Court Refuses to Enforce Health Net Arbitration Provision Because It Was Insufficiently Prominent

In the unpublished case of *Probst v. Superior Court* (Health Net of California, Inc., et al), No. A133742 (March 6, 2012), Division Five of the First Appellate District refused to enforce an arbitration provision in an enrollment form. Brian Probst (who filed a putative class action alleging that Health Net of California, Inc. and Health Net, Inc ("Health Net") failed to adequately protect private personal and medical information from unauthorized disclosure to third-parties) sought writ relief from an order compelling him to arbitrate his claims against Health Net. The Court granted the requested relief because the health plan enrollment form signed by Probst failed to comply with the disclosure requirements of the Knox-Keene Health Care Service Plan Act of 1975 (Knox-Keene Act, Health & Saf. Code, § 1363.1, subdivision (b)), rendering the arbitration agreement unenforceable.

The Knox-Keene Act, Health & Saf. Code section 1363.1 provides:

> "Any health care service plan that includes terms that require binding arbitration to settle disputes and that restrict, or provide for a waiver of, the right to a jury trial shall include, in clear and understandable language, a disclosure that meets all of the following conditions: [¶] . . . [¶] (b) The disclosure . . . shall be prominently displayed on the enrollment form signed by each subscriber or enrollee."

The Court relied heavily on *Zembsch v. Superior Court* (2006) 146 Cal. App. 4th 153, 160-161, where another arbitration agreement was held unenforceable. The Court ruled that the disclosure provided by Health Net "does not command attention to its existence." The provision was contained in a comparatively small and dense section of text. The Court explained that the arbitration disclosure is "essentially buried on the lower one-third of the second page" of the enrollment form. It appeared within a crowded group of other provisions beneath an "Acceptance of Coverage" heading. In explaining why the arbitration provision did not satisfy the "prominently displayed" requirement, the Court stated:

> Relative to the bulk of the provisions contained in the enrollment form, the arbitration provision is contained in a comparatively small and dense section of text that does not capture the reader's attention. As previously described, the first page and the first two-thirds of the second page of the enrollment form contain various provisions which stand out and are readily noticeable, including the sections governing personal, employee and family information, disclosure of other health care coverage, declination of coverage, and selected coverage. Those sections are preceded by headings appearing in white typeface in dark gray boxes stretching seven inches across the page. They also include boxes that are required to be checked, and generous spacing between individual questions and provisions.
>
> In contrast, the arbitration disclosure is essentially buried on the lower one-third of the second page of the enrollment form. The arbitration disclosure appears within a crowded group of provisions appearing beneath the "ACCEPTANCE OF COVERAGE" heading. The small, narrow font used in this section is surrounded by

> narrow spacing, giving an overall compressed appearance and making it more difficult to read. While the font used in the arbitration disclosure appears to be somewhat larger and perhaps slightly darker than the other provisions in this section, and the line spacing somewhat greater, this is so by only the most minimal degree. The arbitration provision is not written in a significantly larger or bolder font, it is not italicized, underlined, or in all caps, and the spacing around the provision is not sufficiently large so as to highlight the provision and make it readily noticeable.
>
> Furthermore, the arbitration disclosure is divided between two columns, unlike the other provisions appearing beneath the "ACCEPTANCE OF COVERAGE" heading. The breaking up of the disclosure between two columns hinders its readability, and serves to make the disclosure even less noticeable than the other provisions in this section.

The Court concluded:

> In enacting section 1363.1, subdivision (b), the Legislature plainly intended that arbitration disclosures in health care service plans be readily observable by the reader. While health plans have flexibility in selecting elements to give prominence to arbitration disclosures (*Burks, supra*, 160 Cal.App.4th at p. 1028), defendants did not achieve the required prominence in the enrollment form signed by plaintiff. It is apparent from reviewing other, nonarbitration related provisions of plaintiff's enrollment form that defendants possessed the ability to make the arbitration disclosure prominent. (*See Zembsch, supra*, 146 Cal.App.4th at p. 165 [when measured against other portions of the form, "Health Net clearly could have made the text of the disclosure more prominent had it chosen to do so"].) However, it cannot reasonably be said in this case that the arbitration disclosure stands out, or is readily noticeable, conspicuous, or striking. (*Imbler, supra*, 103 Cal.App.4th at p. 579; *Burks, supra*, 160 Cal.App.4th at p. 1026.)
>
> Consequently, the superior court erred in compelling plaintiff to arbitrate his claims against defendants. (*Zembsch, supra*, 146 Cal.App.4th at p. 168 [violation of section 1363.1 renders any arbitration agreement unenforceable].)

This case is the latest case from the Court of Appeals to invalidate arbitration provisions by health service plans governed by the Knox-Keene Act.