CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Suh v Superior Court (2/18/2010)

Unconscionability; Arbitration Agreement; Petition to Compel Arbitration

Plaintiffs were anesthesiologists on the medical staff of Defendant Hollywood Presbyterian Medical Center. In 2005, plaintiffs formed a group, "HP Anesthesia LLC," which was later changed to "HP Inc." In 2006, they entered into an agreement with the Hospital to provide all anesthesia and pain management services at the hospital. They signed a "Waiver and Agreement" form to become bound.

The plaintiffs allege in 2008 they were removed from the hospital Anesthesiology Department schedule because of their age and national origin. In 2008, HP and the Hospital entered into a new agreement for coverage of the Department, which plaintiffs assert they did not see or receive until months after it had been executed. Plaintiffs allege that after their removal from the schedule they did not practice at the hospital again.

Plaintiffs filed suit, alleging various forms of discrimination in violation of statute, along with intentional contract interference and economic advantage interference, breach of contract, and other claims. Defendants petitioned to compel arbitration, invoking the 2006 Agreement. That agreement provided for handling the case in accordance with the American Health Lawyers Association (AHLA) rules of procedure.

Plaintiff Suh declared that he had never seen the agreement, and signed the waiver only. He also alleged the AHLA rules would result in a waiver of his rights and remedies to recover certain damages. Under the AHLA rules, the Arbitrator was prevented from awarding various categories of damages in an action unless it was unrelated to a tort arising from employment or termination of employment. Further, clear and convincing evidence was set as the standard required to prove any such damages, with a showing the defendant is guilty of conduct, intentional or reckless disregard for the rights of another, or fraud.

The trial court found the arbitration agreement valid and so ordered. Plaintiffs filed a petition for a writ of mandate, contending no arbitration agreement existed from the date of the 2008 agreement forward, and that the 2006 agreement was procedurally and substantively unconscionable. Defendants claimed plaintiffs had consented to arbitration because they signed the waiver agreement, and are bound even though they are non-signatories, because they accepted the benefits of the agreement. They also argued that to the extent the AHLA rules are unconscionable, they could be severed from the agreement. The Second Appellate District acknowledged that California courts have uniformly acknowledged that there is a strong public policy in favor of arbitration. Thus, "doubts concerning the scope of arbitrable issues are to be resolved in favor of arbitration. (*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v 100 Oak Street* (1983) 35 Cal. 3d 312) Employing general contract law principles, courts will refuse to enforce arbitration provisions that are unconscionable or contrary to public policy. (*Armendariz v Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83)

The 2008 Agreement

The 2008 agreement is between the Hospital and HP Inc. There is no reference to the obligation of any employee or shareholder of HP Inc. There is no evidence that any plaintiffs agreed to arbitrate any dispute arising from the 2008 agreement. Persons are not normally bound by an agreement entered into by a corporation in which they have an interest or in which they are employees. (See, *Benasra v Marciano* (2001) 92 Cal.App. 4th 987)

Defendants claim plaintiffs are bound as third party beneficiaries, agents or employees of HP Inc., or as having accepted the benefits of the 2008 agreement. The Justices pointed out that the plaintiffs did not derive any benefits as shown by the evidence. By 2008, plaintiffs were not working at the hospital. They did not sign the 2008 agreement on behalf of HP Inc. as principals and did not benefit from the agreement. (See, *RN Solutions, Inc. v Catholic Healthcare West* (2008) 165 Cal.App.4th 1511) Plaintiffs are shareholders of a corporation, and the agreement was not signed by them individually or on behalf of the corporation. Therefore, the DCA found, the 2008 Agreement provides no basis for compelling arbitration.

The 2006 Agreement

Turning to the 2006 Agreement, the DCA noted the document provided for arbitration in accordance with AHLA Rules, which prohibit an award of "consequential, …incidental, punitive or special damages" except in tort cases unrelated to employment or termination of employment. In such non-employment cases the arbitrator may award such damages only on a finding that there is clear and convincing evidence the party against whom such damages are awarded is guilty of intentional conduct or reckless disregard for the rights of another, or fraud. Thus, there is an absolute bar to several damage categories in employment cases, and there are several other limitations as well.

In this case, the claims are such that the above limitations would apply. Plaintiffs claim the 2006 Agreement is both procedurally and substantively unconscionable, rendering the arbitration clause unenforceable. Procedural unconscionability focuses on oppression, surprise and the manner in which the agreement was negotiated. Substantive unconscionability focuses on the actual terms of the agreement and evaluates whether they create overly harsh or one-sided results as to shock the conscience. (*Aron v U-Haul Co. of California* (2006) 143 Cal.App.4th 107)

As the Supreme Court has said, the prevailing view is that both procedural and substantive unconscionability must be present before a court can refuse to enforce an arbitration provision based on unconscionability. (*Gentry v Superior Court* (2007) 42 Cal.4th 443) The court added that the absence of procedural unconscionability would as a logical conclusion mean that no matter how one-sided the contract terms, a court will not disturb the contract. (*Gentry v Superior Court* (2007) 42 Cal.4th 443) (See, Civil Code section 1670.5)

Although both substantive and procedural unconscionability are required, *they need not be present in the same degree*… the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion the term is unenforceable, and vice versa. (See, *Armendariz*, above)

Here, the severe AHLA rules limits are substantively unconscionable. All types of relief available in court are not available here. There is also uncontradicted evidence of procedural unconscionability, where here the plaintiffs did not even have an opportunity to see the contract when they signed the "Waiver and Agreement," as a condition of practicing anesthesiology at the Hospital.

Weighing both the substantive and procedural unconscionability, the Justices concluded the arbitration provision in the 2006 Agreement was unconscionable. Additionally, the AHLA rules could not be severed from the agreement because there is no provision for any replacement rules. The limitation on damages in this case is, "…so egregious and so draconian that it should not be permitted to be severed. Otherwise parties will be encouraged to insert such clauses, with the only sanction being the removal of the clause." (See, *Armendariz*) The parties are not bound by the 2006 agreement to arbitrate. Since neither the 2006, nor the 2008 arbitration provision is valid, the Petition for Writ of Mandate is granted. The trial court shall set aside its order compelling arbitration. Plaintiffs are awarded their costs.