

CONTRACTUAL ARBITRATION: IS IT BINDING ON VICTIMS OF ELDER ABUSE?

By Edward J. Corey, Jr. and Kelly E. Sutter**

I. INTRODUCTION

These days, it is virtually impossible to open a bank or brokerage account, or even be admitted to a nursing home, without unwittingly agreeing to resolve any future disputes with the company through binding arbitration. Arbitration clauses are standard in many industries, and once accepted on an industry-wide basis they become unavoidable and non-negotiable: one either agrees to arbitrate disputes or foregoes the desired or needed services.

Each of us is affected by arbitration agreements in virtually every facet of our lives, but the elderly are particularly impacted by such agreements. Whether contracting for long-term care, seeking care from a hospital, or entrusting their retirement assets to the management of a financial advisor, the elderly are asked to sign binding arbitration agreements which, unbeknownst to them, usually take away rights guaranteed to the elderly by law. Since 1992, the California Legislature has enacted a series of laws specifically designed to protect seniors who are victims of elder financial abuse. Yet arbitration provisions wipe away these rights with merely a signature.

In a ruling by the Sacramento County Superior Court, however, the plaintiff in an elder-financial-abuse case successfully defeated the defendant financial institution's arbitration provisions, thereby allowing the plaintiff to avail herself of rights and remedies that her contract with the financial institution had specifically limited. This ruling provides a blueprint for all elders who are victims of abuse—whether it be financial abuse, physical abuse, or neglect—to have their lawsuits resolved in a public forum, before a sympathetic jury, with all the rights and remedies the law provides. Shortly after this ruling was issued, the California Court of Appeal, First District, held that enforcing arbitration clauses against abused seniors violated California public policy.¹

After briefly discussing how arbitration became the favored means of resolving consumer disputes, this article analyzes arbitration in the context of elder-abuse cases and reflects on the courts' evolving scrutiny of arbitration clauses as they apply to seniors and their successor representatives.

II. PERCEIVED BENEFITS OF ARBITRATION

A. Historical Overview: The Evolution of Arbitration

In 1925, Congress enacted the Federal Arbitration Act (FAA).² The statute dictates that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." The statute was passed by Congress because state courts were failing to enforce arbitration agreements. California, showing its support for arbitration, enacted a parallel statute two years later.³

Why would a party seek to resolve disputes in arbitration instead of in court? The answer varies from dispute to dispute, but foremost, parties perceive arbitration as faster and more cost-effective than court proceedings. They also perceive arbitration as providing parties with more control over the dispute resolution process. For example, in arbitration, parties sometimes may pick their judge and determine

when their claims will be heard.

Courts construing the FAA have opined that it established a “manifest liberal federal policy favoring arbitration agreements.”⁴ Arbitration, however, is not a panacea, particularly where the rights of a disadvantaged class such as seniors are concerned.

B. Prevailing Realities: A Closer Look at the Impact of Arbitration

In a commercial context, the perceived benefits of arbitration may be actual benefits, but if a dispute is between a company and an individual, particularly an elderly individual, arbitration may have devastating effects. For example, a recent New York Times article, *When Winning Feels a Lot like Losing*,⁵ tracked the case of an elderly woman whose life savings had been squandered by her stock broker. The brokerage firm lost nearly \$300,000 of the victim’s investments, but the arbitrator awarded the victim only \$5,000 in compensatory damages. Adding insult to injury, the arbitration costs were \$10,000. The victim, bound by an arbitration clause, recovered a fraction of her losses from Morgan Stanley and was ordered to pay more than twice the amount of her judgment in arbitration costs and fees, rendering the outcome a net loss despite her “victory” at arbitration.

This case highlights what consumer advocates have been saying for years: despite its perceived advantages, there are circumstances in which arbitration results in an injustice. Consumer-rights advocates have been challenging arbitration clauses not only in the elder-abuse context, but also in cases against retail giants such as Gateway. In El Dorado County, a resident has been trying to avoid arbitrating a case against the manufacturer of his computer, which he claims sold him a defective product. Arbitration would cost more than the computer at issue in the case. The aggrieved party has asked the small claims court to allow his dispute to proceed and to deny the company’s motion to compel arbitration.⁶

The economic burden of arbitration is not the only problem consumers face. In arbitration proceedings, discovery is limited, there is no right to a jury trial, all decisions are final and cannot be appealed. Also, damages are limited, so plaintiffs cannot get punitive damages, attorney’s fees or, in those cases where they otherwise would be available, treble damages. The awarding of attorney’s fees, as well as special damages, is particularly important in elder abuse cases. Often, elderly victims of financial abuse are left nearly penniless. If prohibited from seeking an award of attorney’s fees or special damages, attorneys have little incentive to represent such victims. Finally, arbitration is a private proceeding and, although some see this as beneficial, this denies plaintiffs the important public validation that many seek. This aspect of arbitration also keeps from the public’s view the rampant problem of elder abuse.

III. EVOLUTION OF PROTECTIVE LEGISLATION FOR SENIORS

In 1991, the California Legislature passed Senate Bill 679, which added certain provisions to the Welfare and Institutions Code.⁷ Recognizing that elderly persons are a “disadvantaged class in need of special protection,” the Legislature added Welfare and Institutions Code section 15657, authorizing the award of attorney’s fees and costs in elder-abuse cases. Prior to the enactment of this legislation, commonly known as the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA), few civil cases were brought in connection with elder abuse due to problems of proof, court delays, and the bar’s lack of incentives to prosecute these types of suits. The Legislature specifically declared that, by adding Section 15657, it intended to “enable interested persons to engage attorneys to take up the cause of abused elderly persons.”⁸

The Legislature was particularly concerned about rising levels of abuse, neglect and abandonment of elderly persons by their families or caretakers. The Legislature has documented that nearly 225,000 Californians are victims of elder and dependent-care abuse each year and, as our population ages, the

number of cases is expected to rise in the coming years.⁹ The Legislature recognized that the elderly are a disadvantaged class in need of protection from hidden acts of elder abuse. For these reasons, EADACPA not only established civil actions and remedies, but with Welfare and Institutions Code sections 15657 *et seq.* recognizes a right in the decedents' successors in interest to bring these actions against alleged abusers.¹⁰

The Legislature is continuing in its efforts to protect seniors from elder abuse. On July 12, 2007, Governor Schwarzenegger signed into law Senate Bill 611, which will add Welfare and Institutions Code section 15657.01, allowing plaintiffs in elder financial-abuse cases to request attachment of the defendant's property to recover any judgment filed against them.¹¹ This recent legislation reflects the prevailing public policy that elder abuse is an important issue and requires special legislative measures to deter abusers and compensate those who prosecute them.

California law does not just create statutory rights of action for elders and their families to use when responding to abuse; the law also provides for double or treble damages, as a deterrent to elder abuse and neglect.¹² Because seniors face unique challenges when seeking legal assistance, statutes which provide for punitive damages and attorney-fee awards increase the likelihood that seniors will receive adequate representation. These most important elements—punitive damages and attorney fees—are often lost when arbitration clauses are enforced. This is unconscionable, given that seniors often waive with a signature rights and protections of which they know nothing, leaving little incentive for lawyers to take their cases.

IV. ARBITRATION OF ELDER ABUSE CLAIMS: CAN IT BE AVOIDED?

Despite the public policy favoring arbitration, courts have become increasingly aware of several contexts in which arbitration agreements are unenforceable as a matter of law. To defeat a motion to compel arbitration, a plaintiff must show that public policy in his or her state prohibits enforcing the agreement, usually on the grounds that it is unconscionable. One such special circumstance is employment law, where courts have refused to enforce agreements lacking certain procedural protections.¹³

In 2000, the California Supreme Court set forth its requirements for enforcing and protecting statutory rights in arbitration. In an employment-law case, *Armendariz v. Foundation Health Psychcare Services, Inc.*,¹⁴ the court held that rights guaranteed under the California Fair Employment and Housing Act (FEHA)¹⁵ cannot be abridged by an arbitration agreement between employer and employee. To protect those statutory guarantees, the court imposed the following standards on arbitration of statutory claims: 1) the arbitration agreement must provide for a neutral arbitrator; 2) the agreement must provide for more than minimal discovery; 3) the arbitrator must produce a written award or disposition; 4) the process cannot limit relief guaranteed under the statute; and 5) the process may not require the employee to pay unreasonable expenses to access the arbitration forum.¹⁶

Recently, the United States Court of Appeals for the Ninth Circuit declined to compel arbitration in an employment dispute where the knowledgeable paralegal employee had signed an arbitration agreement with employer law firm O'Melveny & Myers. *Davis v. O'Melveny & Myers*¹⁷ is one more example of the courts' increasing skepticism of arbitration agreements in the special context of employment. The court reasoned that the arbitration agreement left the employee no opportunity to negotiate; the employee either had to bind himself to the arbitration agreement or leave the employer. This was unconscionable and unenforceable¹⁸ The *Davis* case reiterates that federal courts should apply state law regarding the formation of contracts when analyzing the enforceability of arbitration agreements.¹⁹ In California, this requires analyzing the procedural and substantive unconscionability of the agreement.²⁰

Attorneys representing victims of elder abuse are now applying the *Armendariz* principles to defeat arbitration agreements on similar grounds. In this endeavor, attorneys will be aided by the Legislature's

recognition of seniors as a disadvantaged class and by the legislation enacted over the past 15 years. This legislation articulates a vibrant public policy to support elders and their successor representatives in the face of abuse and neglect. After *Armendariz*, it seems clear that California public policy will not support a motion to compel arbitration where an elderly plaintiff is asserting rights guaranteed under California law.

A. Elder Financial Abuse

The authors have successfully applied the *Armendariz* principles in the context of financial elder abuse. Arguing that arbitration was not an appropriate method of dispute resolution in elder-abuse cases, the authors compared the rights and remedies which are created for the elderly under EADACPA to the rights and remedies which are created for employees under FEHA. Both statutes were created for a public reason: EADACPA was created to protect all elders from physical abuse, financial abuse, and neglect; FEHA was created to protect all employees from sex discrimination and sexual harassment in the workplace. Following the holding of the California Supreme Court in *Armendariz*, the authors argued that an arbitration agreement involving an elderly party must provide adequate safeguards for the selection of neutral arbitrators and must not unreasonably limit the plaintiff's right to discovery; the arbitrator must be required to issue a written award; the agreement must allow the plaintiff all of the same types of recovery that he or she would be allowed in court; and, the agreement must not require the plaintiff to pay unreasonable costs or arbitrators' fees.²¹

The groundbreaking litigation was brought by Evelyn Ugarte, successor trustee of the trust created by Frank Vierra ("Frank"), an 84-year-old retired school custodian. Frank entrusted his retirement savings to a financial advisor with WM Financial Services, Inc., an investment arm of Washington Mutual Bank. Unbeknownst to Frank, the financial advisor took advantage of Frank and depleted Frank's assets to the point that he was virtually penniless when he died. After Frank's death, Frank's cousin, acting as successor trustee (the "Plaintiff"), filed suit against the financial advisor, his former employer WM Financial Services, Inc., and Washington Mutual Bank, for fraud, breach of fiduciary duty and elder financial abuse, among other claims.

Like every other customer who has ever opened an account at a bank or financial institution, when Frank opened his accounts at Washington Mutual, he signed a customer agreement which contained an arbitration clause. To no one's surprise, Washington Mutual Bank and WM Financial Services, Inc. ("Washington Mutual") moved to force Plaintiff into arbitration. However, because the case involved statutory claims of elder financial abuse, Plaintiff defeated Washington Mutual's motion.

In *Ugarte v Washington Mutual Bank*,²² the authors argued that the same requirements *Armendariz* established for claims under FEHA should be applied to arbitration agreements involving EADACPA claims. The trial court agreed. The elderly are guaranteed certain rights and remedies which are generally not available to those under the age of 65 (i.e., the recovery of attorney's fees and costs and the ability to triple exemplary or punitive damages). The authors argued that an elder cannot be denied those rights simply because he or she was forced to agree to an arbitration provision as a condition of opening a bank account. The court further agreed and, finding that Washington Mutual's arbitration agreement contained none of the *Armendariz* minimum requirements, ruled that as a matter of law, Washington Mutual's arbitration agreements were unconscionable at the time that they were made. Washington Mutual's arbitration agreement was unenforceable in Plaintiff's elder financial abuse case and the court refused to order the case to arbitration.

In a later case, the First District Court of Appeal upheld a trial court denial of a rehabilitation center's motion to compel arbitration. In *Fitzhugh v. Granada Healthcare and Rehabilitation Center, LLC. et al*, the court held that in enacting EADACPA, the legislature was expressing the public policy that, "under no circumstances may a patient or resident waive his or her right to sue for violations of rights under the Patients Bill of Rights, or other federal and state laws and regulations, which would include the existing

*Elder Abuse and Dependent Adult Civil Protection Act.*²³ The court went on to say that the Legislature has acted in certain terms to protect the elderly as a particularly vulnerable class and that to enforce arbitration agreements against seniors is a violation of public policy.

B. Nursing Homes

Compelling seniors to arbitrate may be objectionable not only in the financial abuse context, but also in cases against hospitals and nursing homes. The nursing home environment, however, presents additional issues which makes it less certain whether plaintiffs may successfully rely on the *Armendariz* principles. Particularly challenging in these cases is that often the person who signs the arbitration agreement is not the senior but is instead the senior's agent under an advance health care directive.

In *Garrison v. Superior Court*,²⁴ an ailing senior designated her daughter to be her attorney in fact and placed no restrictions on her daughter's agency power. The daughter signed an arbitration provision on her mother's behalf when she admitted her mother for care at a nursing facility. The court considered an array of statutes when determining whether a durable power of attorney for health-care decisions includes the right to bind a patient to arbitration. Because the power of attorney was granted for the purpose of making health-care decisions, the court read Probate Code sections 4683(a), 4684 and 4688 to include the power to bind the patient and their successors to arbitration. The extensive power granted in the durable power of attorney was central to the court's holding that the arbitration provision relied on by the nursing home would be enforced over the family's objections. The court noted that the durable power of attorney specifically stated that it was executed so as to facilitate health-care decisions.²⁵ When the mother died and the family sought to pursue actions for elder abuse and medical malpractice against the care facility, the family was forced to arbitrate the dispute based on the agreement signed by the daughter at the time of admission. In *Garrison*, the durable power of attorney specifically referenced the Probate Code. This, the court found, supported the proposition that the daughter had wide discretion in her mother's care.

In *Hogan v. Country Villa Health Services*,²⁶ the Fourth District Court of Appeal also ruled for a nursing home in a case to compel arbitration. The court reasoned that because the daughter (pursuing damages after her mother's death) had been authorized to make health-care decisions for her mother, it was within the daughter's agency to bind her mother and her mother's successors to arbitration. This durable power of attorney which established the daughter's agency was key to the court's holding. The court cited a variety of other medical care cases to support its rationale that power of attorney agency allows parties to bind one another to arbitration clauses. The plaintiff relied most heavily on the court's earlier decision in *Garrison*. Principally, the court noted that the daughter had been authorized to make such decisions under Probate Code section 4701.

On appeal, the plaintiff family in *Hogan* raised the concerns of the *Armendariz* case and argued that public policy mandated setting aside the arbitration agreement, but the family did not raise this argument at trial. Because the issue was raised for the first time on appeal, the court held this argument to be waived. Thus, the Court of Appeal has yet to provide guidance on whether the *Armendariz* principles affect enforceability of an arbitration agreement signed by an agent under a durable power of attorney. Further complicating matters, not all durable powers of attorney are executed pursuant to statute.

Just two weeks after ruling in *Hogan*, the Fourth District spoke again to elder abuse issues. In *Flores v. Evergreen at San Diego, LLC*,²⁷ the court declined to uphold an arbitration provision signed by a husband when admitting his wife to a facility. At the time of admission, the husband did not have his wife's power of attorney and the court found that marital status alone was not sufficient to establish the husband's right to submit his wife's claims to arbitration. Certainly there was no *statutory authority* granting the husband such agency which, considering the public policies evident in elder-abuse prevention statutes, should not be implied. And, although the wife later granted the husband a power of attorney, the instrument was not prepared pursuant to statutory guidelines, was narrowly construed and

could not be used to ratify the husband's earlier actions. The court's ruling was justified not only by the absence of express statutory authority granting agency to the husband, but by the "plethora of statutes and regulations" meant to ensure that arbitration agreements are obtained with informed consent and are limited in scope.²⁸

Among these safeguards is California Civil Code section 1599.81, which requires arbitration agreements to be on forms separate from the form admission and treatment contracts. The court also cited Civil Code section 1430, which forbids binding arbitration for violations of the Patients Bill of Rights or other statutory or regulatory rights. The Flores court concluded by noting, "because arbitration agreements waive important legal rights, the Legislature has imposed heightened requirements on arbitration provisions in nursing home contracts."²⁹

The question remains what would happen if principals specifically excluded from their durable powers of attorney the right to bind the principal to an arbitration provision. Would providers still contract with seniors' families to give seniors the care they need? Or would the existence of such a prohibition make it impossible for an agent to gain for the principal admission to a care facility? What would happen if an agent prohibited from agreeing to arbitration nevertheless signed an arbitration agreement? If the principal later suffered actionable harm, would the prohibition on arbitration be enforceable? Or could the defendant compel arbitration by arguing its reliance on the arbitration agreement?

V. CONCLUSIONS

Although the cases involving claims under EADACPA should, as a matter of law, preclude attempts to arbitrate, efforts to codify in EADACPA a prohibition against arbitration have been fiercely opposed. Hope is not lost, however. The impact of the trial court's ruling in the *Washington Mutual case* and the appellate holding in *Fitzhugh* extends beyond the bounds of these two cases. Now, any financial institution, nursing home, health maintenance organization, hospital, or any other person or entity who contracts with an elder (i.e., any person age 65 or older) must be on notice. If an entity or its employee neglects or abuses an elder, the arbitration agreement will likely be unenforceable, unless the arbitration agreement meets certain minimum requirements. Absent these requirements, disputes alleging abuse or neglect of an elder likely will be decided by a jury, rather than an arbitrator. Juries have the power to award punitive damages, and under the appropriate factual circumstances, can also award double and treble damages, including punitive damages. The court's ruling in the *Washington Mutual case* was clearly a victory for Plaintiff, but it was also a victory for all susceptible persons 65 years and older, for their families and for their advocates.

* *Weintraub Genshlea Chediak, Sacramento, California.*

ENDNOTES

1. *Fitzhugh v. Granada Healthcare and Rehabilitation Center, LLC. et al.* (2007) 150 Cal.App.4th 469.
2. 9 U.S.C. § 1, *et seq.*
3. Stats, 1927, ch.225.
4. *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 25.
5. Morgenson, *When Winning Feels a Lot like Losing* (Dec. 10, 2006) N.Y. Times, business section pages 1 and 10.

6. Sangree, *Stubborn PC Owner Takes on Gateway* (June 7, 2007) Sacramento Bee, pages B1 and B2.
7. Well. & Instit. Code, § 15600 *et seq.*
8. Well. & Inst. Code, § 15600(j).
9. Assembly Concurrent Resolution No. 8 (Dymally, Jan. 14, 2005).
10. Code Civ. Proc., k 377.30.
11. Stats 2007, Chapter 45, Well. & Inst. Code, § 15657.01.
12. Prob. Code, § 859 and Civ. Code, § 3345.
13. *Davis v. O'Melveny & Myers* (2007) 485 F. 3d 1066.
14. *Armendariz v. Foundation Health Psychcare Services, Inc* (2000) 24 Cal. 4th 83.
15. Gov. Code, §§ 12900 *et seq.*
16. *Id.* at 102.
17. *Davis v. O'Melveny & Myers, supra*, 485 F. 3d 1066.
18. *Id.* at 1075.
19. *Id.* at 1068.
20. *Circuit City Stores, Inc. v. Adams* (9th Cir. 2002) 279 F. 3d 889, 892.
21. *Armendariz, supra*, 24 Cal. App. 4th 83.
22. Sacramento Superior Court Case No. 01-AS06203-Evelyn Ugarte (*Successor Trustee of the Frank Vierra Family Trust Dated April 20, 1999*) v. *Washington Mutual Bank FA. et al.*
23. *Fitzhugh v. Granada Healthcare and Rehabilitation Center; LLC. et al.*, (2007) 150 Cal.App.4th 469, 476 (emphasis added).
24. *Garrison v Superior Court* (2005) 132 Cal.App.4th 253.
25. *Id.* at 258.
26. *Hogan v. Country Villa Health Services* (2007) 148 Cal. App. 4th 259.
27. *Flores v. Evergreen at San Diego, LLC.* (2007) 55 Cal. Rptr. 3d 823, 828.
28. *Id.* at 830.
29. *Id.* at 832.