

Press Release



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WLF Names Former Corporate General Counsel and Former Associate Attorney General Jay Stephens as Chairman of Its Legal Policy Advisory Board

WASHINGTON, DC—Washington Legal Foundation (WLF) announced today that it has named **Jay B. Stephens** as Chairman of its Legal Policy Advisory Board. Mr. Stephens succeeds **The Honorable Dick Thornburgh**, who served as Chairman for 18 years.

Mr. Stephens recently retired from Raytheon Company after serving for nearly 13 years as a member of the company's senior leadership team. As Senior Vice President, General Counsel, and Corporate Secretary at Raytheon, he led the company's corporate governance, risk management, and global compliance and ethics programs as well as its legal function, and participated in the company's operational management and strategic planning.

Prior to joining Raytheon, Mr. Stephens had a distinguished career in the public and private sectors, serving as Associate Attorney General of the United States (2001-2002); United States Attorney for the District of Columbia (1988-1993); Deputy Counsel to the President of the United States (1986-1988); Deputy General Counsel of Honeywell International; and as a partner in the Washington office of a national law firm. In 2014, *National Law Journal* named him among the top fifty general counsel in America, and in 2015 New York Stock Exchange Governance Services honored him with its Lifetime Achievement award.

Constance Larcher, WLF's President and CEO, praised Governor Thornburgh for his nearly two decades of leadership of WLF's Legal Policy Advisory Board: "We deeply appreciate Dick's humble guidance, extensive involvement in WLF's litigation, publishing, and communications programs, and devoted friendship. WLF is honored to have Jay Stephens as Dick's successor, and we look forward to his direction of the Board and his engagement in WLF's public-interest mission."

Mr. Stephens noted, "I am delighted to have the opportunity to work with the talented and dedicated team at WLF and to provide leadership to its very capable Advisory Board as together we advance the important public interest mission of WLF. I look forward to building on Dick Thornburgh's many significant contributions to the success of the Foundation's mission of being an advocate for freedom, justice, and free enterprise."

Washington Legal Foundation is America's premier public interest law and policy center. WLF preserves and defends the nation's free-enterprise system by advocating for free markets, a limited and accountable government, individual and business civil liberties, and the rule of law. For more than 38 years WLF has successfully advanced these principles through a unique three-pronged strategy of original and *amicus* litigation; publications offering single-issue advocacy in eight distinct formats; and direct communications outreach through webcast programs, timely blogging, and other mechanisms.

WLF's Legal Policy Advisory Board includes over forty distinguished professionals from the government, private sector, academic, and public policy legal communities.

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CALIFORNIA COURT SETS UNIFORM “SUBSTANTIVE UNCONSCIONABILITY” STANDARD IN ARBITRATION DECISION

by
J. Alan Warfield

In an effort to ensure more uniform and predictable results, the California Supreme Court recently sought to clarify the standard used by judges who declare an agreement to be “unconscionable.” In a case arising from a dispute over the sale of a used luxury car, *Sanchez v. Valencia Holding Co., LLC*, 61 Cal.4th 899 (2015), the California Supreme Court addressed whether a class-action waiver in an arbitration agreement is unconscionable after the United States Supreme Court’s decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

While *Sanchez* is not the first California Supreme Court case to address *Concepcion*, or even the first to address the specific issue of class-action waivers and unconscionability, it is the first to address whether a single, unifying standard should be used to define substantive unconscionability, given the various formulations courts have used to describe the standard. Also, given California courts’ previous reluctance to adhere to *Concepcion* and uphold the Federal Arbitration Act faithfully, the decision signals that the U.S. Supreme Court’s message has finally registered.

Applying California’s sliding-scale approach, the court in *Sanchez* determined that the adhesion contract at issue presented some degree of procedural unconscionability, because there were elements of oppression and surprise in obtaining assent. However, it did not find that any of the four contract terms identified by the Court of Appeal were substantively unconscionable and, in light of *Concepcion*, neither was the class-action-waiver provision.

The *Sanchez* court also considered whether to define a single “short-hand” formula for determining whether an arbitration provision is substantively unconscionable. In fact, it requested supplemental briefing on the issue to determine whether it should choose among formulations used in prior cases, such as “unreasonably favorable” to one party, “so one-sided as to shock the conscience,” “unfairly one-sided,” “overly harsh,” and “unduly oppressive.” To avoid undermining prior decisional authority, the Supreme Court held that there is no “higher” or “lower” standard, and explained that “these formulations, used throughout our case law, all mean the same thing.”

It remains to be seen whether this pronouncement will reduce confusion and unify prior case law, especially since lower courts, and even the dissenting Supreme Court justice in *Sanchez*, viewed some formulations as more stringent than others. In the end, the Supreme Court may have inadvertently (or more likely intentionally) set forth a single, unifying standard not only by

announcing that all the formulations mean the same thing, but also by announcing that standard's meaning: "courts, including ours, have used various nonexclusive formulations to capture the notion that unconscionability requires *a substantial degree of unfairness beyond 'a simple old-fashioned bad bargain.'*"

J. Alan Warfield is Of Counsel in the Toxic and Mass Tort litigation team of the law firm Polsinelli LLP, resident in the Los Angeles office.

About WLF and the COUNSEL'S ADVISORY

Washington Legal Foundation (WLF) is the nation's foremost free enterprise public interest law and policy center. WLF litigates *and* publishes in order to advocate and defend legal policies that promote economic liberty, limited government, individual and business civil liberties, and the rule of law. As a 501(c)(3) tax-exempt organization, WLF relies upon the charitable support of individuals, businesses, associations, and foundations to fund its programs.

This COUNSEL'S ADVISORY is one of WLF's eight publication formats. Its purpose is to inform the free-enterprise community about a development in the legal policy world that can be favorably influenced by the immediate involvement of legal experts and business and community leaders or one that they should know about.

For more information on WLF, please contact Constance Larcher, CEO and President, at (202) 588-0302.