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Appeals court refuses to enforce arbitration provision presented to customers on a take-it-or-leave-it basis.

Court Refuses To Enforce "Unconscionable" Arbitration Provision

Although California law looks favorably on arbitration agreements, the California Court of Appeal's recent decision in Lhotka v. Geographic Expeditions, Inc. illustrates that courts will not hesitate to set such agreements aside if they perceive that the agreements are unfair. In *Lhotka* , the appellate court held that the agreement at issue was unconscionable because it was presented on a "take it or leave it" basis and because it contained provisions that unfairly benefited one side.

Geographic Expeditions is a tour company that leads expeditions up Mount Kilimanjaro. The company required its clients to sign an agreement to submit potential disputes to arbitration. The agreement placed limits on the amount of recovery that the clients could receive, and obligated them to pay the company's legal fees if they brought suit based on claims that they had released. Jason Lhotka, a client of Geographic Expeditions, died of altitude sickness on the mountain. His mother sued the company for wrongful death. Because Jason had signed the arbitration agreement, the company asked the court to dismiss the lawsuit in favor of arbitration. The trial court refused the company's request, finding that the agreement was both procedurally and substantively unconscionable.

The Court of Appeal affirmed the trial court's ruling. The appellate court noted that California has a "strong public policy in favor of arbitration" and that "any doubts regarding the validity of an arbitration agreement are resolved in favor of arbitration." Yet the appellate court concluded that the agreement at issue was

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unenforceable because it was oppressive and unconscionable. The appellate court rejected the argument that the agreement was acceptable because Jason "could have simply decided not to trek up Mount Kilimanjaro." While conceding that "[t]he argument has some initial resonance," the appellate court held that it was outweighed by the "other circumstances surrounding the execution of the agreement." Specifically, the appellate court noted that the company's owner had sent prospective customers a letter informing them that the company''s lawyers and insurance carrier had insisted on requiring the agreement, that the agreement could not be modified, and that other travel companies would also require customers to sign similar agreements.

Turning to the substance of the agreement, the appellate court focused principally on a provision limiting the company''s liability to the amount of money that the clients had spent on the trip. The appellate court wrote, "the limitation of damages provision here is yet another version of a 'heads I win, tails you lose' arbitration clause that has met with uniform judicial opprobrium." The appellate court also objected to a provision requiring clients to conduct the arbitration in Colorado, where the company was located, rather than in the place where the clients reside. Finally, the appellate court objected to the provision requiring clients to pay the company's legal fees if a client brought a claim covered by a release. In light of these deficiencies, the appellate court held that the company "designed its arbitration clause not simply as an alternative to litigation, but as an inferior forum, that would give it an advantage." Accordingly, the appellate court held that the arbitration was unenforceable in its entirety.

Conclusion. The decision provides useful guidance for companies seeking to include enforceable arbitration provisions in their agreements with customers. Most obviously, the company should not have included a letter with the agreement informing clients that the provision was non-negotiable. Equally important, the appellate court concluded that Geographic Expeditions was seeking to use arbitration as a way to gain an advantage at its clients' expense. To avoid this outcome, communications accompanying an arbitration agreement should be drafted in a way that makes clear that both sides stand to benefit from arbitration. In addition, the agreement itself should be even-handed and should entitle a party to recover the same remedies that would be available if the case were to be heard in court.

About TroyGould

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