CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FOUR

# Fisher v. MoneyGram International, Inc.

Fisher · No. A158168 · Decided July 27, 2021

## SUMMARY

The California Court of Appeal considered whether an arbitration provision in MoneyGram’s consumer money-transfer agreement was enforceable. The court held that the provision was procedurally and substantively unconscionable because it was presented in tiny, difficult-to-read print on the back of an adhesion contract and imposed one-sided limitations and costs. The court affirmed the superior court’s denial of MoneyGram’s petition to compel arbitration.

## CASE DETAILS

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| COURT | California Court of Appeal, First Appellate District, Division Four |
| WRITING FOR THE COURT | Streeter, Acting Presiding Justice; Tucher, Justice; Brown, Justice |
| JURISDICTION | California |
| DECIDED | July 27, 2021 |
| DOCKET | A158168 |
| DISPOSITION | affirmed |
| PROCEDURAL POSTURE | MoneyGram appealed the Alameda County Superior Court's order denying its petition to compel arbitration in Fisher's putative class action under California's unfair competition law. |
| STANDARD OF REVIEW | The existence and validity of an arbitration agreement are reviewed de novo absent conflicting extrinsic evidence; factual findings concerning procedural unconscionability are reviewed for substantial evidence. The superior court's decision whether to sever unconscionable provisions is reviewed for abuse of discretion. |
| PRECEDENTIAL VALUE | Published California Court of Appeal opinion; certified for publication. |
| PARTIES | MoneyGram International, Inc. v. Jonathan Fisher |

## TOPICS

arbitration · unconscionability · consumer protection · appellate procedure · standard of review

## PRACTICE AREAS

Arbitration | Contracts | Consumer protection | Appellate procedure | Civil procedure

## QUESTIONS PRESENTED

1. Whether the arbitration provision in MoneyGram's consumer money-transfer contract was procedurally unconscionable because it was presented on a take-it-or-leave-it form, hidden on the back of the form, and printed in extremely small and difficult-to-read type.
2. Whether the arbitration provision was substantively unconscionable because it shortened the limitations period, required commercial rather than consumer AAA arbitration, imposed potentially prohibitive arbitration fees, and required each party to bear its own expert and attorney fees.
3. Whether the arbitration provision was unenforceable in its entirety under California's sliding-scale unconscionability doctrine.
4. Whether the superior court abused its discretion by refusing to sever the unconscionable provisions.

## HOLDINGS

1. The arbitration provision was procedurally unconscionable because it was contained in an adhesive consumer contract and was presented with an extremely high degree of surprise: it appeared on the back of the Send Form in a dense block of faint, cramped 6-point type that was practically unreadable.
2. The arbitration provision was substantively unconscionable because, considered in the aggregate, its one-year limitations period, use of AAA Commercial Rules and associated fees, and apparent waiver of statutory attorney-fee recovery imposed an undue and one-sided burden on consumers.
3. The entire arbitration provision was unenforceable as unconscionable.
4. The superior court did not abuse its discretion by refusing to sever the unconscionable provisions and enforce the remainder of the arbitration agreement.

## KEY QUOTATIONS

> *"Even without an expert's opinion we can say the Arbitration Provision's practically unreadable small typeface, faint contrast, thin characters, and cramped spacing reproduced on page 3, ante, and in appendix A are strong indicators of surprise and therefore of procedural unconscionability."* (20)

> *"We see no reason why MoneyGram's tiny-font Arbitration Provision should not be considered procedurally unconscionable as a matter of law, and to a high degree of unconscionability, based both on surprise and oppression."* (26)

> *"We find no abuse of discretion in the superior court's decision to deny severance and to declare the entire Arbitration Provision unenforceable."* (29)

## FACTUAL BACKGROUND

Jonathan Fisher completed two MoneyGram transfers at Walmart stores in California in February 2016 after being induced by a scammer to send money. The MoneyGram Send Form contained terms and conditions, including an arbitration clause, on its reverse side in a dense block of 6-point type that Fisher, who had poor eyesight, could not read without a magnifying glass. The arbitration clause required commercial AAA arbitration, shortened the limitations period from four years to one year, required each party to bear its own expert and attorney costs, and waived class participation. Fisher later sued MoneyGram under the UCL, and MoneyGram sought to compel arbitration.

### PROCEDURAL HISTORY

Fisher filed suit in March 2019 alleging that MoneyGram failed to warn consumers about fraud and failed to comply with an FTC anti-fraud injunction. MoneyGram petitioned to compel arbitration. The superior court denied the petition, finding the arbitration provision procedurally and substantively unconscionable and declining to sever the offending provisions. The Court of Appeal affirmed, denied Fisher's motion for new evidence, granted his unopposed request for judicial notice, and awarded him costs on appeal. The opinion was filed June 29, 2021, and certified for publication July 27, 2021.

### DISPOSITION

affirmed

### CASES CITED

- Sanchez v. Valencia Holding Co., LLC (2015) 61 Cal.4th 899, 910-921
- Carlson v. Home Team Pest Defense, Inc. (2015) 239 Cal.App.4th 619, 630-637
- Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 114, 122-125
- OTO, L.L.C. v. Kho (2019) 8 Cal.5th 111, 119, 125-130
- Gutierrez v. Autowest, Inc. (2003) 114 Cal.App.4th 77, 88-91
- Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal.4th 951, 972
- De La Torre v. CashCall, Inc. (2018) 5 Cal.5th 966, 978-979
- AT&T Mobility LLC v. Concepcion, AT&T Mobility LLC v. Concepcion (2011) 563 U.S. 333, 341-343, 347 fn. 6
- Domestic Linen Supply Co., Inc. v. L J T Flowers, Inc. (2020) 58 Cal.App.5th 180, 182-185
- Ali v. Daylight Transport, LLC (2020) 59 Cal.App.5th 462, 474-476, 481
- Dennison v. Rosland Capital LLC (2020) 47 Cal.App.5th 204, 212
- McGill v. Citibank, N.A. (2017) 2 Cal.5th 945, 962
- Baxter v. Genworth North America Corp. (2017) 16 Cal.App.5th 713, 720, 722, 737-738
- Martinez v. Master Protection Corp. (2004) 118 Cal.App.4th 107, 116-117
- O’Hare v. Municipal Resource Consultants (2003) 107 Cal.App.4th 267, 280
- Conservatorship of Link (1984) 158 Cal.App.3d 138, 141-143
- Bennett v. United States Cycling Federation (1987) 193 Cal.App.3d 1485, 1487, 1489-1490
- Okura v. United States Cycling Federation (1986) 186 Cal.App.3d 1462, 1468-1469
- Doctor’s Associates, Inc. v. Casarotto (1996) 517 U.S. 681, 684, 687-688