

Haydon's Key Language May Help You Defeat Unconscionable Arbitration Agreements

and Keep Your Long-Term Care Case in Court

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Haydon v. Elegance at Dublin, (2023) 97 Cal.App.5th 1280, serves as an excellent decision for the plaintiffs' bar in challenging the enforceability of arbitration agreements in long-term care settings in California, and particularly for plaintiffs bringing claims of abuse and neglect under the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) against Residential Care Facilities for the Elderly ("RCFE").

In *Haydon*, California's First District Court of Appeal provided clear language and strong authority that when a long-term care facility financially pressures an elder into signing an arbitration clause hidden in a stack of admissions paperwork with confusing signature blocks and tacked to a confidentiality provision and unfair discovery rules, the agreement as a whole is unconscionable and cannot be upheld.

Sally Ann Haydon ("Plaintiff"), who suffers from progressive supranuclear palsy and dementia, sued the owners and operators of Elegance at Dublin ("Facility"), an RCFE, alleging that she was sexually assaulted by a caregiver at the Facility, and alleging that the Defendants failed to protect her from known health and safety hazards and failed to protect her from abuse. Haydon further alleged that the Defendants knew she was unable to provide for her own care and safety, and that she and her family relied on the care and supervision Defendants were supposed to provide to her at the Facility.

Plaintiff sued Defendants and the caregiver under the Elder Abuse and Dependent Adult Civil Protection Act, as well as for negligence, assault, and battery.

The Haydon Admission and Signing of the Arbitration Agreement

The process of Plaintiff's admission, with increasing care needs, arbitrary time pressure by the marketing department, a lack of information, and unknown financial incentives and motives by the Facility, mirrors those of so many other elders and dependent adults throughout California who turn to a long-term care facility in a time of need and vulnerability.

Due to her recent diagnosis and decline in condition, Plaintiff's two daughters were assisting in finding her placement in an RCFE where she could receive assistance and supervision and be kept safe, and from her daughters' communication with the Facility's sales representatives, Facility staff were informed that Plaintiff suffered from cognitive and speech deficits.

Despite this knowledge, the Facility's "sales specialist" pressured the family for a signature on the admission paperwork before his final day in the position, promising that he could ensure Plaintiff, who had limited financial means, a more favorable monthly rate if she signed up with him. The Facility's "sales specialist" then followed up

multiple times on the admissions paperwork, continuing to rush Plaintiff to sign before he left the company. He told Plaintiff's daughters that he was in a "time crunch" to get all the paperwork done before his last day so that Plaintiff could get the rate she could afford.

Throughout this process, no one from the Facility explained the 44-page Residence and Care Agreement (RCA), or the arbitration clause included therein, which was sent via email to Plaintiff.

Furthermore, the arbitration clause buried within the RCA was confusing and convoluted. Specifically, the arbitration clause was the last of over twenty unrelated "miscellaneous" provisions tacked to the end of the RCA. The agreement contained two consecutive and confusing signature blocks: one for the arbitration clause and one for the RCA as a whole, although neither was clearly identified or distinguished from the surrounding text.

Also problematic was the language of the arbitration clause itself, which contained a confidentiality provision barring the parties from "disclos[ing] the existence, content, or results of the arbitration without prior written consent of the parties..." The agreement also required the parties to bear their own costs and fees for the arbitration.

The arbitration clause required that any claims and disputes arising out of the agreement shall be submitted to "neutral, binding arbitration in accordance with the Federal Arbitration Act," and "the arbitration shall be administered by the Judicial Arbitration and Mediation Services ("JAMS")," whose rules provides for exceptionally limited discovery. Any attorney who has ever handled an elder abuse case knows the arbitration default discovery would not be sufficient for Plaintiff to meet her burden of proof in a case like this.

Defendants' Attempt to Enforce the Unenforceable

After Plaintiff's complaint was filed, Defendants moved to compel arbitration, which the trial court denied, finding the arbitration agreement unconscionable, evidencing "a high degree of procedural unconscionability because it is a contract of adhesion presented under oppressive and surprising circumstances" and "a high degree of substantive unconscionability." Defendants appealed, arguing both that the agreement itself was valid and alternatively that any unconscionable portions of the agreement should be severed, leaving the balance to be enforced. Despite these arguments, the appellate court affirmed. Defendants thereafter sought further review by the California Supreme Court, which was denied.

As detailed below, the *Haydon* court laid out key language that practitioners should cite to when opposing motions to compel arbitration agreements in long term care cases.

Oppressive and Surprising Circumstances of Execution and Unfair Terms Make for an Unconscionable Agreement

Unconscionability is a "valid reason for refusing to enforce an arbitration agreement under Code of Civil Procedure §1281, which, as noted, provides that arbitration agreements are 'valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract;" (mirroring FAA §2.) To show unconscionability, both procedural and substantive unconscionability must be present, though the two factors are evaluated on a sliding scale, meaning more evidence of substantively oppressive terms will thus require less evidence of procedural unconscionability and vice versa.

As the *Haydon* court explained, "[p]rocedural unconscionability 'addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power.' ... 'Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided.'"

"In assessing procedural unconscionability, courts ask 'whether circumstances of the contract's formation created such oppression or surprise that closer scrutiny of its overall fairness is required.' [Citation omitted.] Oppression occurs 'where a contract involves lack of negotiation and meaningful choice' and surprise involves the extent to which 'the allegedly unconscionable provision is hidden within a prolix printed form.'"

The *Haydon* court affirmed that the "the circumstances surrounding Haydon's execution of the arbitration provision reflect a high degree of procedural unconscionability," due to both oppression and surprise, a finding "well-supported by the agreement itself and the declaration of Haydon's daughter..." Both the trial court order and the appellate decision demonstrate the power of a plaintiff's declaration regarding the circumstances of the execution of an arbitration agreement.

In opposing motions to compel, a declaration by the party, or as here, by the elder's attorney-in-fact, can be powerful in bringing evidence of consent to the court's attention. In elder abuse cases, a declaration such as this can effectively contradict and counteract a form declaration by a facility employee which purportedly states the "facts" of the signing in an attempt to validate the agreement. ,

In its analysis, the *Haydon* court heavily relied on *Dougherty v. Roseville Heritage Partners*, another case involving an elder abuse claim against an RCFE. The arbitration agreement in *Dougherty* was buried in a 70-page stack of documents that the daughter lacked time to review as she rushed to complete the admission process before her father arrived to the facility.

The *Haydon* court also upheld the trial court's finding of "surprise" based on the suspect formatting of the agreement itself:

Haydon was presented with a long, dense agreement interspersed with several confusing signature blocks – some of which she filled out incorrectly. As in *Dougherty*, the arbitration provision was "buried within the packet" Haydon was pressured to sign... And worse, the provision was not presented in a separate document ... or even in a separate section, but as the last of over 20 unrelated "miscellaneous" provisions spanning several pages at the end of the agreement. These reflect a high degree of surprise.

Defendants' failure to alert Plaintiff to the relevant provisions of the JAMS rules, including the limited default discovery available under those rules, discussed further below, also supported the finding of surprise.

The *Haydon* court also found that "the evidence supports the court's conclusion that [Plaintiff] was subjected to a financial 'pressure tactic' that was oppressive," based on the declaration outlining Plaintiff's declining condition, her limited financial resources and a "limited time only" deal offered to her by the Facility, and indicated that the circumstances surrounding Plaintiff's execution of the arbitration agreement was similar to the type of oppression discussed in *Dougherty*, where the prospective resident needed to find a facility that day.

The oppressive and surprising nature of the execution in combination with the formatting problems led the appellate court to affirm the trial court's finding of a "high degree" of procedural unconscionability, and under the sliding scale test, therefore "only a low level of substantive unconscionability is therefore required to render the arbitration agreement unenforceable."

"Substantive unconscionability arises when a contract imposes unduly harsh or one-sided results." In making this determination, courts look to whether the agreement meets a minimum level of fairness based on the factors set forth in *Armendariz v. Foundation Health Psychcare Services, Inc.*

Both the trial court and appellate court found three substantively unconscionable components to the arbitration clause: (1) the arbitration clause's confidentiality provision, (2) the default discovery limitations pursuant to the arbitration rules, and (3) the requirement that the parties bear their own costs and fees in connection with the arbitration.

First, the *Haydon* court found that the confidentiality provision, which prevented the parties from "disclos[ing] the existence, content, or results of the arbitration," restricted informal discovery, unnecessarily increased costs, and "unreasonably favored defendants to the detriment of those 'seeking to vindicate unwaivable statutory rights and may discourage potential plaintiffs' from bringing such [elder abuse] cases," was unconscionable to a high degree, because confidentiality about the case makes it difficult for other plaintiffs to obtain information about prior arbitrated cases against a defendant facility.

The *Haydon* court also emphasized the public policy dangers of keeping elder abuse claims confidential and the "repeat player effect" explaining:

While defendants attempt to dismiss Haydon's alleged abuse as an isolated incident, the Legislature has recognized that elders are particularly vulnerable to abuse by caretakers. (Welf. & Inst. Code, § 15600, subds. (b), (d).) There is an obvious risk that such abuse could occur at an elder residential care facility (see *Dougherty*, supra, 47 Cal.App.5th at p. 106, 260 Cal. Rptr.3d 580) and that it could reoccur if kept secret. As in the employment context, confidential arbitration of claims like Haydon's "tilt[s] the scales of justice" against potential victims of abuse "by denying [them] access to any information about other claims" against the facility. (Murrey, supra, 87 Cal.App.5th at p. 1254, 304 Cal.Rptr.3d 439.) Such a requirement is at odds with the Legislature's declaration that "confidential settlement agreements are disfavored" in actions involving violations of the Elder Abuse Act. (Code Civ. Proc., § 2017.310, subd. (a).)

Next, the Court found the required arbitration rules in the *Haydon* agreement, which provide for only a single deposition and do not provide for interrogatories or requests for admission, did not provide anything close to the full range of discovery available under the Civil Discovery Act. "In striking the appropriate balance between the desired simplicity of limited discovery and [plaintiffs'] statutory rights, courts assess the amount of default discovery permitted under the arbitration agreement, the standard for obtaining additional discovery, and whether the plaintiffs have demonstrated that the discovery limitations will prevent them from adequately arbitrating their statutory claims."

Be sure to review applicable discovery rules to determine whether there are any discovery limitations that could allow for a finding of unconscionability, especially in cases involving claims like

those under the Elder Abuse Act which require a heightened burden of proof. Indeed, the *Haydon* court noted, “these [discovery] restrictions ‘run the risk of frustrating plaintiffs’ statutory rights under the [Elder Abuse] Act,’ which requires plaintiffs to prove their claims by clear and convincing evidence... While courts have approved discovery restrictions akin to these in other contexts, the heightened standard of proof for elder abuse claims and the obstruction of informal discovery tip the balance here.” Note that in contrast, however, the California Supreme Court recently found in *Ramirez v. Charter Communications, Inc.* that the discovery provisions in the subject arbitration agreement were conscionable. The *Ramirez* court laid out some important criteria for plaintiffs’ attorneys to address regarding the conscionability of the arbitration’s discovery rules:

The assessment of whether a discovery clause is unconscionable should focus on general factors that can be examined without relying on subsequent developments. Those factors include the types of claims covered by the agreement, the amount of discovery allowed, the degree to which that amount may differ from the amount available in conventional litigation, any asymmetries between the parties with regard to discovery, and the arbitrator’s authority to order additional discovery.

Lastly, the *Haydon* Court took issue with the requirement that the parties bear their own costs and fees in connection with the arbitration. “In consumer cases, arbitration provisions that impose fees and costs that ‘in fact would be unaffordable or would have a substantial deterrent effect’ in the plaintiff’s case are unconscionable.” The trial court noted JAMS can charge up to \$10,000 a day for a single-arbitrator arbitration, an excessive cost to the elderly Plaintiff, who was on Social

Security and had no retirement funds. And although Defendants attempted to argue on appeal that Plaintiff would only pay the \$250 filing fee in reality per the fee schedule posted on the JAMS website, the appellate court found that they waived this claim by not bringing it up to the trial court. Accordingly, the *Haydon* court found substantial evidence to uphold the trial court’s determination of the requirement that the parties bear their own costs and fees in connection with the arbitration was unconscionable.

In sum, the *Haydon* court concluded, “[t]he unconscionable provisions identified by the trial court are enough to make the arbitration clause unenforceable under the sliding scale approach.”

An Agreement Permeated by Unconscionability Cannot Be Cured by Severability Clause and Terms Cannot Be Modified by Counsel at Argument

In light of a finding of unconscionability, a trial court has discretion to “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” pursuant to Civil Code §1670.5(a). The *Haydon* Defendants accordingly argued on appeal that the trial court abused its discretion by failing to address whether any unconscionable provisions could be severed from the arbitration agreement in order to enforce the rest of the agreement.

However, the *Haydon* court found no abuse of discretion in the trial court’s finding that the arbitration “provision here was permeated by unconscionability.” The *Haydon* Court again relied on *Armendariz*, holding that an arbitration agreement containing more than one unlawful

provision “may ‘indicate a systematic effort to impose arbitration’ not simply as an alternative to litigation, but as ‘an inferior forum that works to the [drafting party’s] advantage.’”

In a last-ditch attempt to cure the unconscionable agreement and have the court compel Plaintiff’s claims to arbitration by severing the unconscionable portions, Defendants offered to pay her arbitration fees. However, the *Haydon* court quickly discredited their offer, stating, “[this] ‘does not change the fact that the arbitration agreement **as written** is unconscionable and contrary to public policy.’ ... The trial court was not required to enforce an agreement ‘permeated by unconscionability’ by accepting defendants’ **after-the-fact offer to modify it.**” Thus, the *Haydon* court refused to sever any of the unconscionable provisions in the arbitration clause and found it was unenforceable in its entirety pursuant to Civil Code § 1670.5(a).

Since *Haydon*, we have relied on the above language and this powerful precedent to combat last minute attempts by counsel to essentially negotiate away the terms of problematic arbitration agreements.

We should also note here that in the recent *Ramirez* case, the court remanded the case back to the trial court to determine “whether the contract’s unconscionability can be cured purely through severance or restriction of its terms, or whether reformation by augmentation is necessary.” The Court muddied the waters on this issue by stating that on one hand “no bright line rule requires a court to refuse enforcement if a contract has more than one unconscionable term,” but going on to state that “[I]kewise, a court is not required to sever or restrict an unconscionable term if an agreement has only a single such term.” Notably, the *Ramirez* court cited

Haydon for the proposition that “parties to an agreement cannot divest a trial court of its discretion under Civil Code section 1670.5 by including a severance clause.”

Conclusion

When making arguments against motions to compel arbitration, the *Haydon* decision gives plaintiffs and their attorneys key language to fight against defendants who attempt to enforce or cure unconscionable arbitration agreements, especially in the context of elder abuse cases and/or cases where injuries occur in long-term care settings.



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