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"The more unconscionable provisions contained in a contract, the less likely severance is an appropriate remedy."

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California Supreme Court provides guidelines for severing unconscionable arbitration terms – primarily, whether they reflect an intent to secure a forum that favors the stronger party.

In *Ramirez v. Charter Communications, Inc.* (July 15, 2024) 16 Cal.5th 478, Plaintiff Angelica Ramirez was hired by Defendant Charter Communications, Inc. Using an onboarding process, Ramirez read and signed several documents, including an arbitration agreement. Ramirez was fired and sued Charter, alleging claims for discrimination, harassment, retaliation, and wrongful discharge in violation of public policy. Relying on the Agreement, Charter moved to compel arbitration. Ramirez opposed the motion, arguing the arbitration agreement procedurally unconscionable as a contract of adhesion, and that several provisions were substantively unconscionable as well. The trial court refused to compel arbitration, finding the arbitration agreement was "permeated with unconscionability." Charter appealed.

The Court of Appeal affirmed the denial of Charter's motion, although it disagreed with aspects of the trial court's reasoning and concluded additional provisions were unconscionable. The court also disagreed with *Patterson v. Superior Court* (2021) 70 Cal.App.5th 473, as to the enforceability of a provision calling for an interim award of attorney fees following a successful motion to compel. The California Supreme Court granted review to resolve that conflict and to determine whether the Court of Appeal erred in concluding the arbitration agreement was unconscionable because it lacked mutuality in terms of the claims subject to and excluded from arbitration; shortened the period for filing claims; and truncated discovery.

Reversed and remanded with instruction. The more unconscionable provisions contained in a contract, the less likely severance is an appropriate remedy. Nevertheless, courts may sever unconscionable provisions and enforce the remainder of the contract if the section was not central to the contract's main purpose and enforcement would serve the interests of justice. The decision to do so requires analyzing the totality of the circumstances. Here, the appellate court concluded that four aspects were unconscionable, while the Supreme Court found that one was not, the discovery rules. Because it was difficult to ascertain how the appellate court would have responded given the same conclusion, reversal and remand was necessary for the appellate court to more thoroughly examine this and other remaining questions about the unconscionability and enforceability of other provisions. Among other guidance, the California Supreme Court noted that courts should consider whether mere severance of the unconscionable terms would function to condone an illegal scheme, whether the

defects indicate an intent to secure a forum that works to the stronger party's advantage, and the deterrent effect of each option.

California Supreme Court holds that party opposing arbitration based on waiver no longer need show prejudice.

In *Quach v. California Commerce Club, Inc.* (July 25, 2024) 16 Cal.5th 562, Peter Quach worked for California Commerce Club for nearly 30 years. After his termination, he sued for wrongful termination, age discrimination, retaliation, and harassment. During his employment, Quach had signed an arbitration agreement related to employment related disputes. However, rather than filing a motion to compel arbitration, Commerce Club answered Quach's complaint and initiated discovery. It waited 13 months before bringing a motion to compel arbitration. Quach opposed the motion, arguing that Commerce Club had waived its contractual right to compel arbitration. The trial court denied Commerce Club's motion. It found that Commerce Club "knew of its right to compel arbitration" and instead of moving to compel arbitration, propounded a "large amount" of written discovery, spent "significant" time meeting and conferring "over many months," and took Quach's deposition, demonstrating "a position inconsistent [with the intent] to arbitrate" and causing "prejudice." Commerce Club appealed and a divided Court of Appeal reversed. Two weeks after the Court of Appeal published its decision, the United States Supreme Court issued *Morgan v. Sundance, Inc.* (2022) 596 U.S. 411, holding that federal law does not require a showing of prejudice to establish waiver of the right to arbitrate. The California Supreme Court granted review to reexamine California's prejudice rule in light of *Morgan*.

"Accordingly, under California law, as under federal law, a court should apply the same principles that apply to other contracts to determine whether the party seeking to enforce an arbitration agreement has waived its right to do so."

Reversed and remanded with instructions. Private parties may agree to resolve their disputes in arbitration rather than in court. If a party to an arbitration agreement files a complaint in court raising a claim covered by the agreement, the defendant can file a motion asking the court to stay the lawsuit and send the dispute to arbitration. A defendant who instead litigates the case risks losing the contractual right to compel arbitration. One way a contractual right may be lost is by waiver. Outside the arbitration context, a California court will find waiver when the party seeking to enforce a known contractual right has intentionally relinquished or abandoned that right. In the arbitration context, however, California law has added the requirement that the party seeking to avoid arbitration show prejudice. (See *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187). This additional, arbitration-specific requirement, was based on a policy favoring arbitration over litigation as a form of dispute resolution. Until recently, most federal appellate courts similarly applied an arbitration-specific rule that required a showing of prejudice to establish waiver. The California rule is based upon these federal cases. However, in *Morgan* the United States Supreme Court rejected this rule and clarified that the federal " 'policy favoring arbitration' " is about putting arbitration agreements on equal footing with other contracts, not about favoring arbitration. Accordingly, the Supreme Court held that, under federal law, a court must apply the same rules that apply to any other contract when determining whether a party to an arbitration agreement has lost the right to enforce the agreement. Because the California state-law arbitration-specific prejudice requirement is based upon the federal precedent that *Morgan* overruled, the

California Supreme Court abrogated it. California policy, like federal policy, now puts arbitration agreements on equal footing with other types of contracts. Accordingly, under California law, as under federal law, a court should apply the same principles that apply to other contracts to determine whether the party seeking to enforce an arbitration agreement has waived its right to do so. The Court of Appeal applied an arbitration-specific prejudice requirement to overrule the trial court's order denying California Commerce Club's motion to compel arbitration and was, therefore, reversed.

Airline fuel technician fell within FAA's transportation worker's exemption and could not be compelled to arbitrate wage and hour claim (Ninth Circuit).

In *Lopez v. Aircraft Service International, Inc.*, 107 F.4th 1096 (Jul. 19, 2024), Danny Lopez was employed by Menzies Aviation (USA), Inc., as an airline fuel technician at LAX. He filed an action in California superior court against Menzies and Aircraft Service International, Inc. alleging that Menzies violated California's wage, meal period, and rest period requirements. Menzies removed to district court and filed a motion to compel arbitration based upon an arbitration agreement Lopez had signed in connection with his employment. The district court denied the motion holding that, as a transportation worker engaged in foreign or interstate commerce, Lopez was exempt from the arbitration requirements imposed by the Federal Arbitration Act (FAA). Menzies appealed, asserting that Lopez's fueling of airplanes that carried goods in interstate and foreign commerce was insufficient to support an exemption under the FAA.

"Here, the court concluded that a fuel technician who places fuel in an aircraft used for foreign and interstate commerce is a "transportation worker" engaged in commerce because such a worker plays a direct and necessary role in the free flow of goods across borders."

Affirmed. The Federal Arbitration Act does not "apply to contracts of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Any class of workers directly involved in transporting goods across state or international borders falls within this transportation worker exemption. Here, the court concluded that a fuel technician who places fuel in an aircraft used for foreign and interstate commerce is a "transportation worker" engaged in commerce because such a worker plays a direct and necessary role in the free flow of goods across borders. To fall within this exemption, there is no requirement that the worker have hands – on contact with goods and cargo or be directly involved in the transportation of the goods. Therefore, the district court correctly denied the motion to compel arbitration.

District court properly declined to compel arbitration and sever unconscionable terms from arbitration agreement containing unfair surprise and one-sided terms (Ninth Cir.).

In *Ronderos v. USF Reddaway, Inc.* (Aug. 22, 2024) 2024 WL 3894525, Plaintiff Jose Emilio Ronderos applied to work for Defendant USF Reddaway, Inc., as a line haul manager. He was required to sign a pre-printed document that included an arbitration clause on a take-it-or-leave-it basis. The agreement imposed two procedural requirements on Ronderos, but not on Reddaway: (1) a requirement that Ronderos send Reddaway notice of a claim using a particular form in a specific manner; and (2) a one-year statute of limitations running from the date the claim arose. Failure to comply resulted in waiver of any claim. The agreement

also contained a severability clause. Ronderos alleged that he was diagnosed with cancer, took a medical leave of absence, and was terminated. He filed employment-related claims in California state court. Reddaway removed the case to district court and brought a motion to compel arbitration. The district court denied the motion finding the agreement both procedurally and substantively unconscionable, lacking mutuality to a substantial degree. It also declined to sever the unconscionable provisions.

"While courts may sever unconscionable terms, the question is whether the contract is 'tainted with illegality.' If so, the contract as a whole cannot be enforced."

Affirmed. A contract is unconscionable if one of the parties lacked a meaningful choice in deciding whether to agree, and the agreement included terms favorable to the other party. While courts may sever unconscionable terms, the question is whether the contract is "tainted with illegality." If so, the contract as a whole cannot be enforced. Here, the agreement contained both substantive and procedural elements. It was adhesive, involved significant oppression, and some surprise. It also included one-sided requirements imposed on Ronderos only that were less favorable and burdensome to him. The district court also considered the agreement's severability clause and correctly concluded that such clauses are not dispositive. For those reasons, the district court did not abuse its discretion in declining to sever the unconscionable terms and compel arbitration.

Arbitrator may exclude evidence from consideration if party engaged in discovery abuse.

In *Valencia v. Mendoza* (July 1, 2024) 103 Cal.App.5th 427, Miguel and Lizette Valencia purchased a home from Armondo Mendoza and discovered significant, undisclosed defects shortly after escrow closed. They sued Mendoza, who compelled arbitration pursuant to an arbitration clause in the purchase contract. The arbitrator excluded a permit inspection card proffered by Mendoza because he did not produce it in discovery. Instead, after the close of discovery, he produced it on the evening before the arbitration hearing claiming he had done "another search" and found the card intermixed with other non-relevant documents. After the arbitrator awarded monetary and punitive damages, Mendoza petitioned to vacate the award.

"The court (or arbitrator) may impose evidentiary sanctions if a party engages in a pattern of discovery abuses, including a failure to provide responsive documents."

Affirmed. The court (or arbitrator) may impose evidentiary sanctions if a party engages in a pattern of discovery abuses, including a failure to provide responsive documents. The Plaintiffs submitted excerpts of their discovery demands clearly demonstrating that the permit inspection card was within the scope of requested documents and not timely produced. At the hearing on the petition to vacate, the court was not persuaded by Defendant's explanation that he happened to find the card on the evening before the arbitration hearing. Rather, the court found that sufficient evidence existed to support the conclusion that Defendant willfully failed to comply with discovery requests. Because Defendant failed to meet his burden of proof in showing the arbitrator erred in her ruling, the judgment was affirmed.

Ralphs Grocery Company cannot compel arbitration as third-party beneficiary of contract between Instacart and consumer.

In *Mahram v. The Kroger Co.* (Aug. 19, 2024) 104 Cal.App.5th 303, Plaintiff Payam Mahram used Instacart, an online grocery delivery service, to have

groceries delivered from Defendant The Kroger Co., dba Ralphs Grocery Company. Mahram had agreed to arbitrate disputes against Instacart when he opened an account and agreed to its Terms of Service, which included an arbitration clause. Mahram sued Ralphs alleging violation of false advertising and unfair competition laws. Ralphs moved to compel arbitration as a third-party beneficiary under Instacart's contract with Mahram. The trial court denied the motion. Ralphs appealed.

"In order to be a third-party beneficiary, the contracting parties must have a motivating purpose to benefit the third-party, and not mere knowledge that a benefit may flow to it by virtue of their contract."

Affirmed. In order to be a third-party beneficiary, the contracting parties must have a motivating purpose to benefit the third-party, and not mere knowledge that a benefit may flow to it by virtue of their contract. Here, Ralphs was not a third-party beneficiary because Instacart and its consumers did not contract for the purpose of benefiting Ralphs, or any grocery store in particular. Instead, the consumer's goal was to get groceries, and Instacart's goal was to receive payments from consumers who request deliveries. Thus, the trial court correctly declined to compel arbitration.

Likewise, Ford Motor Co. could not compel arbitration as a third-party beneficiary of car sale contract.

In *Rivera v. Superior Court (Ford Motor Co.)* (Sept. 23, 2024) 2024 DJDAR 9327, Isai Rivera purchased a new Ford F–250 truck from a dealer, Fairway Ford, receiving a new vehicle limited warranty from Ford Motor Company as part of the purchase. The sales contract included an arbitration agreement on the second page, and specifically allowed for third-party beneficiaries such as Ford to seek arbitration when the claim related to the vehicle's condition. Upon experiencing problems with the truck, Rivera took it to Ford of Ventura for servicing. After efforts to repair the problem failed, Rivera sued Ford under state lemon laws. When Ford moved to compel arbitration, the trial court granted the motion, noting that under *Felisilda v. FCA US, LLC* (2020) 53 Cal.App.5th 486, when claims are intertwined with the underlying contract to which a third-party is an intended beneficiary, that party may compel arbitration. Rivera filed a motion for reconsideration after other Courts of Appeal disapproved *Felisilda*. The trial court denied the motion. Rivera sought a writ of mandate.

"Contracts made to benefit a third party may be enforced by the third-party beneficiary. Whether that party benefits from the contract requires analysis of several factors, including whether the motivating purpose was to provide a benefit to the third party."

Writ issued. Contracts made to benefit a third party may be enforced by the third-party beneficiary. Whether that party benefits from the contract requires analysis of several factors, including whether the motivating purpose was to provide a benefit to the third party. Here, the contract's language did not support a finding that Ford was a third- party beneficiary. The arbitration agreement in the sales contract specifically referenced the buyer and seller-creditor, Fairway Ford, in such a way that did not include Ford as a third-party beneficiary. In addition, the sales contract clearly distinguished between dealer and manufacturer warranties. Finally, *Felisilda* was inapplicable because Rivera's claims against Ford were not intertwined with the sales contract.

“No evidence was introduced to indicate the decedents had authorized any of the family representatives to sign the arbitration agreements.”

Nursing home could not compel arbitration of wrongful death claims because relatives who signed agreements lacked any agency relationship - actual or ostensible - with decedents.

In *Hearden v. Windsor Redding Care Center* (July 23, 2024) 103 Cal.App.5th 1010, Plaintiffs were family members of relatives who died from Covid while under the care of Defendant, Windsor Redding Care Center, LLC). Plaintiffs sued Windsor and its owners. Defendants moved to compel arbitration based on four agreements signed by family members rather than the decedents. The trial court denied the motion, finding that as to three of the agreements, there was no evidence the family signatory had authority to sign on behalf of the decedent; as to all four of the agreements, there was no evidence the family signatory agreed to arbitrate their individual claim; and as to one successor claim in which the family signatory had power of attorney, the trial court exercised its discretion to deny the motion to compel arbitration to avoid the possibility of conflicting results. Defendants appealed.

Affirmed. A person authorized to act as a resident’s agent can bind the resident to an arbitration agreement. The agency may be ostensible, which requires conduct on the part of the principal that causes a third party to believe the agent has authority to act on the principal’s behalf. However, an agency relationship cannot be created by the unilateral conduct of the agent. The party seeking to compel arbitration based on an agreement signed by an agent bears the burden of proving ostensible agency. Here, the family representatives signed agreements as “legal representatives,” and stated in the agreements they were authorized to act as agents in signing them. That was insufficient on its own to establish ostensible agency. No evidence was introduced to indicate the decedents had authorized any of the family representatives to sign the arbitration agreements. In addition, there was no indication of any relevant representations, concealed facts, or misconduct directly related to the arbitration agreements that would support the application of either the doctrine of equitable estoppel or unclean hands. Therefore, in light of the lack of signatories, the arbitration agreements were not binding on the decedents’ heirs.

Similarly, trial court denied nursing home’s motion to compel arbitration and appellate court remanded to determine threshold issues as to validity of arbitration agreement.

In *Maxwell v. Atria Management Co., LLC* (Sept. 23,2024) 2024 WL 4259238, Trudy Maxwell was a 93-year-old resident of Defendant Atria Park of San Mateo, who died after she drank an industrial strength cleaner that had been poured into a beverage pitcher by an Atria employee and served to her and several other residents. Trudy's eight surviving children sued Atria. Atria moved to compel arbitration. The trial court denied the motion, concluding, among other things, that Trudy’s son, James III, was not authorized to sign the arbitration agreement executed in connection with Trudy's admission to Atria because, as the holder of a durable power of attorney, he was not authorized to make health care decisions for Trudy. Instead, Trudy's daughter, Marybeth, held Trudy's power of attorney for health care. Atria appealed. While the appeal was pending, the

California Supreme Court decided *Harrod v. Country Oaks Partners, LLC* (2024) 15 Cal.5th 939.

"Here, the appellate court noted that in Harrod, the California Supreme Court concluded that the signatory's agreeing to an optional, separate arbitration agreement with the nursing facility was not a health care decision and, therefore, not within the signatory's authority, because it was not 'a necessary decision that must be made to preserve a person's well–being.'"

Reversed and remanded. The general principles of contract law determine whether a party has entered into a binding agreement to arbitrate. Here, the appellate court noted that in *Harrod*, the California Supreme Court concluded that the signatory's agreeing to an optional, separate arbitration agreement with the nursing facility was not a health care decision and, therefore, not within the signatory's authority, because it was not "a necessary decision that must be made to preserve a person's well–being." However, before those issues could be addressed, the court noted several threshold questions regarding whether the arbitration agreement was validly executed or voluntarily executed in the first place. In light of those unresolved issues, the appellate court remanded to the trial court to reconsider the validity of the arbitration agreement in light of *Harrod*.

So also, nursing home could not compel arbitration because conservatorship order did not confer authority in conservator to bind conservatee to arbitration.

In *Enmark v. KC Community Care* (Sept. 25, 2024) 2024 WL 4290290, Lisa Enmark suffered from psychosis and required a conservatorship under The Lanterman-Petris-Short Act (LPS) (Welf. & Inst. Code, § 5000 et seq.). The LPS "authorizes the appointment of a conservator for up to one year for a person determined to be gravely disabled as a result of a mental disorder and unable or unwilling to accept voluntary treatment." Her father, Scott Enmark, was appointed Lisa's conservator and moved her into KC Community Care Center, a skilled nursing facility. Scott signed two optional arbitration agreements with KC as Lisa's representative. After Lisa was sexually assaulted by a male resident and died days later, her parents sued KC's owners and operators. Defendants petitioned to compel arbitration. The trial court denied the petition, finding no evidence of Scott's authority to bind Lisa to arbitration on the successor claims. KC appealed.

"Here, the conservatorship order did not establish an agency relationship giving Scott authority to sign the arbitration agreements on Lisa's behalf."

Affirmed. Because arbitration agreements are contractual in nature, generally one must be a party to the arbitration agreement to be bound by it. However, care facility residents not signing an arbitration agreement may nevertheless be compelled to arbitrate when an agency relationship exists between the resident and persons signing the agreement. Here, the conservatorship order did not establish an agency relationship giving Scott authority to sign the arbitration agreements on Lisa's behalf. The conservatorship order did not include other language, generally or as a catch-all, that would confer such authority to Scott. Although the order provided Scott authority to make health care decisions for Lisa, the separate agreements to arbitrate were unrelated and unnecessary to the health care decisions of placing Lisa in the facility.

Defendant's payment of arbitration fees is timely where Plaintiff's counsel mistakenly paid Defendant's share and Defendant promptly paid after new invoice sent.

In *Anoke v. Twitter* (Sept. 18, 2024) 2024 WL 4230621, Sarah Anoke and other current or former employees initiated arbitration proceedings with Judicial Arbitration and Mediation Services to resolve employment–related disputes with Twitter (now known as "X"). On March 7, 2023, the arbitrator emailed an invoice for $27,200, X's share of the initial fees, to all counsel. Anoke's counsel mistakenly paid the invoice the same day. As a result, when X's counsel accessed the arbitrator's online portal, the system listed the status of the invoice as closed and the $27,200 invoice has "paid." After notifying the arbitrator of the error, Anoke's counsel received a refund. Anoke's counsel did not notify X that it had paid the fees or requested a refund. On April 7, 2023, the arbitrator emailed counsel for both parties indicating that the billing department reversed the original invoice and sent a second invoice for $27,200. On May 5, 2023, X remitted payment of the April 7 invoice. Anoke filed a motion seeking a remedy for untimely payment under Code of Civil Procedure Section 1281.97(b)(2). After a hearing, the trial court denied relief, concluding that X timely paid the second invoice and therefore met the statutory deadline.

"Neither invoice was ever past due for 31 days, as the statute requires for a default. Accordingly, the trial court properly denied the petition."

Affirmed. To discourage delays in arbitration, Section 1281.97 provides a remedy when a company's share of the initial arbitration fees "are not paid within 30 days" of the invoice. A default occurs when the arbitration fees go unpaid for 31 days after the due date set by the arbitration provider's notice. Here, the court found that no default occurred. The arbitrator issued the first invoice, properly marked due upon receipt. Anoke's counsel immediately paid the invoice in full. When the arbitrator issued a new invoice, also marked due upon receipt, X paid the fees within 30 days. Neither invoice was ever past due for 31 days, as the statute requires for a default. Accordingly, the trial court properly denied the petition.

Employer waived right to compel arbitration of former employee's claim by stipulating to mediation and waiting months before seeking to compel.

In *Campbell v. Sunshine Behavioral Health* (Sept. 25, 2024) 2024 WL 4283848, Plaintiff Britnee Campbell, a former employee of defendant Sunshine Behavioral Health, LLC, filed an employment action against Sunshine for wage and hour violations as a putative class action on May 23, 2022. Sunshine proceeded with litigation, eventually entering into a joint stipulation to, among other things, participate in mediation. In November, Sunshine, allegedly for the first time, discovered Campbell had signed an arbitration agreement. Weeks later, Sunshine represented to the court it intended to proceed with mediation. The parties submitted a joint stipulation regarding mediation and discovery. The trial court signed the mediation order in March 2023. At that point, for the first time, Sunshine stated it would not participate in mediation but instead intended to file a petition to compel arbitration. It did not do so until May 3, when it filed a motion to compel arbitration. The trial court determined Sunshine had waived arbitration, and denied the motion. Sunshine appealed

"'The alternative is to encourage parties to lull their opponents into believing that a dispute will be litigated, while they wait for an opportune moment to spring the trap door of arbitration.'"

Affirmed. There was clear and convincing evidence to support the trial court's finding that Sunshine's conduct waived any right to arbitration. It was "'highly probable' " that Sunshine knew of its right to attempt to compel arbitration. Sunshine's delay in asserting any right to arbitration was not from its alleged discovery in November 2022 until it finally filed its motion to compel in May 2023—it was from the outset of the case.

"It is well established that a four-to six-month delay in enforcing the right to arbitrate may result in a finding of waiver if the party acted inconsistently with the intent to arbitrate during that window." Prior to November, Sunshine behaved as if it intended to litigate the case, engaging in negotiations over the joint stipulation and representing to the court that it intended to mediate. After November, Sunshine presented the joint stipulation to the court, and until March 2023, behaved as if it intended to proceed with mediation and to follow the court's order. This, too, was inconsistent with its claimed right to arbitrate, as was its later participation in discovery.

"If one is to take seriously the view that arbitration is freely-chosen, consensual, and tailored to the parties' desires, then parties wishing to arbitrate disputes should be required to invoke their rights with some measure of good faith. The alternative is to encourage parties to lull their opponents into believing that a dispute will be litigated, while they wait for an opportune moment to spring the trap door of arbitration."

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