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ARTICLES

Unconscionable Arbitration Provision at the Friendly Confines

Illinois Appellate Court rules that an arbitration provision referenced on the back of a ticket to a baseball game is unenforceable.

By Andrew D. Campbell

The Illinois Appellate Court ruled that a mandatory arbitration provision referenced on a ticket to a Chicago Cubs baseball game was unconscionable and unenforceable. *Zuniga v. Major League Baseball*, 2021 IL App (1st) 201264.

The plaintiff, Zuniga, attended a Cubs home game at Wrigley Field—the "Friendly Confines"—in August 2018. On game day, she received her ticket from her father, who had won it in a workplace raffle. During the game, a foul ball struck the plaintiff causing serious injuries to her head and face, including her eye. The plaintiff sued the Cubs and Major League Baseball in Illinois state court. Defendants moved to compel arbitration based on the terms printed on the paper ticket the plaintiff presented when entering the park. The trial court denied the motion and held the arbitration provision unenforceable. The appellate court agreed.

The back of the plaintiff's ticket contained an advertisement (covering one-third of the ticket) and six paragraphs of "fine print" setting forth terms and conditions. The first term stated that by using the ticket, the ticket holder agreed to the terms and conditions available on a Cubs' website. The

web address was not set-off from the other text through print that was a different color, larger, bolded, italicized, or in capital letters. However, other provisions of the ticket back were in all caps or otherwise emphasized—including a warning that baseballs might be hit into the stands. The ticket also stated that the terms and conditions were available in the Cubs' administrative office—but failed to state where that office is located.

The ticket's terms also stated, "Any dispute/controversy/claim arising out of/relating to this licenses/these terms shall be resolved by binding arbitration, solely on an individual basis, in Chicago, Illinois."

The complete terms and conditions on the Cubs' website included a mandatory arbitration provision entitled, "*MANDATORY ARBITRATION AGREEMENT & CLASS ACTION WAIVER ('ARBITRATION AGREEMENT')*." The arbitration agreement spanned eight paragraphs and approximately one and one-third pages of single-spaced text in the Westlaw version of the decision.

In the litigation, the plaintiff did not dispute entering into a contract by attending the game. Rather, she denied agreeing to arbitrate her dispute. Applying state contract law, the court found the arbitration agreement was procedurally unconscionable and unenforceable.

The court stated that "[p]rocedural unconscionability consists of some impropriety during the process of forming the contract depriving a party of a meaningful choice" and that courts consider

> all the circumstances surrounding the transaction including the manner in which the contract was entered into, whether each party had a reasonable opportunity to understand the terms of the contract, and whether important terms were hidden in a maze of fine print; both the conspicuousness of the clause and the negotiations relating to it are important albeit not conclusive factors in determining the issue of unconscionability.

The court added that procedural unconscionability is more likely to be found where contracts involve: a consumer; a disparity in bargaining power; and the presence of an allegedly unconscionable provision in a preprinted form. *Id.* at ¶ 14–15.

The court discussed several cases rejecting unconscionability attacks based on fine print, legalese, preprinted forms, and terms and conditions that were available through websites. Here, the plaintiff's ticket suffered from all these shortcomings and others. The court observed that to learn the complete terms and conditions, ticket holders needed (1) a smartphone or other device with internet connectivity, (2) adequate wireless coverage, and (3) the time and opportunity—in the commotion before a baseball game—to access the terms and conditions and review them. Further, the Cubs made minimal effort to direct ticket holders to the website by highlighting or emphasizing the URL in a meaningful way. Although paper copies of the terms and conditions were available at the Cubs' administrative offices, the address for that office was not on the ticket.

The court also distinguished this case from others where terms and conditions were available through the internet, yet no unconscionability was found. The other cases usually involved contract formation through the internet, as well as hyperlinks to the specific terms and conditions. The court also distinguished cases in which fine print or preprinted contract forms were upheld. The contracts in those cases (1) usually included all of the terms and conditions and (2) required the plaintiff to sign the contract or initial the terms. Here, the plaintiff did not sign anything and the ticket did not disclose the complete arbitration agreement.

The court said that the terms did not "appear designed to have the effect of actually causing a reasonable consumer in the plaintiff's position to learn of and read the full arbitration provision to which he or she is purportedly assenting." Further, the purported means of assent to the terms—presenting a paper ticket and entering the gate—was troubling. Going to a ball game is not "a traditional method of forming a contract" and is not an act that would cause a reasonable consumer to realize she was assenting to the terms of a contract. *Id at 26*.

Ultimately, the court found that the Cubs were "overreaching" by seeking to bind a consumer to an extensive, eight-paragraph arbitration provision that was never given to her and was not readily accessible.

The court also determined that there was a degree of substantive unconscionability: some terms were "so one-sided as to oppress or unfairly surprise an innocent party." These one-sided provisions included an unreasonably short period of only seven days after the baseball game to opt out of the arbitration provision and requiring the ticket holder to include an account number in the request to opt out. Here, the plaintiff's injuries were so severe that she could not have read

the terms on the website within seven days of her injury. And she did not have an account number, which the Cubs required to opt out.

Finally, though not in the decision, Chicago White Sox fans will note that their team's tickets do not contain a mandatory arbitration provision.

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