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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

KHRYSTA CRAIGHEAD, Plaintiff and Respondent, v. MIDWAY RENT A CAR, INC., Defendant and Appellant.	B275191 Los Angeles County Super. Ct. No. BC610640

APPEAL from an order of the Superior Court of Los Angeles County, Elizabeth R. Feffer, Judge. Affirmed.

Molino & Berardino and Michelle Cooper for Defendant and Appellant.

Bononi Law Group, William S. Waldo and Marvin C. Cho for Plaintiff and Respondent.

INTRODUCTION

California and federal law now favor arbitration as an efficient, cost-effective alternative to litigation. An employer and employee may voluntarily agree to arbitrate their legal disputes, but as with other contracts, courts will not enforce agreements that violate public policy. While plaintiff and respondent Khrysta Craighead worked at Midway Rent A Car (Midway), the company adopted a policy requiring the parties to arbitrate most types of legal claims arising out of the employment relationship. After Craighead filed a wrongful employment termination suit against Midway, the company sought to compel arbitration under its policy. But the trial court denied Midway's petition because it found Craighead had not agreed to the arbitration policy (rather, it had been imposed on her by Midway) and, in any event, the policy was unenforceable because it was a contract of adhesion so disproportionately favorable to Midway as to be unconscionable. Midway appeals from the trial court's order denying its petition to compel arbitration. We agree with the court that many provisions of Midway's arbitration policy are unlawful and conclude the policy is permeated with so many unconscionable provisions that it is unenforceable in its entirety. Accordingly, we affirm the order.

FACTS AND PROCEDURAL BACKGROUND

Midway hired Craighead in October 2011. Craighead's employment application contained a provision which stated, as pertinent here, "I hereby agree to submit to binding arbitration before a neutral arbitrator all disputes and claims arising out of submission of this application. I also acknowledge that in the event that I am hired by Midway Rent A Car, Inc., I will agree

that all disputes that cannot be resolved by informal internal resolution which might arise out of my employment with Midway Rent A Car, Inc., whether during or after that employment, will be submitted to binding arbitration before a neutral arbitrator. I understand and acknowledge that I am waiving my right to a jury trial."

After she started working at Midway, Craighead received an employee handbook containing Midway's policies and procedures. Craighead had no opportunity to negotiate the terms of any of the items set forth in the handbook and believed she was required to accept the policies and procedures as a condition of her employment.

According to the complaint, Craighead worked first as a reservationist, then as a customer service agent, and Midway ultimately promoted her to be an assistant manager. In September 2014, after Craighead had been working at Midway for several years, Midway adopted a formal dispute resolution policy which it distributed as an amendment to its employee handbook. Generally, the arbitration policy required the parties to resolve all employment-related claims through binding arbitration. At Midway's request, Craighead signed the final page of the arbitration policy, acknowledging she received a copy of the new policy.[1]

Midway terminated Craighead's employment in September 2015. Craighead then filed this suit against Midway alleging a variety of wage-and-hour violations (Lab. Code, §§ 201, 203, 204,

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[1] The acknowledgement reads: "By my signature hereunder, I hereby acknowledge receipt of the Employer-Employee Dispute Resolution Amendment to Employee Handbook."

226, 510, 1182.12, 1194), gender discrimination (Gov. Code, § 12940), unfair competition (Bus. & Prof. Code, § 17200 et seq.), and seeking penalties pursuant to the Labor Code Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.). Citing the arbitration provision in Craighead's employment application and Midway's employee handbook, Midway filed a petition to compel arbitration of all claims except the PAGA claim.

The court denied Midway's petition. The court found the employment application was not an agreement to arbitrate all employment-related disputes which might arise in the future and in the event Midway hired Craighead. Specifically, the court emphasized the application stated Craighead agreed ("I hereby agree") to arbitrate claims arising from the submission of the application. But because the provision expressly contemplated a subsequent agreement ("I will agree") in the event of hiring, it could not reasonably be construed as an agreement to arbitrate all future claims.

As to the arbitration policy contained in Midway's employee handbook, the court found that although Craighead acknowledged receiving Midway's policy, that acknowledgment was not an affirmative *agreement* to arbitrate employment-related disputes. Moreover, the court stated, the arbitration policy was unenforceable as a matter of law because it prohibited Midway's employees from seeking injunctive relief and barred recovery of punitive damages, both in contravention of *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*), abrogated in part by *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 (*AT&T Mobility*).

Midway timely appeals from the order denying the petition to compel arbitration.

DISCUSSION

Midway contends Craighead agreed to arbitrate all employment-related disputes in her employment application and, later, by acknowledging the arbitration policy Midway added to its employee handbook during the course of her employment. Craighead responds that the employee handbook arbitration policy—not the employment application provision—governs and that it is unenforceable because it is both procedurally and substantively unconscionable. We agree with Craighead.

1. Standard of Review

" 'On appeal from the denial of a motion to compel arbitration, "we review the arbitration agreement de novo to determine whether it is legally enforceable, applying general principles of California contract law." ' [Citation.] Thus, unconscionability is a question of law we review de novo. [Citation.] To the extent the trial court's determination on the issue turned on the resolution of contested facts, we would review the court's factual determinations for substantial evidence." (*Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 82 (*Carmona*); *Baxter v. Genworth North America Corp.* (2017) 16 Cal.App.5th 713, 722 (*Baxter*).) In assessing whether the trial court erred in declining to sever any unconscionable provisions and enforce the remainder of the arbitration agreement, we will not reverse the trial court's severance decision unless an abuse of discretion is shown. (See *Carmona, supra*, 226 Cal.App.4th at p. 83.)

2. The arbitration policy contained in Midway's employee handbook controls.

The first issue for our consideration is whether Craighead agreed to arbitrate the employment-related disputes at issue, as Midway contends. As the party seeking arbitration, Midway bears the burden of proving the existence of an arbitration agreement. (*Engalla v. Permanente Medical Group, Inc*. (1997) 15 Cal.4th 951, 972; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*).) We conclude Craighead impliedly agreed to the arbitration policy set forth in the employee handbook and that it governs the present dispute.

There is a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution. (*Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 25; *Pinnacle, supra*, 55 Cal.4th at pp. 235–236.) Both California and federal law incorporate a presumption in favor of arbitrability. (*Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495, 502; *Pinnacle,* at pp. 235–236.) Nonetheless, it is a cardinal principle that arbitration "is a matter of consent, not coercion." (*Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 479; *Pinnacle,* at p. 236.) Thus, " 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " (*AT&T Technologies v. Communications Workers* (1986) 475 U.S. 643, 648; *Pinnacle,* at p. 236.)

"In California, '[g]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate.' [Citations.] Generally, an arbitration agreement must be memorialized in writing. [Citation.] A party's acceptance

of an agreement to arbitrate may be express, as where a party signs the agreement. A signed agreement is not necessary, however, and a party's acceptance may be implied in fact (e.g., *Craig* [*v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416,] 420 [employee's continued employment constitutes acceptance of an arbitration agreement proposed by the employer] … ." (*Pinnacle, supra*, 55 Cal.4th at p. 236.)

Midway points to two documents it asserts evidence Craighead's consent to arbitration: the employment application and Craighead's acknowledgment of receipt of Midway's employee handbook arbitration policy. Midway first argues the arbitration provision contained in Craighead's employment application governs the present dispute. As noted, Craighead initialed an arbitration provision contained in the employment application which stated, "I hereby agree to submit to binding arbitration before a neutral arbitrator all disputes and claims arising out of submission of this application. I also acknowledge that in the event that I am hired by Midway Rent A Car, Inc., I will agree that all disputes that cannot be resolved by informal internal resolution which might arise out of my employment with Midway Rent A Car, Inc., whether during or after that employment, will be submitted to binding arbitration before a neutral arbitrator. I understand and acknowledge that I am waiving my right to a jury trial." The court concluded this provision was not a binding agreement to arbitrate employment-related disputes—as opposed to disputes arising out of the application and/or hiring process—because the use of the phrase "I will agree" indicated the parties intended to enter into an agreement to arbitrate employment-related disputes if Midway hired Craighead.

Midway urges the court erred in its interpretation of the employment application and that, when viewed as a whole, the employment application constitutes an effective agreement to arbitrate all future disputes. We are inclined to agree with the court's interpretation of the arbitration provision contained in the employment application. But we find further analysis on this point unnecessary because whatever effect that provision had, it became obsolete when Midway amended its employee handbook to include a binding arbitration policy (the arbitration policy).

That policy, which Midway adopted and distributed as an amendment to the employee handbook, states in pertinent part, "The parties shall submit to binding arbitration before a neutral arbitrator all disputes and claims arising out of submission of any employment application or any and all disputes that may arise out of or already exist related to employee's employment or relationship with Midway, whether during or after that employment … . This provision to Arbitrate applies to claims that pre-exist or may pre-exist the date of this amendment to the Employee Handbook." Plainly, Midway intended to displace any prior dispute resolution policy or agreement and replace it with the new arbitration policy.

Although the court found Craighead did not agree to the arbitration policy—rather, she simply acknowledged that she received a copy of it—Craighead appears to concede that the arbitration policy contained in the employee handbook governs the present dispute. We agree. (See, e.g., *Harris v. TAP Worldwide, LLC* (2016) 248 Cal.App.4th 373, 383–384 [collecting cases in which employee's acknowledgment of receipt of employer's arbitration agreement combined with start or continuation of employment constituted implied-in-fact

agreement to arbitrate].) Nevertheless, Craighead contends the policy is unenforceable—an issue we address, *post*.

3. The trial court properly denied Midway's petition to compel arbitration because the arbitration policy contained in its employee handbook is unenforceable.

3.1. Although parties may contract to arbitrate their legal disputes, a court will not enforce an arbitration agreement that is unconscionable or contrary to public policy.

Despite the strong policy favoring arbitration, courts may invalidate or limit agreements to arbitrate that are unconscionable or contrary to public policy. (*Armendariz, supra,* 24 Cal.4th at p. 114; and see *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 910–911 (*Sanchez*); *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1142 (*Sonic-Calabasas*); *Pinnacle, supra,* 55 Cal.4th at p. 246.)

Unconscionability " ' "refers to ' "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." ' [Citation.] As that formulation implicitly recognizes, the doctrine of unconscionability has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results." ' " (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1243 (*Baltazar*).) But " '[n]ot all one-sided contract provisions are unconscionable; hence the various intensifiers in our formulations: "*overly* harsh," "*unduly* oppressive," "*unreasonably* favorable." [Citation.] ... [¶] ... The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold

enforcement.' [Citation.]" (*Id.* at p. 1245, omissions and emphases in original.)

3.2. The arbitration policy is unenforceable.

Both procedural and substantive unconscionability must be present for a court to refuse to enforce an agreement to arbitrate, although they need not be present in the same degree. (*Baltazar*, *supra*, 62 Cal.4th at p. 1243.) " 'Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.' [Citations.] In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz, supra*, 24 Cal.4th at p. 114; *Baltazar,* at pp. 1243–1244.) Because unconscionability is a contract defense, the party asserting the defense—here, Craighead—bears the burden of proof. (*Sanchez, supra*, 61 Cal.4th at p. 911.)

3.2.1. The arbitration policy is procedurally unconscionable.

"[P]rocedural unconscionability requires oppression or surprise. ' "Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form." ' " (*Pinnacle, supra,* 55 Cal.4th at p. 247; *Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 689.) "Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion. [Citation.] 'The term [contract of adhesion] signifies a standardized contract, which, imposed and

drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.' " (*Armendariz*, *supra*, 24 Cal.4th at p. 113.)

Midway's arbitration policy is a contract of adhesion and as such, it is procedurally unconscionable. (*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 796 ["The finding that the arbitration provision was part of a nonnegotiated employment agreement establishes, by itself, some degree of procedural unconscionability"].) As is often the case in the employment context, here Craighead had no opportunity to negotiate the terms of Midway's arbitration policy. At the outset of her employment with Midway, Craighead received a copy of Midway's employee handbook containing numerous company policies and procedures, which Craighead understood were conditions of her employment. Subsequently, a manager at Midway gave Craighead a copy of the company's new arbitration policy which was a written amendment to the employee handbook. Craighead signed an acknowledgment that she received a copy of the arbitration policy and believed she was required to accept the terms of the arbitration policy as a condition of her employment with Midway. Under similar circumstances, our courts of appeal have routinely concluded that employer arbitration policies were procedurally unconscionable. (See, e.g., *Baxter, supra*, 16 Cal.App.5th at pp. 723–724 [arbitration agreement held procedurally unconscionable where employer presented arbitration agreement on a take-it-or-leave-it basis and agreement was required as a condition of continued employment]; *Fitz v. NCR Corp*. (2004) 118 Cal.App.4th 702, 722 (*Fitz*) [same].)

Midway disputes Craighead's version of events, citing an affidavit by a human resources manager who stated Craighead

would not have been fired had she refused to sign the acknowledgment. But although unconscionability is a question of law we review de novo, to the extent the trial court's determination on the issue turned on the resolution of contested facts, we review the court's factual determinations for substantial evidence. (See *Baxter, supra*, 16 Cal.App.5th at p. 722.) Here, Craighead's account provides substantial evidence to support the conclusion that she had no opportunity to negotiate any aspect of Midway's arbitration policy.

Midway also argues Craighead has not claimed she requested the opportunity to negotiate the terms of the arbitration policy and Midway refused. This argument ignores the reality of most employment relationships and the inherent imbalance of power between individual employees and large corporate employers—a reality our Supreme Court has repeatedly recognized: " '[I]n the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement.' " (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071, quoting *Armendariz, supra*, 24 Cal.4th at p. 115.) The analysis applies with equal force where, as here, an employer imposes an arbitration policy as a condition of continued employment. (*Baxter, supra*, 16 Cal.App.5th at p. 723 [finding "high degree of oppressiveness" where employee could quit job of over five years or accept employer's new arbitration terms]; *Fitz, supra*, 118 Cal.App.4th at p. 722 ["Few employees are in a position to forfeit a job and the benefits they have accrued …

solely to avoid the arbitration terms that are forced upon them by their employer"].)

Further, and in any event, Midway's position is inconsistent with the language of the policy which reveals the policy was imposed rather than negotiated: "Midway hereby amends its Employee Handbook in order to establish and gain the benefits of a speedy, impartial and cost-effective dispute resolution procedure." In short, nothing about the policy suggests any employee had a choice whether to agree to the policy or that Midway engaged in negotiations with any employee on an individual basis. These facts present a "high degree of oppressiveness" supporting a finding of procedural unconscionability.[2] (See *Baxter, supra,* 16 Cal.App.5th at p. 565.)

Midway insists an arbitration agreement is not *automatically* unenforceable merely because it is contained in a contract of adhesion, such as the one at issue here. Citing cases from both the United States Supreme Court and our high court, Midway posits "that employers are, like other contracting parties, permitted to provide for arbitration of disputes in their employment contracts." We do not disagree. (See, e.g., *Baltazar, supra,* 62 Cal.4th at p. 1244 [" '[A] finding of procedural unconscionability does not mean that a contract will not be enforced, but rather that courts will scrutinize the substantive

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[2] Because these aspects of the arbitration policy plainly evidence a high degree of procedural unconscionability, we do not address Craighead's further argument that the policy is unconscionable because it allows the employer to select unilaterally an arbitrator from one of three specified arbitration companies, thereby making it impossible for an employee to discern in advance what rules will apply to the arbitration proceeding.

terms of the contract to ensure they are not manifestly unfair or one-sided' "].) But Midway's point is unremarkable because, as already noted, it is well established that although procedural unconscionability must be present to invalidate an arbitration agreement, it is not sufficient in and of itself to render an arbitration agreement (or a provision contained within it) unenforceable. Some degree of substantive unconscionability is also required.

3.2.2. The arbitration policy is substantively unconscionable.

"Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. [Citations.] A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to "shock the conscience." ' " (*Pinnacle, supra*, 55 Cal.4th at p. 246; *Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 692.) In addition, " '[a]rbitration agreements in the employer-employee context must provide for: (1) neutral arbitrators, (2) more than minimal discovery, (3) a written award, (4) all types of relief that would otherwise be available in court, and (5) no additional costs for the employee beyond what the employee would incur if he or she were bringing the claim in court.' " (*Armendariz*, *supra*, 24 Cal.4th at p. 102; *Baxter, supra,* 16 Cal.App.5th at p. 722.) In order to be enforceable, an arbitration agreement that applies to the resolution of an employee's public rights must not only be conscionable but must also satisfy the five *Armendariz* requirements. (*Ibid.*)

Craighead points to a series of provisions contained in the arbitration policy which she contends are substantively

unconscionable. We agree multiple provisions are, to varying degrees, substantively unconscionable.

First, Craighead notes the arbitration policy bars recovery of punitive damages. The policy states, in pertinent part, "[t]he arbitrator will be empowered to grant any type of relief which would be available to Employee or Company in a Superior Court action *with the exception of punitive damages or injunctive relief*." (Emphasis added.) It is well established that in this context, an arbitration provision must allow recovery of *all* types of relief generally available in a court of law and a provision barring recovery of punitive damages available by statute is unenforceable. (*Armendariz, supra,* 24 Cal.4th at p. 103 [arbitration provision barring recovery of punitive damages and attorney's fees available under FEHA unenforceable]; *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1476 [recognizing same].) Here, Craighead's complaint seeks punitive damages and she could recover punitive damages on her FEHA claims if litigated in court. (See *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 220–221; *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 471, abrogated on another point as recognized by *Williams v. Superior Court* (2017) 3 Cal.5th 531, 558.) Midway appears to concede the provision is unenforceable, as it argues only that the provision barring recovery of punitive damages should be severed from the remainder of the agreement—an issue we address, *post*.

For the same reason, a second provision of the arbitration policy is unenforceable because it potentially limits an employee's recovery of attorney's fees and costs which must be awarded under the Labor Code. The arbitration policy provides that if any party "prevails on a statutory claim that affords the prevailing

party attorneys' fees and costs … then the Arbitrator may award reasonable attorneys' fees … " Thus, the arbitrator may—but is not required to—award a prevailing employee attorney's fees and costs. But under the Labor Code, a court has no discretion on this point: A prevailing employee is *entitled* to reasonable attorney's fees and costs. (Lab. Code, § 1194, subd. (a) [in suit for unpaid minimum or overtime premium wages, "the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit"].) Because an arbitration agreement must allow recovery of all remedies available in a court action, this provision is unenforceable. (*Armendariz, supra,* 24 Cal.4th at p. 103.)

The arbitration policy contains several additional provisions that significantly favor Midway and therefore exhibit some degree of substantive unconscionability. For example, as Craighead notes, the policy does not apply across the board. Although the arbitration policy states "all disputes and claims" arising out of the employment relationship must be submitted to binding arbitration and it appears to apply to both Midway and its employees in the same manner, a related provision of the arbitration policy erodes the mutuality of this requirement. Specifically, the arbitration policy also provides, "claims by the Company for injunctive and/or other equitable relief for unfair competition and/or the unauthorized disclosure of trade secrets or confidential information" are exempted from the arbitration policy and may therefore be litigated in court.[3]

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[3] *Baltazar, supra,* 62 Cal.4th 1237, is distinguishable. There, the court held that an arbitration agreement was not substantively unconscionable insofar as it acknowledged *both* parties' right to obtain

Other courts evaluating similar policies which require arbitration of all claims brought by employees but allow litigation of claims that would only be brought by the employer have universally concluded such a provision is substantively unconscionable.

Evaluating a provision nearly identical to the one at issue here, one court explained:

"The arbitration agreement specifically covers claims for breach of express or implied contracts or covenants, tort claims, claims of discrimination based on race, sex, age or disability, and claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation or public policy. Thus the agreement compels arbitration of the claims employees are most likely to bring against [the employer]. On the other hand, the agreement specifically excludes 'claims for injunctive and/or other equitable relief for intellectual property violations, unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information ... .' Thus the agreement exempts from arbitration the claims [the employer] is most likely to bring against its employees.

"In *Armendariz,* the court observed substantive unconscionability may manifest itself if the form of 'an agreement requiring arbitration only for the claims of the weaker party but

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injunctive relief under Code of Civil Procedure section 1281.1, even though Forever 21 was far more likely than the plaintiff to benefit from that provision. (*Id*. at pp. 1246–1248.) Here, by contrast, Midway's arbitration policy broadly requires arbitration of all employment-related claims, but carves out an exception for certain claims brought by Midway (some of which might seek equitable and/or injunctive relief) which could be litigated.

a choice of forums for the claims of the stronger party.' [fn. omitted.] This is what we have here: [the employer] requires the weaker parties—its employees—to arbitrate their most common claims while choosing to litigate in the courts its own claims against its employees." (*Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 175–176 (*Mercuro*).)

Midway defends this provision of the arbitration policy by arguing that even though the policy contains an exception for some of its potential claims against its employees, the exception is a narrow one. This argument has been repeatedly rejected in the absence of a compelling showing that the exemption favoring the employer is commercially necessary: "Given the disadvantages that may exist for plaintiffs arbitrating disputes, it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on 'business realities.' … If the arbitration system established by the employer is indeed fair, then the employer as well as the employee should be willing to submit claims to arbitration. Without reasonable justification for this lack of mutuality, arbitration appears less as a forum for neutral dispute resolution and more as a means of maximizing employer advantage." (*Armendariz, supra*, 24 Cal.4th at pp. 117–118; see also *Carmona, supra*, 226 Cal.App.4th at p. 87 ["Courts have repeatedly found this type of one-sided provision—where the employer exempts claims only it would bring from arbitration while restricting any employee claims to arbitration—to be substantively unconscionable"]; *Mercuro, supra*, 96 Cal.App.4th at p. 177 [rejecting argument that

excluding trade secret claims from arbitration had reasonable business justification].)

Craighead points to yet another provision of the arbitration policy—one barring an employee from bringing or joining a representative action such as her cause of action under PAGA—as further evidence of the policy's substantive unconscionability. The pertinent portion of the policy provides, "any binding arbitration must be brought in the employee name as an individual and not as a plaintiff or a class member in any purported class or representative proceeding. The arbitrator may not consolidate more than one person's claims and may not otherwise preside over any form of a representative or class proceeding." Here, Craighead's complaint includes a representative action under PAGA. And as Craighead notes, our Supreme Court has held that "where, as here, an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law." (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 384; see also *Betancourt v. Prudential Overall Supply* (2017) 9 Cal.App.5th 439, 445–448 [PAGA action not subject to arbitration, as state not bound by employee's predispute agreement]; *Tanguilig v. Bloomingdale's, Inc.* (2016) 5 Cal.App.5th 665, 677–680 [PAGA claim cannot be arbitrated pursuant to predispute arbitration agreement without state's consent]; *Julian v. Glenair, Inc.* (2017) 225 Cal.Rptr.3d 798, 810–811 [recognizing same].)

Midway urges us to ignore this provision of its arbitration policy because Midway did not seek to arbitrate Craighead's PAGA claim. Instead, it sought to arbitrate all other claims and requested a stay as to the PAGA claim. As we discuss *post*,

however, the degree of unconscionability found in an arbitration agreement (as evidenced, in part, by the number of unconscionable provisions contained therein) is relevant to our consideration of whether an isolated provision may be excised from an otherwise enforceable arbitration agreement or whether we must invalidate the agreement in its entirety. (*Armendariz, supra*, 24 Cal.4th at pp. 123–127.) The point in that regard is that at one time the employer used its superior bargaining position to obtain a purportedly voluntary agreement by the employee to terms from which the employer disproportionately benefitted—not whether the employer currently asserts the provision should be enforced. (*Id*. at p. 125 [rejecting argument that a postemployment offer to modify unlawful arbitration agreement would cure unconscionability].)

Midway also contends this provision applies only to "representative actions" and, when properly construed, "nothing in the [arbitration policy] limits *qui tam* actions, which is the nature of PAGA. The 'representative' action referred to by the arbitration agreement would not extend to actions on behalf of the state." We disagree with Midway's supposition that the terms "representative action" and "qui tam action," are mutually exclusive alternatives. Instead, a qui tam action is a type of representative action, as is a class action: "A PAGA representative action is … a type of qui tam action." (*Iskanian, supra*, 59 Cal.4th at p. 382.) As our high court has explained, a plaintiff asserting a PAGA claim stands in the shoes of the Labor and Workforce Development Agency, whereas a plaintiff in a class action against an employer acts as a representative of other similarly situated employees. (See *Arias v. Superior Court* (2009) 46 Cal.4th 969, 980–983 [distinguishing class actions under the

Unfair Competition Law from representative actions under PAGA].) Although the nature of the representation and the disposition of any damages recovered are quite different, both types of claims are "representative actions."

3.2.3. Because the arbitration policy is permeated with substantively unconscionable provisions it is unenforceable in its entirety.

To the extent Midway acknowledges certain provisions of its arbitration policy might be unenforceable, it argues those provisions should be severed from the arbitration policy in order that the remainder of the policy be enforced here. Although we would typically remand the matter with directions for the trial court to exercise its discretion on that issue, we do not do so in this case because we conclude, as a matter of law, Midway's arbitration policy is void and unenforceable in its entirety.

"When a court finds a contract unconscionable or illegal it has several options. It may refuse to enforce the contract; it may sever the offending clause; or it may limit the application of the offending clause so as to avoid the unconscionable or illegal result. [ ] As a general rule, if the central purpose of the contract is 'permeated' or 'tainted' with unconscionability or illegality then the contract as a whole cannot be enforced. If, on the other hand, the unconscionability or illegality is collateral to the main purpose of the contract, and the offending provisions can be excised from the contract by means of severance or limitation, then the remainder of the contract can be enforced. [ ]" (*Mercuro, supra*, 96 Cal.App.4th at pp. 184–185, fns. omitted [citing *Armendariz, supra*, 24 Cal.4th at pp. 121–122].) "The overarching inquiry is whether ' "the interests of justice … would be

furthered" ' by severance. [Citation.]" (*Armendariz, supra*, at p. 124.)

Our Supreme Court has held that an arbitration agreement is permeated by unconscionability if it "contains more than one unlawful provision … . Such multiple defects indicate a systematic effort to impose arbitration … not simply as an alternative to litigation, but as an inferior forum that works to the [stronger party's] advantage." (*Armendariz, supra*, 24 Cal.4th at p. 124.) Numerous courts of appeal have applied this rule to invalidate arbitration agreements containing multiple unenforceable provisions. (See, e.g., *Magno v. The College Network, Inc.* (2016) 1 Cal.App.5th 277, 292 [no abuse of discretion in voiding entire arbitration provision where there were multiple unconscionable terms that could not be cured by severance]; *Ajamian, supra*, 203 Cal.App.4th at pp. 803–804 [same]; *Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 826 [multiple unconscionable terms weighed against severance].)

As explained *ante*, Midway's arbitration policy contains numerous unenforceable provisions. In light of the Supreme Court's holding in *Armendariz*, and the agreement among the courts of appeal, we have no difficulty concluding Midway's arbitration policy is unenforceable due to the number of unconscionable provisions. (See *Armendariz, supra*, 24 Cal.4th at p. 125 ["Because a court is unable to cure this unconscionability through severance or restriction and is not permitted to cure it through reformation and augmentation, it must void the entire agreement"]; *Mercuro, supra*, 96 Cal.App.4th at p. 185 ["We cannot save the contract by simply hacking off the provisions governing what claims are arbitrable, how fees and costs will be

allocated and what organization will conduct the arbitrations. If we did so there would be virtually nothing of substance left to the contract"].)

4. Midway waived its contractual right to have the threshold issue of enforceability decided by an arbitrator rather than the court.

As its final argument on appeal, Midway asserts—for the first time in this litigation[4]—that the arbitration policy delegates all questions regarding the interpretation and enforceability of the policy to an arbitrator. According to Midway, the court lacked the authority to decide whether the arbitration agreement is enforceable. Craighead responds that Midway waived or forfeited the issue by failing to raise it below and by litigating the issue on the merits before the court. As to the second point, and in light of the specific facts presented here, we agree with Craighead.

As Midway notes, under the Federal Arbitration Act, parties to an arbitration agreement may agree to arbitrate the threshold issue whether an arbitration agreement is enforceable. (*Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 79, fn. 1 [holding parties may delegate threshold issue of enforceability to

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[4] Midway invites us to exercise our discretion to entertain this argument, notwithstanding its failure to present the issue below and afford both Craighead and the court the opportunity to address the question then. "We may consider legal issues on appeal not raised before the trial court presented on undisputed facts. [Citation.]" (*U.S. Bank National Assn. v. Yashouafar* (2014) 232 Cal.App.4th 639, 645, fn. 4; *People v. Rosas* (2010) 191 Cal.App.4th 107, 115 ["[A]ppellate courts regularly use their discretion to entertain issues not raised at the trial level when those issues involve only questions of law based on undisputed facts" (italics omitted)].)

arbitrator and parties' intent must be shown by "clear and unmistakable" evidence].) California law is in accord.[5] (*Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473, 480 [" 'The arbitrability of a dispute may itself be subject to arbitration if the parties have so provided in their contract' "]; *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 240–242 [noting rules concerning delegation of authority to arbitrator are the same under both state and federal law].) And the arbitration policy at issue here contains what is arguably a clear and unmistakable provision doing just that. Neither Craighead nor Midway mentioned this provision to the court in their briefing on the petition to compel arbitration; both parties instead addressed on the merits whether the two arbitration agreements Midway identified are unconscionable and therefore unenforceable. In other words, Midway acted as though the court—rather than an arbitrator—could properly decide whether the arbitration policy was (or was not) enforceable.

Now, Midway seeks another bite at the proverbial apple. After making the tactical decision to litigate the issue of enforceability before the court—and then receiving a ruling with which it is dissatisfied—Midway wants to invoke the contractual provision delegating that question to an arbitrator. If we agreed with Midway, we would undoubtedly reverse the court's order and remand with instructions to allow an arbitrator (of Midway's

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[5] Although Midway argues forcefully that the agreements offered are governed by the Federal Arbitration Act (9 U.S.C.A. §§ 1-14) rather than the California Arbitration Act (Code Civ. Proc., § 1280 et seq.), Midway fails to explain how it would impact the outcome in this particular case. We need not address the issue, however, as we conclude the result would be the same under either standard.

choosing) to decide anew whether the arbitration policy is enforceable. Although we are confident any competent arbitrator would conclude, as we have, the arbitration policy is unenforceable, Midway has waived the point.

The fundamental attribute of arbitration is its efficient, streamlined procedure. (*AT&T Mobility, supra,* 563 U.S. at p. 346; *Sonic-Calabasas, supra,* 57 Cal.4th at p. 1141.) Any delay in the assertion of the right to arbitrate is fundamentally at odds with the essential goal of arbitration. For that reason, our courts have consistently held that a party's failure to assert the contractual right to arbitration in a timely manner may constitute a waiver of that right where it prejudices the opposing party. (E.g., *Iskanian, supra*, 59 Cal.4th at pp. 374–375 [" 'California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure' "].)

Here, Midway could have asserted below that an arbitrator, rather than the court, should decide all questions relating to the enforceability of the arbitration policy. Stated slightly differently, Midway should have argued the parties agreed to arbitrate not only any employment-related claims but also the threshold issue whether the agreement to arbitrate is enforceable. Instead, Midway waited more than 18 months to bring up the issue for the first time. Midway's actions are inconsistent with the overall goals of the arbitration model and, were we to accept Midway's position, would result in a waste of both judicial and financial resources because the parties have litigated the issue on the

merits below and in this court. We conclude Midway waived its contractual right to have an arbitrator determine issues relating to the enforceability of the arbitration policy by litigating the issue before the trial court and again here.

DISPOSITION

The order denying Midway's petition to compel arbitration is affirmed. Respondent to recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

DHANIDINA, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.