Justice Eileen C. Moore
FOURTH DISTRICT COURT OF APPEAL, DIVISION THREE

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When a signature is not a signature

A CHALLENGE TO THE AUTHENTICITY OF THAT SIGNATURE MAY BE JUST THE BEGINNING OF THE COURT'S ANALYSIS OF THE MERITS OF THE MOTION TO COMPEL ARBITRATION

When a motion to compel arbitration has an attached arbitration agreement purportedly bearing the other party's signature, that case is going to be ordered into arbitration, isn't it? Probably. On the other hand, a challenge to the authenticity of that signature may be just the beginning of the court's analysis of the merits of the motion.

Following is a discussion of cases that demonstrate how the devil is always in the details. While a moving party may have easily met its initial burden, once challenged by the opposing party, the moving party's burden significantly increases.

Carrying the initial burden that a signature is valid

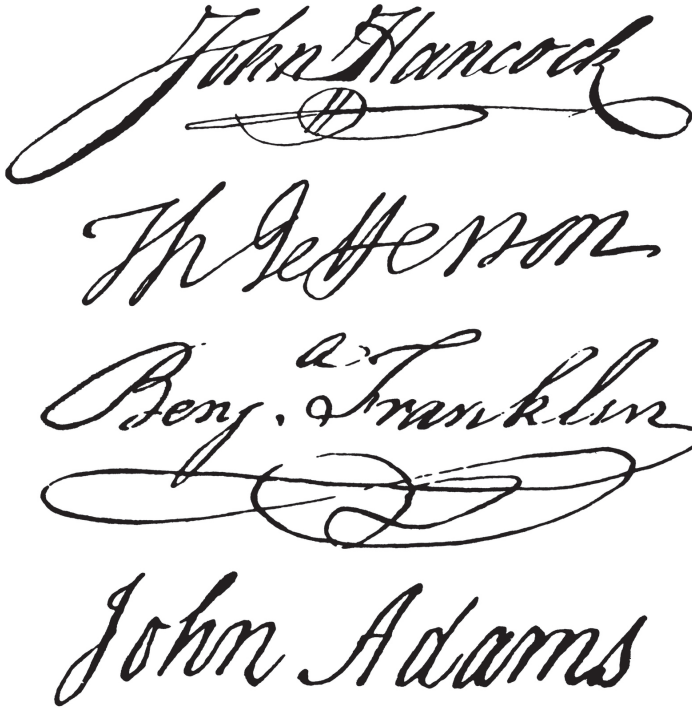
The initial burden of proving a signature on an agreement to arbitrate is relatively easy for the moving party to carry. When a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate a controversy, the court shall order arbitration if it determines that an agreement to arbitrate exists. The petitioner bears the burden of proving the existence of an agreement by a preponderance of evidence. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413-414.)

Under Evidence Code, sections 1400 and 1401, authentication of a writing means the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is. However, the moving party is not required to authenticate an opposing party's signature on an arbitration agreement as a preliminary matter in moving for arbitration because at that point the authenticity of the signature is unchallenged. (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 846.)

California Rules of Court, rule 3.1330, requires that either the provisions of an agreement to arbitrate must be stated verbatim or a copy must be physically or electronically attached to the petition and incorporated by reference. Civil Code section 1633.7 provides electronic and handwritten signatures have the same legal effect and are equally enforceable. And under Civil Code section 1633.9, an electronic signature is attributable to a person if it was the act of the person. The act of a person may be shown in any manner, including surrounding circumstances.

The opposing party's burden

If the moving party meets its initial prima facie burden and the opposing party disputes the agreement to arbitrate, the opposing party bears the burden of producing evidence to challenge the agreement. (*Condee v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215, 219.)



Once the opposing party successfully challenges the signature, the burden returns to the moving party

If the opposing party meets the burden of challenging the authenticity of the alleged agreement, the moving party must establish with admissible evidence and by a preponderance of evidence that a valid arbitration agreement between the parties exists. (*Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158.)

When the opposing party denies signing the arbitration agreement

In *Gamboa v. Northeast Community Clinic, supra,* 72 Cal.App.5th 158, the defendant employer moved to compel arbitration, attaching a signed arbitration agreement to the motion. In opposing the motion to compel arbitration the

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opposing-party plaintiff declared she did not recall such an agreement and, had she been presented with it, she would not have signed it. The trial court denied the employer's motion to compel arbitration. (*Id.* at p. 168.)

The Court of Appeal found the employer met its initial burden by attaching a copy of the arbitration agreement purportedly bearing the plaintiff's signature to its motion, and also found the opposing party/plaintiff met her burden by filing her declaration denying she signed it. Thus, the burden went back to the moving party employer to prove by a preponderance of evidence that the agreement was valid. The Court of Appeal held that the defendant failed to meet its burden by not providing any specific details surrounding the purported contract's execution. (*Id.* at p. 170.) The appeals court noted that the defendant did not have to authenticate the plaintiff's signature, but could have met its burden in other ways, such as providing a declaration from its custodian of records. (*Id.* at p. 171.)

When the opposing party doesn't remember signing the arbitration agreement

In *Ruiz v. Moss Bros. Auto Group, Inc.*, *supra*, 232 Cal.App.4th 836, the opposing party/plaintiff did not deny signing the arbitration agreement, but claimed he did not recall signing it. The trial court denied the motion to compel arbitration.

The Court of Appeal cited Evidence Code section 1401 and held that in light of Ruiz's failure to recall signing the agreement, the burden shifted back to the moving party to prove by a preponderance of evidence that the signature on the agreement was authentic. (*Id.* at p. 846) The moving party/defendant did not even attempt to authenticate plaintiff's signature, and the appeals court concluded it did not meet its evidentiary burden. (*Ibid.*)

However, in *Iyere v. Wise Auto Group* (2023) 87 Cal.App.5th 747, each plaintiff declared that on his first day of work he was given a stack of documents, was told "to quickly sign the documents so I could get to work," and "signed the stack of documents immediately and returned them." Each added, "I do not recall ever reading or signing any document entitled Binding Arbitration Agreement . . . . I do not know how my signature was placed on [the document]." Each plaintiff stated further that if he had understood that the agreement waived his right to sue defendant, he would not have signed it. The trial court concluded that defendant had not borne its burden of proving the authenticity of the signatures and, alternatively, that the agreement is unconscionable. In reversing, the Court of Appeal stated: "Plaintiffs offered no admissible evidence creating a dispute as to the authenticity of their physical signatures." (*Id.*at 76.)

Computerized signatures

In *Fabian v. Renovate America, Inc.* (2019) 42 Cal.App.5th 1062, the purported arbitration agreement submitted by defendant in support of a motion to compel arbitration had a computerized signature. In opposing the motion, plaintiff produced evidence that her communications with defendant were all telephonic and that she was not provided with any documents to sign.

The defendant contended the signature was authenticated by DocuSign, a company used to electronically sign documents in compliance with the U.S. Electronic Signatures in Global and National Commerce Act (ESIGN; 15 U.S.C. § 7001 et seq.) Defendant also produced the declaration of its Senior Director of Compliance Operations, stating plaintiff entered into the contract on a certain date. In denying the motion, the trial court found defendant failed to establish plaintiff electronically signed the contract.

In analyzing the situation, the Court of Appeal noted that the party seeking authentication of a signature may carry its burden "in any manner," including by presenting evidence of the contents of the contract in question and the circumstances surrounding the contract's execution. The appellate court noted that defendant did not present any evidence from or about DocuSign in its papers.

With regard to the declaration of defendant's Senior Director of Compliance Operations, the appeals court found the declarant did not state that plaintiff actually signed the contract, electronically or otherwise. In affirming denial of the motion to compel arbitration, the appellate court stated: "By not providing any specific details about the *circumstances* surrounding the Contract's execution, [defendant] offered little more than a bare statement that [plaintiff] 'entered into' the Contract without offering any facts to support that assertion." (*Id.* at p. 1070.)

According to the moving party/defendant's motion to compel arbitration in *Murrey v. Superior Court* (2023) 87 Cal.App.5th 1223, all new hires are sent a welcome email containing a link to defendant's system/portal as well as a unique user name and temporary password to access the portal. After creating a personal password, new hires are directed to a home page that contains several "tasks assigned to the new hire." One task was to review an electronic copy of a document titled "SOLUTIONS: An Alternative Dispute Resolution Procedure." Another task was to review and electronically sign the "Acknowledgment Conditions of Employment." Based on this process, the declarant in defendant's motion concluded an electronic signature on the Acknowledgment was made by plaintiff. The SOLUTIONS manual is 29 pages long, and contains a provision stating it "may be amended, without notice." The trial court granted the motion to compel arbitration. In reversing, the Court of Appeal held the agreement was "highly unconscionable." (*Id.* at 1242.)

Valid signature, but arbitration clause inconspicuous

But what if there is a valid signature, but the terms compelling arbitration of any controversy are inconspicuous?

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In *Domestic Linen Supply Co., Inc. v. LJT Flowers, Inc.* (2020) 58 Cal.App.5th 180, the commercial contract was printed on a single double-sided page. The place designated for signature of the parties is on the front page. The first paragraph on the front page provides, "THE PARTIES HEREBY AGREE UPON THE TERMS SET FORTH BELOW AND UPON THE REVERSE SIDE HEREOF." On the reverse side are paragraphs 5 to 21 of the agreement. Paragraph 15 contains an arbitration agreement.

All the paragraphs on the back page, including paragraph 15, are in eight-point type. Paragraph 15 contains no heading, boldface, or italics. There is no place on the back page for the parties' signatures or initials. When the plaintiff sued defendant over a dispute, the defendant moved for arbitration. Finding a lack of procedural due process because the arbitration agreement was inconspicuous, the trial court denied the motion to compel arbitration.

In affirming denial of the motion, the Court of Appeal noted the arbitration clause was not above the plaintiff's signature "where one would expect to find it." (*Id.* at p. 185.) The appellate court concluded: "If the contract is not intentionally deceptive, it has that effect. There was simply no agreement to arbitrate." (*Ibid.*)

Valid signature to abide by employer's handbook which contained an arbitration clause

In *Mendoza v. Trans Valley Transport* (2022) 75 Cal.app.5th 748, the plaintiff did not read, write or speak English, so defendant's owner and supervisor filled out his employment application. Several paragraphs above the signature line, the application read: "I certify that I have read and understood all of this employment application. [¶][¶] If hired, I agree to abide by all the rules and policies of the employer." One of the rules and policies of the employer was an arbitration provision contained in an employee handbook. The trial court denied defendant's petition to order the matter into arbitration. In affirming, the Court of Appeal stated: "[T]he parties have not entered into either an express or an implied contract to arbitrate their disputes. . ."

Medical malpractice arbitration agreements

There are two main statutes that have specific signature requirements for medical malpractice arbitration agreements. One statute concerns any contract for medical services that contains an arbitration provision, and the other is specific to arbitration agreements in health care plans.

In subdivision (b) of Code of Civil Procedure section 1295, there is a requirement that immediately before the signature line provided for the individual contracting for medical services, certain language must appear "in at least 10-pointbold red type: 'NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL.'" Subdivision (c) permits rescission within 30 days of signature.

In *Cox v. Bonni* (2018) 30 Cal.App.5th 287, the plaintiff in a medical malpractice action opposed being ordered to arbitration by arguing the defendant doctor failed to place the language required by Code of Civil Procedure, section 1295, subdivision (b) in red type. Plaintiff contended she was unaware she had agreed to arbitrate any disputes with the doctor. The trial court ordered the matter into arbitration and the award was in favor of the doctor. The Court of Appeal found that plaintiff abandoned her argument about the lack of red type by not providing a color copy of the agreement that had been attached to the defendant doctor's original motion to compel arbitration. (*Id.* at p. 301.)

That ruling in *Cox* underscores how important it is to be aware of who carries the burden. At the time of the appeal from denial of plaintiff's motion to vacate the arbitration award, it was the plaintiff who bore the burden of demonstrating error.

Health insurance arbitration agreements

Health and Safety Code section 1363.1, subdivisions (b) and (d), mandates that any health care service plan that includes a waiver of the right to a jury trial to include, "in clear and understandable language," a disclosure that appears as a separate article in the agreement issued to the employer group or individual subscriber, and that the disclosure be "prominently displayed" on the enrollment form signed by each subscriber or enrollee. The statute also requires the disclosure to be displayed immediately before the signature line provided for the representative of the group contracting with a health care service plan as well as immediately before the signature line provided for the individual enrolling in the health care service plan.

In *Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, the trial court denied the health care plan's motion to compel arbitration. In affirming, the Court of Appeal found the arbitration agreement failed to comply with both subdivisions (b) and (d) in that the disclosure that one's right to a jury trial was neither prominently displayed nor placed immediately before the subscriber's signature line. (*Id.* at p. 1422.)

Conclusion

Just because an arbitration agreement bears what appears to be a party's signature does not necessarily mean the matter will be ordered into arbitration. Once the signing party challenges the validity of the signature, the moving party's real work and significant analysis by the court begins.

Justice Eileen C. Moore is an appellate justice on the Fourth District Court of Appeal, Division Three.