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Defeating motions to compel arbitration

SIX QUESTIONS RANGING FROM JURISDICTION OF THE COURT TO UNCONSCIONABILITY THAT MAY HELP YOU DEFEAT THE MOTION TO ARBITRATE

Motions to compel arbitration are common in many types of cases (consumer, elder abuse, employment) and, if successful, deprive your client of the chance to have their claims evaluated by a jury of their peers. This article provides resources and tips on how best to defeat such a motion.

Does the court have jurisdiction to rule on the motion (delegation)?

The first question is whether the court is authorized to rule on the motion or whether the issue of arbitrability was delegated to the arbitrator.

“Under California law, it is presumed the judge will decide arbitrability, unless there is clear and unmistakable evidence the parties intended the arbitrator to decide arbitrability.” (*Dennison v. Rosland Capital LLC* (2020) 47 Cal.App.5th 204.) This principle applies in both state and federal cases: “Courts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clear and unmistakable’ evidence that they did so.” (*First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938.) And recently the Second District agreed, upholding the trial court’s order denying arbitration on similar grounds in *Villalobos v. Maersk* (2025) 114 Cal.App.5th 1170.

Did the parties agree to arbitrate?

Parties cannot be compelled to arbitrate a matter they did not agree to arbitrate. And, although public policy favors enforcing arbitration agreements, such agreements are “placed on an equal footing with other contracts.” (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.)

The question a court must answer is whether there was a meeting of the minds. The policy favoring arbitration has no application to parties who have not agreed to arbitrate their disputes. The party seeking arbitration bears the burden of proving by a preponderance of the evidence that a valid agreement to arbitrate exists. State law governs this question.

This issue often arises in digital consumer agreements. As the First District held in an appeal handled by your undersigned, when transactions occur electronically with no physical contract, a consumer’s actions – such as checking a box or clicking a button – do not manifest assent unless a sufficiently conspicuous notice tells consumers they are entering a valid and enforceable arbitration agreement with the defendant. Because Massage Envy’s electronic application did not do that, the court held there was no arbitration agreement between the parties and the denial of arbitration was proper. (*Doe v. Massage Envy Franchising, LLC* (2022) 87 Cal.App.5th 23.)

Similarly, a “browsewrap” agreement on defendant’s website, which required no affirmative assent by the consumer, is insufficient to constitute an agreement to arbitrate and the trial court’s denial of arbitration was upheld in *Weeks v. Interactive Life Forms, LLC* (2024) 100 Cal.App.5th 1077.

Also, the parties’ previous arbitration agreement does not apply to the employee’s second employment stint with the same employer. In a recent case, the employee had an arbitration agreement for the first employment period but then resigned. When she came back four months later and negotiated a new offer, there was no arbitration agreement and so arbitration was denied. (*Vazquez v. SaniSure* (2024) 101 Cal.App.5th 139.)

Arbitration cannot generally be forced on litigants who were not signatories of the arbitration agreement. For example, plaintiffs suing for their family member’s wrongful death at a long-term care facility are suing in their own right and so are not ordinarily bound by their decedent’s arbitration agreement. (*Holland v. Silverscreen Healthcare* (2025) 18 Cal.5th 364.)

In elder-abuse cases an issue of authorized agency (whether the family member or representative who signed the agreement was authorized to do so) often

arises. As the California Supreme Court recently decided, if a health-care agent’s power of attorney does not include the authority to bind the principal to a separate, optional arbitration agreement, then there is no agreement. (*Harrod v. Country Oaks Partners* (2024) 15 Cal.5th 939.)

In 2025, Consumer Attorneys of California (CAOC) successfully lobbied for SB 82 to stop “infinite” pre-dispute binding arbitration agreements in which corporations improperly extend their arbitration clauses from one context or agreement to other entities and agreements with whom the injured consumer has no direct relationship. (Civ. Code, § 1670.15 (effective January 1, 2026).)

This problem surfaced when a woman died at a Disney-owned restaurant due to anaphylactic shock after repeatedly disclosing her allergy and asking whether the food contained her allergens. Her husband brought a wrongful-death case against Disney. Disney then attempted to force him out of court and into binding arbitration because of an arbitration clause in a Disney+ trial subscription for its online streaming service that he signed up for five years earlier. The public backlash against Disney after its position became publicized ultimately caused Disney to change position and waive its “right” to arbitrate and allow the case to proceed in court.

Is arbitration barred by law?

For example, under the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, “No predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case” that “relates to the sexual assault dispute or the sexual harassment dispute.” (9 USC § 402.)

This statute has successfully been applied by the courts to prevent arbitration of these claims. For example, when an employee sued their employer for sexual harassment, defendant’s motion to compel arbitration was initially granted,

but plaintiff filed writ and the Court of Appeal granted the writ, holding that the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act preempts attempts under state law to compel arbitration of sexual harassment cases. Moreover, parties cannot contract around the law with a choice-of-law provision if their contracts involve interstate commerce. (*Casey v. Superior Court* (2025) 108 Cal.App.5th 575.)

In addition, long-term care facilities that receive federal funding may not enter into a predispute agreement for binding arbitration with any resident or resident's representative where the arbitration agreement is a condition of admission into the facility. (42 CFR § 483.70(n)(1).)

Finally, the defendant entity must be registered with the California Secretary of State; if not, that entity may not compel arbitration. (Bus. & Prof. Code, § 17918; and see *Taylor v. Eclipse Senior Living, Inc.* (2021) 2021 WL 1841475, *2 (unpub. opn.) [failure to file fictitious business name].)

If an arbitration agreement exists, is it enforceable?

The unconscionability analysis set forth in *Armendariz* provides the best roadmap on how to show that an agreement is unenforceable. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.)

The *Armendariz* analysis has two prongs: (1) procedural unconscionability (addressing the circumstances and manner in which the agreement arose) and (2) substantive unconscionability (whether the terms of the agreement themselves are unfair or lack mutuality). The analysis is performed as a sliding scale, meaning that the more procedural unconscionability there is, the less substantive unconscionability you need to establish that an agreement is unenforceable as unconscionable; similarly, a lesser degree of procedural unconscionability will suffice if there is a high degree of substantive unconscionability. Recent case examples illustrate the point.

For example, a trial court properly denied motion to compel arbitration

where multiple agreements simultaneously signed by the employee had the net effect of destroying mutuality. (*Gurganus v. IGS Solutions LLC* (2025) 115 Cal.App.5th 327.)

And the court recently held that a grey text on off-white checkout web page containing other distracting elements was insufficient to alert a reasonably prudent internet customer that purchasing website's products would bind them to the terms of use, upholding the denial of arbitration. (*Cruz v. Tapestry* (2025) 113 Cal.App.5th 943.)

Finally, an arbitration agreement was held unconscionable and thus unenforceable where it contained oppressive terms, prohibitively high fees, and a language plaintiff did not speak. (*Sanchez v. Superior Court* (2025) 108 Cal.App.5th 615.)

Does the claim fall outside the scope of the arbitration agreement?

Parties may be compelled to arbitrate only the claims they agreed to arbitrate. (*Ahern v. Asset Management Consultants, Inc.* (2022) 74 Cal.App.5th 675, 687.) The FAA does not require enforcement of an arbitration clause for "disputes unrelated to the contract in which the provision appears." (*Moritz v. Universal City Studios LLC* (2020) 54 Cal.App.5th 238.)

Accordingly, even if the purported agreement is valid, the court must first "determine whether the parties agreed to arbitrate that dispute." (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 626; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236; *Performance Team Freight Systems, Inc. v. Aleman* (2015) 241 Cal.App.4th 1233, 1244.)

For example, courts deem claims for assault and fraud to be outside the scope of business arbitration agreements. (*Ahern, supra*; *Victoria v. Superior Court* (1985) 40 Cal.3d 734.) And the California Supreme Court has held that a sexual-assault claim was outside the scope of an arbitration agreement dealing with medical treatment at a Kaiser facility. (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 744.) In *Victoria*, the plaintiff, a

hospital patient, alleged she was assaulted by a hospital orderly. The denial of arbitration was upheld on the ground that the attack could not have been "contemplated" by either party and thus it was "difficult to conclude" that the parties "agreed that causes of action arising from such an attack would be within the scope of the arbitration clause." (*Ibid.*)

Moreover, the First District held that an arbitration agreement in a professional or business relationship does not cover "tort claims arising from an alleged violent physical assault by an employee" of the company. (*RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511.)

Waiver and failure to pay arbitration fees

Even if there is a valid agreement, the right to arbitration may be waived or forfeited by defendant's conduct.

Waiver can occur when a defendant fails to timely assert the right to arbitration, instead litigating extensively in court before raising the issue. California courts apply a fact-intensive analysis, looking at whether the defendant's delay prejudiced the plaintiff. For instance, engaging in discovery, filing dispositive motions, or otherwise taking advantage of the judicial forum before seeking arbitration can support a finding of waiver. Plaintiffs should carefully document the defendant's litigation conduct to demonstrate prejudice and argue that the right to arbitrate has been forfeited.

And, if a defendant fails to make a timely payment to arbitrator under section 1281.98 of the Code of Civil Procedure, the right to arbitration may have been forfeited under the statute. (*Hohenshelt v. Superior Court* (2025) 18 Cal.5th 310.) Before *Hohenshelt* was decided, there was "conflicting appellate authority as to whether that consequence [under 1281.98] applied even to innocent missed deadlines and if so, whether the Federal Arbitration Act...would preempt" [the statute]. (*Wilson v. Tap Worldwide, LLC* (2025) 114 Cal.App.5th 1077, 1081.) But *Hohenshelt* confirmed that the statute applied only if the failure to pay the fee was found to be "willful, grossly negligent,

or fraudulent.” (*Hohenshelt, supra*, 18 Cal.5th at 333.)

If all else fails, take a writ or you may appeal after the arbitration

If your opposition fails and the court grants the defendant’s motion to compel arbitration, consider taking a writ, or else, you may appeal the issue after the arbitration (because an order granting a motion to compel arbitration is not an appealable order).

Writs are notoriously difficult to get granted (roughly five percent or fewer are granted), but still, a writ may be worth a try. Courts are occasionally sympathetic to the plight of a plaintiff forced to undergo an unnecessary proceeding only to have to do it all over again in front of a jury if the order

compelling arbitration is erroneous. And if your client is also seeking relief from the order compelling arbitration based on their inability to pay the arbitration filing fee and costs, that provides another basis for the court to grant relief from an arbitration that has been ordered. (*Roldan v. Callahan & Blaine* (2013) 219 Cal.App.4th 87, 96.) And a party seeking relief on either the defense of unconscionability or under *Roldan* may proceed via writ. (*Zembsch v. Superior Court* (2006) 146 Cal.App.4th 153; see also *Parada v. Superior Court* (2009) 176 Cal.App.4th 1554, 1567 [“In this case, the high cost of arbitrating before a three-judge panel at JAMS and the amount of time necessary to complete arbitration justify reviewing the order compelling arbitration by writ of mandate”].)

And recently, where a plaintiff was able to show the arbitration agreement was unconscionable and that he was unable to pay the fees and costs of arbitration, the Fourth District granted a writ and held he was “entitled to relief from the superior court’s order compelling arbitration” in *Sanchez v. Superior Court, supra*, 108 Cal.App.5th at 624.

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