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On the deconstruction and reconstruction of the Kaiser arbitration system

SUBSTANTIVE UNCONSCIONABILITY EXISTS WHERE THE RULES DETERMINING THE OUTCOME ARE STACKED

I take as a given that any lawyer or claimant who has been forced though the Kaiser Permanente arbitration system understands the pressing need for its deconstruction and major repair. This is not because the system is broken; it works exactly as Kaiser intended. Rather, it requires reconstruction because it is pervaded with pro-respondent bias and contractual unconscionability; because basic rights available to plaintiffs in court or in contract law are absent in arbitration; and because none of the judicially anticipated public benefits justifying this privileged "government within a government" actually exist.

The Supreme Court's justifications for permitting a private health insurer to deprive its patients of the right to a jury trial were that the arbitration process was faster, fairer and cheaper than civil litigation, and that it would not deprive patients of the essential rights they would have enjoyed in civil court. None of these have proven true.

The excessive costs of arbitration

First, arbitration is *more* expensive than civil litigation, not less. The fee for filing a lawsuit against Kaiser is $150, less than the cost of filing the complaint and depositing jury fees in civil court, which usually approach $650. That is the only litigation cost which is less in arbitration than civil filings. Most of the routine tasks of trial preparation – discovery, retention of experts, depositions, mediation – cost the same in the two venues.

Neutral arbitrator

But as soon as a judge is needed, arbitration costs soar, rapidly outdistancing those of civil cases for one controlling reason: Where civil litigants do not pay the judge or the jury by the hour, but pay only filing and still-minimal jury fees, in Kaiser arbitrations, unless the claimant has gone to court and been declared indigent, he must pay the neutral arbitrator, who is judge and jury, hourly fees that have evolved into $660-$1000/hour. This fee applies to *all* the time the judge spends on the case – on reviewing motions, handling discovery disputes, reviewing pre-trial briefs, being present at the arbitration, conducting post-arbitration deliberations (if there are party arbitrators), and producing a detailed, usually lengthy award. At each point, substantial charges are levied, which are absent in civil litigation.

For example, filing a motion and getting it decided rarely costs more than $495 in civil court. But the charges in arbitration *for each hour of the judge's time* is greater than the *total* charge for the entire civil court proceeding, as the neutral reviews briefs, holds hearings, and issues a written decision.

The average fee earned by a neutral arbitrator if a Kaiser case goes to arbitration, according to Kaiser publications, is now well over $50,000. In a complex case of my own, set to take nine arbitration days, the neutral arbitrator will almost certainly receive close to $100,000. In a nine-day jury trial, by contrast, the costs for judge and jury would not likely exceed about $1,500.

Party arbitrators

Further, if one party chooses to have a party arbitrator, the other must do so too, and the costs of retaining this lawyer, usually in the $600-750/hour range, fall on the claimant even if he has been declared indigent by the court.

The assertion that Kaiser arbitrations are cheaper than civil litigation is thus gossamer. Arbitration exacts all the usual costs, plus much more to pay the arbitrators.

The speed of arbitration

Second, arbitration does not resolve disputes faster than civil litigation. Kaiser cases generally take at least as long as civil cases. My most recent Kaiser case, not atypical, was finally tried in January 2026, after being filed in May 2023.

Several rules and procedures, unique to arbitration, extend the process. First, the process of choosing the judge often takes months, during which time discovery cannot proceed. Kaiser and claimant litigators have distinct preferences about who will serve as the neutral arbitrator, a determination that is almost as important to the outcome as the evidence. The right in arbitration to disqualify proposed neutral arbitrators without cause once they issue their required disclosure statement, unlimited in number, means that the selection process for a neutral can go through a season or more. This differs from the relatively prompt appointment of the civil court judge, which may be protracted only by a single permitted disqualification without cause per party. Since either party may prohibit discovery until the neutral arbitrator is in place, the "choosing of the neutral" interval is idle time, extending the time to complete discovery so as to materially exceed that required in a civil case.

Once a mutually acceptable neutral *is* chosen, it is not unusual for him or her to be booked for many months. Often, the first open date for a neutral arbitrator acceptable to both sides falls many months to a year out. Complex cases, lasting more than a day or two, are particular strains to placement on already crowded calendars.

Even the concluding proceedings are no quicker in arbitration. Though the arbitration itself usually takes less time than the same case tried in court, the post-proceedings deliberations and the neutral's preparation of a detailed written award usually adds days to weeks to the process.

In sum, the choice of judge, the scheduling of trial/arbitration dates, the time taken for discovery, and the time needed to complete trial proceedings are not *any less* in Kaiser arbitrations than in civil court. Any assertion otherwise is wishful thinking.

Fairness to the parties

Finally, and most important, arbitration is not *fairer* to the claimant than civil litigation. Instead, it puts claimants at material disadvantage. This conclusion is compelled by the observation that the shibboleth about the superiority of having a lawyer, rather than a jury, serve as the finders of fact is pridefully inaccurate, and the recognition, gained from observation, analysis, and experience that contractual unconscionability and embedded conflicts of interest permeate the Kaiser process.

The notion that arbitrations are fairer to claimants than juries turns on the assumptions that neutral arbitrators, being experienced lawyers, are more likely to grasp relevant evidence, to be above bias based on past personal experience, and to be less likely to regard large sums sought for damages as being excessive, even when they are proven, than lay jurors. This "professional ability to rely only on the facts" is the engine of the view that claimants have a more rational and predictable outcome in arbitration than in court, where the composition, knowledge, and personal biases of a jury are uncertain and problematic.

This supposition ignores the value of 12 ordinary people being brought together for compelled exchanges of opinions. The value of a jury, where 12 citizens acting together mitigate the extreme biases of individuals, and where the life experiences of the group, so much broader than that of any one person, permit unjustified theories to be refuted by those who have been there, has been appreciated since colonial times. The jury as a group may see the truth better than any single person, regardless of that person's sophistication.

Another alleged "increaser of fairness" in arbitration is the experience with medical-malpractice cases and medicine that arbitration panel members may have, but that jurors may lack. But no such experience is required for inclusion on the Kaiser arbitration panel, and many neutrals practiced previously in unrelated fields, have never personally litigated a malpractice case, and therefore lack any personal experience in point.

Financial incentive to the arbitrator

More important than all of this is one undisputable fact: in court, *the finders of fact do not stand to make or lose a personal fortune depending on the outcome of the case.* In Kaiser arbitrations, the reverse is most palpably true.

The argument for fundamental restructuring of the Kaiser arbitration system has three legs: currently unavoidable Pro-Kaiser bias; the absence in arbitration of protections of claimants' basic, critical rights; and contractual unconscionability of the arbitration contract.

First, Kaiser's unregulated and unlimited control over the future income of neutral arbitrators makes objectivity impossible and impartiality implausible. Procedures unique to arbitration make it possible for Kaiser to control the prospective income and, ultimately, the conduct of assertedly neutral arbitrators.

When a Kaiser subscriber files an arbitration demand, a computer selects 12 names, assertedly at random, from the "panel" that has been chosen *only* by Kaiser. Each party may then strike four names and rank the remaining individuals by their own order of preference. The computer then decides which name is least objectionable to the two litigants and names him or her the neutral arbitrator. The neutral arbitrator then must issue a disclosure statement revealing past contacts with all participants. *Either side may disqualify the selected potential arbitrator without cause within 15 days of that disclosure.*

This means that for any individual arbitrator foolhardy enough to find against Kaiser, particularly for a large sum, Kaiser can immediately extinguish that individual's future Kaiser arbitration income. Kaiser keeps this person from working by striking his or her name if it comes up on the initial list of potential neutrals or, should that lawyer make it to initial appointment, by disqualifying them without cause after they serve a disclosure statement.

This ability to end a lucrative form of post-retirement income, generated by large, unregulated hourly fees garnered without the uncertainties of litigation and without the burden of overhead – exists for Kaiser but not for injured claimants. Offending a claimant, whom the neutral may see once in years, carries no economic consequence. Offending Kaiser means you will be punished or banished.

The preclusion of appeal of arbitration awards, even if they are demonstrably wrong on the law or on the facts, reinforces the disproportionate influence of future income on the determination of present cases: otherwise reversible decisions, the product of engaged self-interest, cannot be reversed.

Section 170.1 of the Code of Civil Procedure provides for disqualification of judges who have a financial interest in the proceeding, have a current arrangement concerning prospective employment, or have participated in discussions of such employment within the two prior years. The structure of the Kaiser arbitration system makes these grounds for disqualification apply to *every neutral arbitrator in every Kaiser arbitration*.

Federal law and Bar Association Rules of Conduct go further. Title 28 United States Code section 455 holds that judges must disqualify *themselves* if they have "a financial interest in the subject matter in controversy." The California Judicial Counsel, citing the U.S. Supreme Court, asserts that disqualification is not restricted to where *actual* bias has been proven, but turns on "whether as an objective matter, the average judge in his or her position is likely to be neutral or whether there was an unconstitutional 'potential for bias,'" requiring disqualification in this circumstance to avoid violation of due process.

There is no plausible argument that Kaiser's complete control over potential neutral arbitrators' future Kaiser income fails to meet the requirements of each of these legal standards for disqualification or self-disqualification, or that it is not applicable to any neutral who wants to continue to arbitrate…which is all of them.

Second, the Kaiser arbitration system, in truncating basic rights of its subscribers, violates due process and the legislature's conditions precedent for Kaiser's being permitted to operate as a "government within a government."

The central "condition precedent" purportedly making it constitutional for a private insurer/health care provider to compel relinquishment of the right to jury trial is that no basic rights litigants had in court would disappear or be diminished in arbitration.

But in *civil* litigation, the panel of judges from which the trial judge is designated consists of jurists who were appointed or elected in a manner that does *not* come under the complete control of the defendant. The opposite is true in Kaiser arbitration. Subscribers have no say in who is admitted to the Kaiser arbitration panel. That is Kaiser's solo prerogative.

Further, though in civil court a plaintiff may have the good fortune to have as judge a person with recent experience with medical-malpractice litigation, in arbitration, lawyers who have litigated for plaintiffs or even who have served as party arbitrators are barred from the panel for years. The Kaiser arbitration structure thus not only does not try to *include* experienced medical-malpractice lawyers as neutrals but affirmatively disadvantages their applications.

Kaiser can pick and choose its neutrals

Once the Kaiser basic panel is set, and 12 potential arbitrators are picked from it for ranking by the parties, the selection process permits Kaiser to disqualify without cause an *unlimited* number of prospective neutrals, one after the next.

Kaiser can pick the judge for Kaiser leanings, using the potential for inflicting economic hardship on wayward neutrals. The claimant has no such power. Neither the unlimited ability to disqualify judges without cause, nor the potential for depriving a judge of his or her future income burden plaintiffs in civil court.

There is no appeal

Another legal distortion of arbitration is that no appeal of an arbitration award is permitted for a clear mistake of law or for clear error on the facts. Presently, gross errors in law or fact are immune to reversal. Only ex parte contact may generate vacation of an award. These basic rights – to a judge without personal economic interest in the outcome and to an appeal – are absent in arbitration.

The contract is unconscionable

Finally, the Kaiser arbitration contract is both substantively and procedurally unconscionable, making it subject to invalidation. I won't go through all the intricacies of California's law of unconscionability here, but here are the fundamental rules:

First, an arbitration agreement is a contract, subject like all contracts to invalidation for unconscionability and for absence of good faith and fair dealing. "California's unconscionability standard is, as it must be, the same for arbitration and non-arbitration agreements…the application of unconscionability doctrine to an arbitration clause must proceed from general principles that apply to any contract clause." (*Sanchez v. Valencia Holding Co.* (2015) 61 Cal.4th 899, 912.)

Second, there are two aspects of unconscionability: procedural and substantive. The former focuses on oppression or surprise in the formation of the agreement, due to unequal bargaining power; the latter focuses on overly harsh or one-sided results. (*Id.*, 61 Cal.4th at p. 912.)

The Court *in Balthazar v. Forever-21, Inc.* (2016) 62 Cal.4th 1237,1243, framed the same rules in a simpler way: "One common formulation of unconscionability is that it refers to an absence of meaningful choice on the part of one of the parties together with contract terms that are unreasonably favorable to the other party."

The "oppression" that can trigger a finding of procedural unconscionability, "occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form. There are degrees of procedural unconscionability. At one end of the spectrum are contracts that have been freely negotiated by roughly equal parties, in which there is no procedural unconscionability. Contracts of adhesion that involve surprise or other sharp practices lie on the other end of the spectrum." (*Dougherty v. Roseville Heritage Partners (2020)* 47 Cal. App.5th 93,103.)

Similarly, "[w]hen the weaker party is presented the clause and told to "take it or leave it" without the opportunity for meaningful negotiation, oppression, and therefore procedural unconscionability, are present." (*Bakersfield College v. California Community College Athletic Assn*. (2019) 41 Cal.App.5th 753, 762.) Procedural unconscionability is also present where the document at issue is so unclear that the weaker party must "…go to another source to find out the full import of what he or she is about to sign and must go to that effort prior to signing." (*Epstein v. Vision Health Service Plan* (2020) 56 Cal. App.5th 223, 237.)

Each of these indicia of procedural unconscionability is present in *every* Kaiser arbitration proceeding. Kaiser subscribers have zero input into the terms of their arbitration agreement, which is drafted and imposed solely by Kaiser, the party of superior strength. It is precisely "take it or leave it." There is profound inequality of bargaining power: subscribers, in fact, have none.

And the vagueness of the OIA rules is legendary. In three cases in the last three years, in pro per claimants have been subject to summary judgment motions for not understanding that

OIA Rule 8 meant that your arbitration demand had to *explicitly* name the medical group to sue a doctor and to *explicitly* name the hospital corporation to sue a nurse. Two of these motions were granted. The "Kaiser Oversight Board," putatively tasked with changing OIA rules to ease the path for subscribers, when I asked it to clarify Rule 8 in light of these unfair summary judgments, replied: "We do not see any need to change the Rule."

Substantive unconscionability exists where the rules determining the outcome are stacked; where these rules are selectively and finally interpreted by the stronger party; and particularly and *dispositively* where the *judicial panel deciding the dispute is chosen only by the stronger party*. Such panels, like Kaiser's, are *presumptively biased*.

The *Sanchez* court affirmed that arbitration agreements must not deprive claimants of rights they would have had in court, noting, "Arbitration is intended as an alternative to litigation, and the unconscionability of an arbitration agreement is viewed in the context of the rights and remedies that otherwise would have been available to the parties." (*Sanchez*, 61 Cal.4th at p. 922.)

A particularly noxious aspect of substantively unconscionable arbitration agreements, one that carries *dispositive* weight, is *the exclusive allocation to the stronger party the choice of the judicial panel from whom the ultimate judge will be selected*. *Calling* someone "neutral" proves nothing when the panel from which he is chosen is preselected entirely and without permitted modification by the more powerful party.

The court applied this rule in *Epstein v. Vision Health Service Plan* (2020) 56 Cal. App. 5th 223, 237, which described a problematic arbitrator-selection process from another case:

> Three arbitrators were selected from a 'preestablished 12-person master list.' The selection procedure delineated no standards to ensure impartiality or neutrality of the candidates. Although the constitution allowed the colleges to nominate one of the persons on the panel and specified the schools would have "'a reasonable voice'" in the selection of other panel members, the trial court found that in actual practice "'the entire master list was solicited, and appointed, solely by the [Athletic Association's] Executive Director, with no input from member colleges.'

In *Murrey v. Superior Court* (2023) 87 Cal.App.5th 1223, the court held that an arbitration agreement was unenforceable because the employer retained sole authority to designate the hearing officer solely from a group of his own choosing.

These appellate cases found that arbitration agreements that were materially *identical* to Kaiser's – given Kaiser's ability to choose the panel from which neutral arbitrators are drawn – were unconscionable and invalid.

Kaiser might argue that the rank-and-strike process and the right to disqualify neutrals without cause after disclosures obviates any advantage flowing from Kaiser's choice of the panel's membership. But that argument does not survive scrutiny. Being able to choose from among a panel designated by the stronger party does not mitigate the effect of the stronger party's choice of who serves on the panel. The bias inherent in a panel including only my own wife, children and close friends would not be mitigated by the Kaiser rank-and-strike process.

The rank-and-strike and disqualification-after-disclosure processes are the instruments through which Kaiser punishes neutrals who find for the claimant. Where a neutral's repeat lucrative employment by Kaiser, the dominant party, may be *instantly extinguished* after one substantial claimant's award, that system cannot help but produce in panel members an association of their own interests with those of the stronger party, and in addition, lead to selective *application to the Kaiser arbitration panel* of lawyers who know where their bread will be buttered.

In sum, *irremediable* substantive unconscionability exists if the arbitration panel is one in whose selection the weaker party has no say, particularly where those panel members are subject, through the "carrot" of potential six- or seven-figure incomes, to self-interest-fertilized bias towards the stronger party, unmitigated by the threat of appeal.

Both forms of unconscionability are embedded in the Kaiser arbitration system.

Conclusion and recommendations

Standard sources report that 40-54% of the health care market in California belongs to Kaiser. If we all are patients, this means that 16-21 million people in our state, when seeking redress for negligent medical care, are shunted away from a jury trial to a system constructed and interpreted only by the entity who harmed them; must, on penalty of being summarily dismissed, understand ambiguous Kaiser rules which Kaiser refuses to simplify; and must have their cases determined by a cadre of lawyers chosen only by Kaiser, who, should they rule adversely to Kaiser, stand to lose their substantial retirement income, and who, in leaning towards Kaiser, are immune from appeal.

The irony is that this disaster for the public was permitted to obtain public benefits that have proven illusory.

The system is salvageable if its three worst abuses are corrected.

The choice of the panel from which neutrals are chosen must fall to a combination of plaintiff and defendant representatives, so that there is no plausible argument of corruption at the start.

The structure must permit neutral arbitrators to rule according to the evidence, without fear of economic repercussion.

And arbitration awards must be as appealable as civil verdicts.

The Legislature needs to act.

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