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Appellate Practice Corner

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Appellate Courts Show Willingness to Invalidate Commercial Arbitration Agreements Between the Parties with Unequal Bargaining Power

In a series of recent decisions, the Illinois appellate courts demonstrated their willingness to scrutinize arbitration clauses in consumer contracts and to refuse to enforce them, if found substantively or procedurally unconscionable. In doing so, the courts departed from the general principle that "arbitration is a favored alternative to litigation by state, federal and common law because it is a speedy, informal, and relatively inexpensive procedure for resolving controversies arising out of commercial transactions." *Board of Managers of Courtyards at Woodlands Condo. Ass'n v. IKO Chicago, Inc.*, 183 Ill. 2d 66, 71 (1998). Rather, the First and Fifth Districts of the Illinois appellate court focused on the parties' unequal bargaining power and the customers' inability to negotiate the terms of arbitration provisions in what amounts to adhesion contracts.

Hwang v. Pathway LaGrange Property Owner, LLC

In *Hwang v. Pathway LaGrange Property Owner, LLC*, 2024 IL App (1st) 240534, the Illinois Appellate Court First District affirmed a circuit court order declining to enforce an arbitration provision in an assisted nursing facility contract, which the court deemed substantively unconscionable. In that case, the plaintiff, Joan Hwang, was 90 years old and a resident of Aspired Living, an assisted living facility in LaGrange, Illinois. *Hwang*, 2024 IL App (1st) 240534, 3 ¶. She brought common law negligence and statutory claims against the facility after sustaining injuries when an Aspired employee opened a door into a hallway, striking her and knocking her to the ground. *Id*. Aspired sought to compel arbitration, pursuant to an arbitration agreement, which Hwang had signed, among other voluminous paperwork when she entered into the residency. The arbitration agreement applied to all disputes, except payment and eviction disputes, and limited all damages to a maximum of $250,000. *Id*. ¶ 5. The agreement also provided: "You acknowledge that you have been encouraged to discuss this Agreement with an attorney. By signing below, you acknowledge that you have reviewed this Agreement and understand it." *Id*.

Despite this contractual language, Hwang argued that the arbitration clause was both procedurally and substantive unconscionable because it constituted several pages "of the extremely voluminous 75-page residency and services agreement" and because she was 89 when she signed it on the day she was scheduled to be admitted to the facility. *Id*. ¶ 6. She also argued that the agreement, taken as a whole, was one-sided in Aspired's favor, and that she did not receive any additional consideration for limiting her damages and waiving rights to statutory attorneys' fees. *Id*.

The appellate court agreed with Hwang, finding the arbitration agreement "entirely one-sided, greatly favoring Aspired to Hwang's detriment." *Hwang*, 2024 IL App (1st) 240534, ¶ 19. The court pointed out that the only disputes excluded from arbitration were rent disputes and eviction actions—the very claims Aspired was most likely to bring against its residents. *Id*. Yet, residents were forced to arbitrate negligence claims, which "residents often bring in the

assisted living context." *Id*. The court also stressed that the confidentiality clause, requiring proceedings to "remain confidential in all respects," unfairly favored Aspired. *Id*. ¶ 22. The court explained that, as a repeat player in arbitration, Aspired had access to information about past arbitration precedents, while Hwang did not. *Id*. Finally, the court concluded that the $250,000 damages cap and prohibition of punitive damages supported an unconscionability finding because they were intended to limit Aspired's liability for personal injury and malpractice claims. *Id*. ¶¶ 23-24. Finally, the court pointed out that the arbitration agreement was on a pre-printed form, and nothing in the record reflected that Hwang had any opportunity to negotiate its terms. *Hwang*, 2024 IL App (1st) 240534, ¶ 25. Accordingly, the court refused to enforce the arbitration provision and let the case proceed to the circuit court.

Dick-Ipsen v. Humphrey, Farrington & McClain, P.C.

The appellate court reached a similar result in *Dick-Ipsen v. Humphrey, Farrington & McClain, P.C.*, 2024 IL App (1st) 241043, which involved an arbitration provision in a law firm's retainer agreement. In that case, plaintiff, who resided in Johnsburg, Illinois, retained attorneys in Independence, Missouri, some 500 miles away, to represent him in a tort case against chemical manufacturers and suppliers. *Dick-Ipsen*, 2024 IL App (1st) 241043, ¶¶ 4-5. After the case was filed, several of his claims were dismissed as time-barred, and he sued his attorneys for legal malpractice. *Id*. ¶¶ 8-9. The law firm sought to compel arbitration, based on the Attorney-Client Agreement, which provided for a 45 percent contingency fee and obligated plaintiff to resolve all disputes relating to the agreement "exclusively by arbitration before a single arbitrator in Kansas City, Missouri" in accordance with AAA rules. *Id*. ¶ 7. The First District affirmed a circuit court order refusing to compel arbitration on the ground that the arbitration provision was procedurally unconscionable. *Id*. ¶ 39.

The court held that, under Illinois Supreme Court Rules of Professional Conduct, there is no prohibition on a lawyer entering into an agreement with the client to arbitrate legal malpractice claims, but the client must be fully informed of the scope and effect of the agreement. *Id*. ¶ 19. The plaintiff, however, submitted an affidavit in the trial court, attesting that the law firm never discussed the arbitration provision with him. *Id*. ¶¶ 11, 20. The plaintiff further claimed that, as a result, he did not know what the term "arbitration" meant, what rights he was giving up, and the overall effect of the arbitration provision. Id. The law firm did not submit any evidence to the contrary. *Dick-Ipsen*, 2024 IL App (1st) 241043, .20 ¶

The appellate court found that the arbitration provision was procedurally unconscionable. *Id.* ¶ 26. The court explained:

> When deciding whether a contract or a provision thereof is procedurally unconscionable, courts may consider all the circumstances surrounding the transaction including the manner in which the contract was entered into, whether each party had a reasonable opportunity to understand the terms of the contract, and whether important terms were hidden in a maze of fine print; both the conspicuousness of the clause and the negotiations relating to it are important, albeit not conclusive factors in determining the issue of unconscionability.

Id. ¶ 27. The court explained that the law firm drafted the provision and never discussed it with the plaintiff, despite discussing other material terms, such as the amount of its fee, the nature of the contingent fee agreement, and the intended scope of work. *Id*. ¶ 28. The court also focused on the parties' unequal bargaining power, with the plaintiff working "as a dry-cleaner since graduating from high school" and the defendants being "sophisticated attorneys who have earned multi-million-dollar settlements and verdicts in high-profile litigation." *Id*. The court concluded: "Attorneys

who have drafted a retainer agreement have the burden to show that the contracts are fair, reasonable, and fully known and understood by their clients." *Id*. ¶ 35.

Gaines v. Ciox Health, LLC

However, one does not have to be an unsophisticated consumer to avoid the consequences of a commercial arbitration clause. In *Gaines v. Ciox Health, LLC*, 2024 IL App (5th) 230565, the Fifth District refused to enforce an arbitration agreement between a medical records company and a seasoned attorney. In *Gaines*, an attorney who represented social security disability clients brought a putative class action against Ciox, a medical records management company, alleging it charged unauthorized fees for electronically delivered medical records. *Gaines*, 2024 IL App (5th) 230565, ¶¶ 4-6. Ciox sought to compel arbitration. *Id*. ¶ 7. It claimed that the plaintiff agreed to its Terms and Conditions when registering to use its website, including an agreement to arbitrate, and that the plaintiff continued to agree to those terms and conditions each time he accessed records through the Ciox online portal. *Id*. The plaintiff, however, disputed that the Ciox online registration process required users to agree to the Terms and Conditions. *Id*. ¶¶ 15-16. He also argued that if a registrant e-mailed a paper enrollment form, that form made no reference to any "Terms and Conditions" for the electronic delivery of records. *Id*. Thus, he claimed that the company failed to prove, by a preponderance of evidence, that he had a binding arbitration agreement with it. *Id*.

The appellate court refused to enforce the arbitration agreement on the ground that "Ciox failed to produce competent evidence that the plaintiff agreed to the Terms and Conditions for Ciox eDelivery when he registered to use the online portal." *Gaines*, 2024 IL App (5th) 230565, ¶ 30. The court pointed out that "Ciox did not produce any documents or screen shots to replicate the self-registration process" as it existed in 2019 when plaintiff registered for its service. *Id*. The court did not credit the declaration of Ciox's vice-president of billing and collections stating that, to receive Ciox electronic services, the plaintiff "would have clicked through to a screen with the Terms and Conditions" and "would have accepted and acknowledged those terms and conditions, including the arbitration agreement." *Id*. ¶ 31. Because Ciox failed to produce a specific online arbitration agreement with the plaintiff, the Fifth District affirmed an order refusing to compel arbitration.

Practice Tip

The recent appellate precedent demonstrates that, in consumer contracts containing arbitration provisions, it is no longer enough to include boiler-plate language that, by signing, the consumer acknowledges that she has reviewed and understands the agreement. Rather, when it comes to arbitration clauses, particularly the ones substantially limiting consumers' remedies, counsel should ensure that the agreement does not appear to be heavily one-sided, and that the consumer understands the rights she is giving up. Counsel also should work with clients to make sure the clients keep copies of their arbitration agreements with consumers so that they could be produced in court in case of an arbitrable dispute.

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About the Author

Irina Dmitrieva is a partner with *HeplerBroom, LLC*. She focuses her practice on appellate litigation and critical trial motions. Irina has represented both government entities and private clients in federal and state appellate courts, including the Illinois Supreme Court, Illinois Appellate Court, and the U.S. Court of Appeals for the Seventh Circuit. Prior to joining HeplerBroom LLC, she handled all appeals on behalf of the Chicago Transit Authority.

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