra* note 2, at 809-10.

141. See generally *Iberia*, 379 F.3d at 174-76.

142. 539 U.S. 444 (2003).

143. See Jonathan R. Bunch, Note, *To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration*, 2004 J. DISP. RESOL. 259, 266 (2004). In *Bazzle*, the Supreme Court, in a plurality opinion, vacated and remanded the decision of the South Carolina Supreme Court, holding that the language in the arbitration agreement indicated that the parties agreed to have the matter decided by an arbitrator. *Id.* at 266.

tration clause invalid.¹⁴⁴ The court hung its hat on the fact that LUTPA does not permit individuals to bring class actions, but allows the state attorney general to sue on behalf of wronged consumers.¹⁴⁵ Here, the court determined that because the consumers had a remedy available (if the attorney general did choose to intervene), the clause failed to rise to the level of being unconscionable.¹⁴⁶

This is yet another example of the Fifth Circuit's seemingly schizophrenic attitude about protecting the unassuming consumer. It seems as if there is more to the court's argument than what appears in the opinion. If this is the case, the court should rule definitively on this issue instead of using the LUTPA issue as a means of bolstering the court's argument. There are currently serious debates about the merits of class-arbitration.¹⁴⁷ The court touches on the plaintiffs' arguments that "the bar on collective proceedings has the effect of immunizing the defendants from low-value claims . . . the arbitration clause is therefore not so much an alternative method of dispute resolution as it is a system for avoiding liability all together."¹⁴⁸ In the end, the court defers to the argument that both federal and Louisiana policy favors arbitration.¹⁴⁹ Furthermore, the court justified the potential for unfairness saying, "the fact that certain litigation devices may not be available in any arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition.'"¹⁵⁰ Because the Fifth Circuit had recently rejected an argument that an arbitration clause barring class action was unconscionable, the court found itself bound by this recent precedent.¹⁵¹ Without examining the pros and cons of class-arbitration, it can be argued that at least the Fifth Circuit has made a definitive ruling on the subject that a bar on class actions will not rise to the level of unconscionability for the court to strike it.¹⁵² However, considering the national scope of arbitration agreements (especially regarding consumer contracts), it is unnerving for the Ninth Circuit to have a completely different rule of law, where an arbitration agreement's bar on class-wide relief is considered unconscionable under California law.¹⁵³ Therefore, definitive guidance from the Supreme Court—at least regarding class-wide arbitration—would be helpful.

By the time the *Iberia* court reached the discussion regarding confidentiality in arbitration, it appears it had become decidedly pro-arbitration. The court overturned the district court's decision, finding that "[w]hile the confidentiality requirement is probably more favorable to the cellular provider than to [the] customer, the plaintiffs have not persuaded us that the requirement is so offensive as

144. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004).

145. *Id.* at 174-75.

146. *Id.* at 175.

147. See Jean R. Sternlight & Elizabeth J. Jensen, *Mandatory Arbitration: Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 85-99 (2004) (finding bars on class actions in arbitration clauses problematic on various levels including ineffective administrative enforcement actions and lack of feasibility for consumers to pursue remedy individually and discussing the argument that class action prohibitions are economically efficient).

148. *Id.* at 174.

149. *Id.*

150. *Id.*

151. *Id.* See *Carter v. Countrywide Credit Indus. Inc.*, 362 F.3d 294 (5th Cir. 2004).

152. *Iberia*, 379 F.3d at 174-75.

153. See *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003), *aff'd in part and rev'd in part*, 319 F.3d 1126 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 53 (2003).

to be invalid.”¹⁵⁴ The court took offense to the challenge regarding the confidentiality clause, calling it an “attack on the character of arbitration itself.”¹⁵⁵ Curiously, there is significant authority finding confidentiality provisions unconscionable.¹⁵⁶ Still, the Fifth Circuit’s claws came out in defense of the merits of arbitration when it dismissed confidentiality provisions as being unconscionable. Again, the court noted that “part of the point of arbitration is that one ‘trades the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration.’”¹⁵⁷ The court, citing authority from the mid-1980s that is far from settled today, (perhaps not surprisingly) chose to err on the side of arbitration in favor of the Supreme Court’s stance.¹⁵⁸

When contrasting the decision to use unconscionability for rendering the one-sided arbitration clause in Centennial’s contract void with the resistance of the court to find any of the other clauses unenforceable, two very distinct voices emerged. On the one hand, upon finding that the one-sided arbitration clause was unconscionable, the *Iberia* court appeared eager to come to the rescue of individuals who unknowingly found themselves in these agreements. On the other hand, throughout the rest of the opinion, the court seemed to adhere rigidly to a pro-arbitration stance and reluctant to extend that generosity to any other provisions. Still, if the court wanted to show that they were not afraid to use unconscionability, while still maintaining some measure of reasonableness and affinity toward arbitration, this was really the only position the court could take.

VI. CONCLUSION

As a means of countering the pro-arbitration stance taken by the Supreme Court, a number of lower courts have chosen to use the doctrine of unconscionability as a means of policing the fairness of arbitration clauses in contracts.¹⁵⁹ The Supreme Court has authorized the use of contract law principles—including unconscionability—to invalidate arbitration agreements.¹⁶⁰ Unconscionability provides courts with a means of coming to the rescue of parties who, if the court is sufficiently shocked, are entangled in unfair arbitration clauses. The Fifth Circuit, in *Iberia*, had the opportunity to expand the use of the unconscionability doctrine as a means of undermining arbitration. However, the court chose to only apply the doctrine in what they considered the worst circumstances.

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154. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004).

155. *Id.*

156. See Randall, *supra* note 105, at 218-19 (noting that the majority of courts have found confidentiality provisions that require the arbitration proceedings and award both be kept confidential unconscionable and that only a few courts have found otherwise).

157. *Id.* at 176.

158. *Id.* (referencing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

159. Stempel, *supra* note 2, at 802.

160. *Doctor’s Assocs. v. Casarotto*, 517 U.S. 681 (1996).