Editor-in-Chief
Jeffrey I. Ehrlich
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Appellate Review

ARBITRATION AGREEMENTS IN HEALTH-CARE SETTINGS; ALSO, THE "BASEBALL RULE" ON ASSUMPTION OF THE RISK; LEGAL MALPRACTICE, CAUSATION AND ANTI-SLAPP

Enforceability of an arbitration agreement in a healthcare or senior-care facility

Nelson v. Dual Diagnosis Treatment Center, Inc. (2022) __ Cal.App.5th __ (Fourth Dist., Div. 3.)

Why it's important: Affirms the denial of a motion to compel arbitration; rejects the defendant's contentions that the agreement delegated the gateway issues of arbitrability to the arbitrator; finds that an agreement that purports to release the plaintiff's claims as a condition of admission is unconscionable; finds that it is unconscionable to attempt to bind a person in the throes of severe psychosis to the terms of an arbitration contract.

Synopsis: In early 2018, Brandon Nelson, a UCLA engineering graduate, suffered a sudden onset of psychosis in which he expressed suicidal ideation. Over the next six weeks, he was treated in several facilities and was diagnosed as "gravely disabled" and "paranoid, delusional, and fearful." On March 7, 2018, he was discharged from one mental-health facility and sent to defendant Dual Diagnosis Treatment Center, dba Sovereign Health.

When he arrived at Sovereign's facility on March 7, 2018, he was assessed as having auditory hallucinations, he thought that the people on TV were speaking to him, he displayed "extreme psychomotor agitation" and was "curled up in a fetal position." The assessment stated that he had a "limited attention span" and was unable to concentrate and focus for more than 10 to 20 seconds at a time. The assessment stated that he required 24-hour supervision and support. But the day after his arrival, he was allowed to enter his room unsupervised, where he hung himself with the drawstring from his sweatpants.

In response to the wrongful-death and survival action filed by his parents, Sovereign moved to compel arbitration. The trial court denied the motion and Sovereign appealed. Affirmed.

The court first rejected Sovereign's contention that the trial court erred in addressing the scope and enforceability of the arbitration agreement because it delegated the resolution of those questions to the arbitrator. Under both California law and the Federal Arbitration Act, it is presumed that questions of arbitrability will be resolved by judges unless there is clear and unmistakable evidence that the parties intended otherwise. The court found that there was no clear and unmistakable evidence of that intent here: (1) the statement in the agreement that the parties desired to resolve "any dispute" arising out of or related to the agreement without litigation did not clearly and unmistakably show that the parties intended to delegate the gateway issues to the arbitrator;
(2) the fact that the parties' agreement provided that any term of the agreement should be severed if *a court* found it to be invalid or unenforceable suggests that no such intent existed; (3) the incorporation of AAA's arbitration rules, which provide for delegation, at best introduced an element of uncertainty, which precludes a finding of clear and unmistakable intent to delegate.

The court then found that Sovereign's admission agreement, which included the arbitration clause it sought to enforce, was both procedurally and substantively unconscionable, and that the unconscionable terms permeated the agreement, precluding any attempt to sever the offending provisions.

Procedural unconscionability

The court rejected Sovereign's contention that the enrollment agreement was not an adhesion contract because it required that any modification be made in writing. This term did not show that the agreement's terms were negotiable; it was intended to forestall any claim of an oral modification.

The court also found that the attempt to rely on the AAA rules, which were not provided to Brandon when he was admitted, to insert a delegation clause into the parties' agreement, showed procedural unconscionability. "It is oppressive to artfully hide contract terms by the simple expedient of incorporating them by reference rather than including them in or attaching them to the arbitration agreement." This approach is akin to furnishing a translation of only portions of a proposed agreement.

In addition, Sovereign's assessment that Brandon could not concentrate for more than 10 to 20 seconds at a time supported a high degree of procedural unconscionability. It is akin to providing written contract terms to a visually impaired person who is unlikely to be able tor read and understand them, which has been held to support a constructive-fraud defense to enforcement of a contract.

Substantive unconscionability

Sovereign's agreement was substantively unconscionable in multiple ways. It required Brandon to release any possible claim he might bring against Sovereign. There was no corresponding provision that released any claims that Sovereign might assert. The agreement purported to relieve Sovereign of its duty to provide competent care or basic protection against tort harms by extending to "any losses caused or alleged to be caused, in whole or in part, by the negligence of the company."

This provision not only purported to release Brandon's claims, but purported to extend to the claims of third parties, making Brandon the financial guarantor against the conduct of other program participants or even Sovereign's own staff. In the court's view, the provision "Is more than unfair and one sided – it is punitive."

Severance

The court found that the trial court properly declined to sever the release provision and enforce the balance of the contract because the entire agreement was permeated by unconscionable provisions. These included: (1) a provision shortening the statute of limitations; (2) a provision limiting discovery; and (3) a "gag" provision forbidding the disclosure of the facts of the underlying dispute to

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any third parties. In light of these provisions, severance was not a reasonable option.

Primary assumption of risk; baseball spectators and protective measures

Mayes v. La Sierra University (2022) 73 Cal.App.5th 686 (Fourth Dist., Div. 2)

Monica Mayes was struck in the face by a foul ball while attending an intercollegiate baseball game between Marymount University and defendant and respondent La Sierra University (La Sierra). She suffered skull fractures and brain damage, among other injuries. When struck by the foul ball, she was seated in a grassy area along the third-base line, behind the dugout, which extended eight feet above the ground, and there was no protective netting above the dugout.

The trial court granted summary judgment for La Sierra in her negligence lawsuit based on primary assumption of risk. Reversed.

For over a century, courts in California and across the U.S. have applied the "baseball rule," finding that teams and their owners are not liable for injuries sustained by fans hit by bats or balls leaving the field of play, so long as the teams and owners have taken minimal precautions to protect their spectators from harm. Recent decisions, such as *Summer J. v. United States Baseball Federation* (2020) 45 Cal.App.5th 261, have eroded that rule in California, however.

The primary assumption of risk doctrine is a rule of limited duty that holds owners and operators of sports venues responsible for: (1) not increasing the risks of injury inherent in the activity, and (2) taking reasonable steps to increase safety and minimize the inherent risks of injury, if such steps can be taken without altering the nature of the activity.

In granting La Sierra's motion, the trial court did not consider the second facet of La Sierra's limited duty – its duty to take reasonable steps to increase safety and minimize the risk of injury to spectators at its baseball games, if it could do so without changing the nature of the game or the activity of watching the game. Rather, the trial court ruled that "primary assumption of the risk bars [all] claims for injuries common to baseball." In doing so, it relied on a cramped or oversimplified interpretation of the primary assumption of risk doctrine and the scope of a sports venue operator's limited duty to spectators.

La Sierra did not dispute Maye's showing that it could have installed protective netting above the dugouts for $8,000 to $12,000, and that installing the netting would not have altered the game in any way. Nor did it dispute her contention that recent improvements in net technology allowed teams to "install thinner screens that present less of an obstruction to fans' views of the field."

This evidence presented a triable issue whether it was reasonable to require La Sierra to install protective netting over and perhaps beyond the end of its dugouts to minimize the risk of injury to spectators from batted or foul balls.

Mayes also raised a triable issue of fact concerning the legal question of whether La Sierra had a duty to warn spectators that there was no protective netting above its dugouts. Mayes had attended 300 to 400 baseball games in which her two sons had played. Mayes had come to expect all college baseball fields to have protective netting over the dugouts because at every college game she had attended, the spectators were protected by "netting and/or fencing."

Thus, a trier of fact could reasonably conclude that it was reasonable to require La Sierra to post signs or otherwise warn spectators that there was no protective netting over its dugouts and that the only protected seats were behind home plate.

Legal malpractice; causation

Mireskandari v. Edwards Wildman Palmer LLP (2022) __ Cal.App.5th __ (Second Dist., Div. 3.)

Mireskandari sued his former attorneys, defendants Edwards Wildman Palmer LLP (EWP) and Dominique Shelton, for professional negligence alleging, among other things, that the defendants failed to advise him of California's anti-SLAPP statute before filing a complaint on his behalf against a newspaper publisher in California federal court. He alleged the lawsuit predictably drew a successful anti-SLAPP motion, which caused him to incur substantial attorney fees litigating and losing the motion and deprived him of discovery he intended to use in a disciplinary proceeding pending against him in the United Kingdom, ultimately resulting in the loss of his law license, substantial fines and fees, and bankruptcy.

The trial court granted defendants' motion for summary adjudication of the professional negligence claim, concluding Mireskandari could not establish causation under the case-within-a-case method because he could not prove he would have prevailed in his lawsuit against the publisher but for defendants' negligence. Reversed.

While the damages he claimed based on the adverse outcome of the U.K. disciplinary matter were too speculative to create a jury question, they were only part of his claim. Because an attorney owes a duty of care to advise a client of foreseeable risks of litigation before filing a lawsuit on the client's behalf, Mireskandari asserted a viable claim that, but for defendants' negligent failure to advise him of the risks associated with a potential anti-SLAPP motion, he would not have filed his lawsuit in California and would not have incurred damages from litigating and losing an anti-SLAPP motion.

Jeffrey I. Ehrlich is the principal of the Ehrlich Law Firm, *in Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. He is the editor-in-chief of Advocate magazine and a two-time recipient of the CAALA Appellate Attorney of the Year award.*