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Does the Physical or Mental Impairment of a Party Make An Arbitration Agreement Voidable?

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For an arbitration agreement to be enforceable, the parties must have a *reasonable opportunity* to understand its terms. *See Fagerstrom v. Amazon.com, Inc.*, 141 F. Supp. 3d 1070 (S.D. Cal. 2015). With this principle in mind, the U.S. Court of Appeals for the Ninth Circuit commented in 2006, regarding the enforceability of an arbitration clause that was prominent in a contract, "*You'd have to be blind to miss this warning.* There was no surprise here." *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1309-10 (9th Cir. 2006) (en banc) (emphasis added). But what if the plaintiff in *Nagrampa* had been blind, or was otherwise unable reasonably to read, or to understand, or to appreciate the significance of the arbitration clause by virtue of a disability or a more temporary impairment?

The Court of Appeals for the First Circuit confronted such a question in *National Federation of the Blind v. The Container Store, Inc.* 904 F.3d 70 (1st Cir. 2018). At issue was The Container Store's loyalty rewards program, the terms and conditions of which contained an arbitration clause. *Id.* at 75-76. To enroll, customers were required to input their phone numbers and e-mail addresses at a store checkout point-of-sale terminal ("POS"). *Id.* at 75. In the process of enrolling, the arbitration provision appeared on the POS. *Id.* Blind customers could not enter their contact information into the POS without staff assistance, and if they chose to do that, they would have to reveal personal details to a staff member. *Id.* at 76. The blind plaintiffs had brought a class action suit, alleging that this state of affairs amounted to unlawful discrimination against blind customers in violation of the Americans with Disabilities Act ("ADA") and state civil rights laws. *Id.* at 76-77.

In response, The Container Store had moved to compel arbitration on the theory that plaintiffs agreed to arbitrate their claims when they enrolled in the loyalty rewards program. *Id.* at 83. The district court had denied the motion to compel, concluding that those plaintiffs could not have agreed to arbitrate because they had not had an opportunity to review the arbitration agreement.

The First Circuit affirmed the district court's decision, focusing on The Container Store's failure to show that the terms of the arbitration agreement were communicated to the plaintiffs or that the plaintiffs had done anything during enrollment to manifest their assent to arbitrate. *Id.* at 83. It is basic that agreements to arbitrate are formed in the same way as ordinary contracts, and so a "meeting of the minds" is necessary for an arbitration clause to be valid. *PCH Mut. Ins. Co. v. Cas. & Sur., Inc.* , 750 F. Supp. 2d 125, (D.D.C. 2010), citing *ISC Holding AG v. Nobel Biocare Invs. N.V.*, 351 Fed. App'x 480, 481 (2d Cir. 2009) ("Without a meeting of the minds such that an enforceable agreement to arbitrate was formed, we will not compel arbitration."). The First Circuit Court of Appeals reasoned that because the blind plaintiffs were not presented with the arbitration provision, and thus were unaware of it, *ipso facto* they could not have agreed to it. 904 F.3d at 84.

The Court contrasted those plaintiffs' circumstances with situations where parties were deemed to have had constructive notice of contract formation even though they could not read – for example, when taking out a loan or entering into an employment relationship – because in those situations, the parties presumably understood that they were entering into a contractual relationship. *Id.* at 83-84 ("the parties were treated as knowing the terms despite being illiterate or blind because of the very nature of the agreements they entered into.").

Importantly, the First Circuit concluded not that the arbitration agreement in question was procedurally unconscionable, but that no contract had been formed because, in light of the plaintiffs' visual impairments and the absence of evidence that the store's staff alerted plaintiffs to the arbitration agreement, the plaintiffs had "zero hint" that an arbitration agreement applied to their enrollment in the loyalty program. *Id.* at 84, 88 n.23. In the analogous case of minors, who cannot be charged with constructive notice, the "predominant rule is that [their] contracts are generally voidable but that contracts for what are known as 'necessaries' are enforceable." *Rodriguez v. Reading Hous. Auth.*, 8 F.3d 961, 964 (3d Cir. 1993). Similarly, challenges to a contract on the basis of a party's mental impairment are regularly considered with reference to the contract's formation. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006), citing *Spahr v. Secco*, 330 F.3d 1266 (10th Cir. 2003) (Alzheimer's patient lacked mental capacity to contract).

Courts have also recognized that there are situations where an individual can be aware that he is entering into a contractual relationship, including an agreement to arbitrate, without being able to appreciate the significance of some or all of the agreed terms. Arbitration clauses are often challenged on the basis that they are "unconscionable." "Procedural unconscionability" generally concerns issues of unfairness in the process of making a contract. For example, courts have held arbitration agreements to be procedurally unconscionable in cases where the arbitration clause is hidden "in a maze of fine print" and does not provide "reasonable notice" of its terms and conditions. *Fagerstrom*, 141 F. Supp. 3d at 1067, 1069. *See, e.g.*, *Smith v. Legal Helpers Debt Resolution, LLC*, 2011 U.S. Dist. LEXIS 153938, at *17-21 (W.D. Wash. Oct. 24, 2011) (denying motion to compel arbitration); *Hollins v. Debt Relief of Am.*, 479 F. Supp. 2d 1099, 1107 (D. Neb. 2007) (same). However, in some cases, courts have invoked "procedural unconscionability" as the basis to avoid an arbitration provision where one of the parties was deemed impaired in some material way. *See, e.g.*, *Arnold v. United Cos. Lending Corp.*, 204 W. Va. 229 (W. Va. 1998) (arbitration provision in loan agreement between corporate lender and *elderly, unsophisticated consumers* was void for unconscionability); *Romano v. Manor Care, Inc.*, 861 So. 2d 59, 63 (Fl. Dist. Ct. App. 2003) (arbitration clause in contract between resident and nursing home was procedurally unconscionable where it was presented to resident's *elderly* husband "as simply another document required to be signed as part of the admission process."); *Harrington v. Atlantic Sounding Co.*, 2007 U.S. Dist. LEXIS 67097, at *11 (E.D.N.Y. Sept. 11, 2007) (arbitration agreement was procedurally

However, the courts' attitudes in this regard vary widely, and many do not follow this avenue of legal analysis. *See, e.g., Mason v. Acceptance Loan Co.*, 850 So. 2d 289, 296 (Ala. 2002) (mental disabilities do not affect ability to contract); *Estate of Etting v. Regents Park at Aventura, Inc.*, 891 So. 2d 558, 558 (Fl. Dist. Ct. App. 2004) (per curiam) (upholding validity of arbitration clause with respect to decedent's estate where decedent had been legally blind when she signed a nursing home agreement containing an arbitration clause).

There are myriad situations where a party's disability or other impairment is an impediment to perception, or to understanding, or to appreciation of the terms of a contract. Blindness, deafness, age- or illness-related impairment, cognitive impairment (even if temporary), or another disability, might be asserted as a basis for the voiding of a contract. We suggest that to better ensure the enforceability of an agreement to arbitrate in a consumer contract, for example, the party requesting such agreement should (i) draw explicit attention to the offered arbitration clause; (ii) provide an explanation or summary of its terms in accessible, non-technical language to the extent possible; (iii) collect tangible evidence of the customer's assent to the arbitration agreement (*e.g.*, requiring the customer to acknowledge his/her assent by signing or initialing); and (iv) limit or eschew the use of clickwrap agreements.

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