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# NOT TO BE PUBLISHED IN OFFICIAL REPORTS



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

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| **AUDREY SMITH et al.,**<br>**Petitioners,**<br>**v.**<br>**THE SUPERIOR COURT OF ALAMEDA COUNTY,**<br>**Respondent;**<br>**STEVEN D. LA VIOLA et al.,**<br>**Real Parties in Interest.** | **A130537**<br><br>**(Alameda County Super. Ct. No. RG09470457)** |

THE COURT:*

Petitioners Audrey Smith, Aundre Christy, Rhonda Smith, Ladell Gayle, Albert Smith and Martha Jackson (plaintiffs) are the five adult children and the mother of Patricia Amonoo (decedent), who allegedly died following cardiac pacemaker surgery. Plaintiffs seek writ relief from an order compelling them to arbitrate their wrongful death and survival claims against real parties in interest Steven D. La Viola, M.D., and the Permanente Medical Group, Inc. (collectively referred to as Kaiser). Because we find that the Kaiser health plan enrollment form signed by decedent fails to comply with the

* Before Jones, P.J., Simons, J. and Bruiniers, J.

requirements of Health and Safety Code section 1363.1, subdivision (b),[1] rendering the arbitration agreement unenforceable, we grant the requested relief.

## BACKGROUND

The Kaiser health plan enrollment form signed by decedent is a one page, letter-sized document entitled "Enrollment Application **GROUP MEMBERSHIP**." Below the approximate one-inch title section, the page is divided into four sections covering approximately one-half of the page (just over six inches). The four sections are entitled "Instruction," "Please Complete," "Arbitration," and "Your Signature," and these titles are printed in identical typeface with a white font against a black boxed background. Following the signature and date lines, the bottom portion of the page (approximately three inches) contains several questions regarding the applicant's language preference, and details about Kaiser's service area appear beneath a heading that reads in boldface type, "**Our Northern California Service Area**."

Under the heading "Arbitration," the following paragraph appears: "I apply for Health Plan membership for myself and my covered family dependents. We agree to abide by the provisions of the Service Agreement and Health Plan policies. We understand that, except for small claims court cases, any claim that we, our heirs, or other claimants associated with us, assert for alleged violation of any duty arising out of or relating to the Service Agreement, including any claim for medical or hospital malpractice, for premises liability, or relating to the coverage for, or delivery of, service pursuant to the Agreement, irrespective of legal theory, must be decided by binding arbitration under California law and not by a lawsuit or resort to court processes except as California law provides for judicial review of arbitration proceedings. We are therefore giving up our right to a jury trial and are accepting the use of binding arbitration." None of the text in this paragraph is underlined, in boldface type, or otherwise distinct from the

[1] All further statutory references are to the Health and Safety Code, unless otherwise indicated.

remainder of the text in the paragraph. The "Your Signature" heading next appears, followed by blank spaces for decedent's signature and signature date.

The font size of the typewritten material on the enrollment form varies from section to section. The headings are printed in a font size larger than the remaining text of the agreement. The text of the paragraph beneath the "Arbitration" heading appears to be the same size as text appearing in other portions of the agreement, including text beneath the "Instructions," "Your Signature" and service area headings.

## DISCUSSION

### I. *Writ Review is Appropriate*

While "the preferred procedure in arbitration proceedings is to proceed with the arbitration and attack the intermediate rulings in connection with a petition to vacate or confirm the arbitrator's award or on appeal from a judgment confirming the award" (*International Film Investors v. Arbitration Tribunal of Directors Guild* (1984) 152 Cal.App.3d 699, 706), this general rule is not without exceptions. As this court has recognized, writ review is warranted where, as here, noncompliance with section 1363.1 renders an arbitration agreement under which arbitration was compelled unenforceable. (*Zembsch v. Superior Court* (2006) 146 Cal.App.4th 153, 160-161 (*Zembsch*).)

### II. *The Arbitration Disclosure Does Not Meet the "Prominently Displayed" Requirement*

As pertinent to this case, 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." We review de novo the superior court's ruling on whether section 1363.1 is satisfied. (*Zembsch*, *supra*, 146 Cal.App.4th at p. 162.)

In *Imbler v. PacifiCare of Cal., Inc.* (2002) 103 Cal.App.4th 567 (*Imbler*), the court discussed the "prominently displayed" requirement of section 1363.1, subdivision (b) as follows: " 'Prominent' is defined as 'standing out or projecting beyond a surface

or line,' or 'readily noticeable.' " The court in *Imbler* found this requirement not met because "the disclosure sentence was written in the middle of the authorization for the release of medical records and an authorization for payroll deduction of premiums. The disclosure was in the same font as the rest of the paragraph, and was not bolded, underlined or italicized. The disclosure sentence neither stood out nor was readily noticeable." (*Id.* at p. 579, fn. omitted.)

The *Imbler* court, like the court in *Burks v. Kaiser Foundation Health Plan, Inc.* (2008) 160 Cal.App.4th 1021, 1026-1028 (*Burks*), rejected the insurer's contention that the disclosure was "prominently displayed" within the meaning of section 1363.1, subdivision (b) by virtue of the fact that, in compliance with section 1363.1, subdivision (d),[2] the arbitration disclosure appeared immediately above the signature line. (*Imbler, supra,* 103 Cal.App.4th at p. 579.) *Burks* explained its reasons for rejecting this contention, as follows: " 'It is a maxim of statutory construction that "Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage." ' [Citation.] If placement of a legible arbitration disclosure immediately before the signature line were sufficient, in the judgment of the Legislature, to make that disclosure stand out from its surroundings, then there would have been no reason for the Legislature to separately mandate that the disclosure be 'prominently displayed' on the enrollment form. By requiring that the arbitration disclosure be displayed prominently *and* immediately before the signature line, the Legislature communicated its intent that something *other* than the placement of the disclosure would be needed to achieve the required prominence." (*Burks*, at p. 1027.) The "legislative history supports Kaiser's assertion that the Legislature wanted to give flexibility to health plans in choosing how to give prominence to the arbitration disclosure in their enrollment

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[2] Subdivision (d) of section 1363.1 requires: "In any contract or enrollment agreement for a health care service plan, the disclosure required by this section shall be displayed immediately before the signature line provided for the representative of the group contracting with a health care service plan and immediately before the signature line provided for the individual enrolling in the health care service plan."

forms. By requiring that the notice be 'prominently displayed,' without dictating exactly how, the Legislature gave health plans like Kaiser the right to choose what typeface, format, headings, and/or other devices they would use to make the notice stand out from its surroundings. At the same time, however, the legislative history supports the conclusion that by requiring prominence *in addition* to placement immediately above the signature line, the Legislature intended to require something more than placement to make the notice prominent." (*Id.* at pp. 1028.) "To demonstrate compliance with *both* statutory requirements, the health plan must be able to point to something other than the placement of the disclosure above the signature line that makes it stand out from its surroundings, such that it could reasonably be expected to command the attention of the person filling out the form." (*Ibid.*)

In *Burks*, Kaiser argued that the arbitration disclosure was "prominently displayed" under subdivision (b) of section 1363 since it was placed immediately above the signature line, which the court found insufficient under the reasoning set forth above. Kaiser also argued that the disclosure was prominently displayed since the notice appeared in a paragraph under a solid horizontal border. (*Burks, supra*, 160 Cal.App.4th at p. 1028.) The court found that the placement of the disclosure below that box "does little (if anything) to make the disclosure stand out from its surroundings," given the plain, small typeface used, without any heading, and the fact that most of the remainder of the form contains larger typeface, some of which was in bold or highlighted by a different colored background. (*Id.* at p. 1028-1029.) The court so held, even though, unlike other reported cases, the arbitration disclosure did " 'not compete with any non-arbitration text for the applicant's attention.' " (*Id.* at p. 1029.)

In *Malek v. Blue Cross of California* (2004) 121 Cal.App.4th 44 (*Malek*), the arbitration disclosure was preceded by the words "**ARBITRATION AGREEMENT**" (in capital letters and boldface type). (*Id.* at p. 51, fn. 2.) The court nevertheless found that the provision failed to meet the "prominently displayed" requirement of section 1363.1, subdivision (b), as "[t]he arbitration provision is in the same type size and font as provisions authorizing deductions and release of medical information. While the

arbitration provision constitutes a separate numbered paragraph, it does not stand out and was not readily noticeable from these other provisions." (*Malek*, at p. 61.)

To similar effect is *Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419 (*Robertson*), a case from Division Two of this court. There, the court found the "prominently displayed" requirement unsatisfied, even though the title of the arbitration clause was in boldface (it read "**Arbitration Agreement**"). The court emphasized that "both the bolded title, as well as the text of the disclosure itself, are printed in the same typeface as that used in the rest of the enrollment form." (*Id.* at p. 1428.) The court stated that "[w]hile the disclosure here is somewhat more arresting than that in *Imbler* in that Health Net's paragraph is, at least, separately stated and its title is in bold print, it is still not prominent as described in *Imbler*, and as required by the statute" since the provision was "some distance from the enrollees' signature line," the "provision is printed in the same font or typeface as the rest of the form," and "only the title is in bolded type." (*Id.* at p. 1429.)

In *Zembsch*, *supra*, 146 Cal.App.4th at pages 162-167, this court held that the arbitration disclosure did not satisfy the "prominently displayed" requirement of section 1363.1, subdivision (b). We explained: "Like the disclosure in *Robertson*, the disclosure before us is printed in the same font or typeface as most of the form; the disclosure heading appears to be in faint boldface type. [Citation.] The disclosure is the second of two single-spaced paragraphs of small, condensed type located at the bottom of the enrollment form. Neither the disclosure nor the preceding paragraph is indented, and the two paragraphs are not separated from each other by any lines or spacing. The disclosure is in the same font as the preceding paragraph, and it is 'not bolded, underlined or italicized.' [Citation.] In contrast, some of the text of the form is printed in boldface type, in all capitals or in larger fonts, so Health Net clearly could have made the text of the disclosure more prominent had it chosen to do so. The disclosure does not stand out from the remainder of the document and is not readily noticeable. [¶] The Health Net disclosure before us is *less* prominent than the disclosures discussed in [*Robertson*] and [*Malek*]. As is clear from the form attached as an appendix to the *Robertson* opinion, that

disclosure paragraph was set off from the remainder of the text by blank lines before the first and after the last sentences. [Citation.] This spacing gives it greater prominence and makes it easier to read than the disclosure we are considering. The disclosure in *Malek* was preceded by the heading "**ARBITRATION AGREEMENT**" in clear, boldface type. [Citation.] In addition, the disclosure in *Malek* was contained in a separate numbered paragraph. [Citation.] Neither of these two distinguishing features is present here." (*Zembsch*, at p. 165, fn. omitted.)

Guided by the foregoing authorities, we determine that the arbitration disclosure on the enrollment form signed by decedent is not "prominently displayed" within the meaning of section 1363.1, subdivision (b).

The arbitration disclosure is preceded by the title "Arbitration" appearing in a white font in a black box. Notwithstanding the "Arbitration" titling, the arbitration disclosure itself does not begin until the *third sentence* in the paragraph that follows. The titling and the content of the arbitration disclosure are interrupted by two sentences that do not appear at all integral or related to the arbitration provision: "I apply for Health Plan membership for myself and my covered family dependents. We agree to abide by the provisions of the Service Agreement and Health Plan policies." Additionally, following these two sentences appears lengthy preliminary verbiage describing the claims subject to arbitration before the term "binding arbitration" is first revealed. The word "arbitration" is preceded by almost 100 words in the text of the paragraph. As plaintiffs describe, "[t]he word 'arbitration' does not even occur in the paragraph until the fifth line, and the waiver itself is buried under a heap of abstruse text, in lines six and seven." We do not believe the Legislature intended that a reader of a health plan enrollment form should have to ferret out an arbitration disclosure designed in this manner.

The only word in this section of the enrollment form that stands out is the title "Arbitration" contained in a black box preceding the paragraph appearing beneath that word. As we observed in *Zembsch*, however, other courts have found that an arbitration disclosure preceded by the words "Arbitration Agreement" in boldface type and/or capital letters is insufficient in and of itself to meet the prominence requirement of the

statute. (*Zembsch, supra,* 146 Cal.App.4th at pp. 163-164.) We are one step removed from the cases described in *Zembsch,* as the word "Agreement" does not follow the word "Arbitration" in the titling of decedent's form, making notice of an arbitration obligation even more remote.

The authorities previously discussed make it abundantly clear that the disclosure itself must stand out, and here, it does not. As in *Zembsch,* the arbitration disclosure at issue is "printed in the same font or typeface as most of the form," and the disclosure itself is " 'not bolded, underlined or italicized,' " such that "[t]he disclosure does not stand out from the remainder of the document and is not readily noticeable." (*Zembsch, supra,* 146 Cal.App.4th at p. 165.)

The arbitration disclosure in this case appears in a paragraph above decedent's signature. Plaintiffs argue that the separate heading appearing between the arbitration notice and the signature line does not meet the requirements of section 1363.1, subdivision (d). They reason, "[t]he fact that the form contains an intervening heading . . . is not a mere stylistic departure from the statutory rule" since it "leads a reasonable applicant to believe she is simply signing in order to complete her entire application." We find it unnecessary to resolve this contention, since pursuant to *Imbler* and *Burks* compliance with the requirements of section 1363.1, subdivision (d) is insufficient in and of itself to demonstrate that the arbitration disclosure is "prominently displayed" for purposes of section 1363.1, subdivision (b).

Put simply, the eye is not drawn to the arbitration disclosure in the Kaiser health plan enrollment form signed by decedent. While health plans retain flexibility in selecting elements that would give prominence to arbitration disclosures contained in health plan enrollment forms (*Burks, supra,* 160 Cal.App.4th at p. 1028), Kaiser did not achieve the required prominence here, in violation of section 1363.1, subdivision (b). Consequently, the superior court erroneously compelled plaintiffs to arbitrate their

wrongful death and survival claims against Kaiser. (*Zembsch, supra,* 146 Cal.App.4th at p. 168 [violation of section 1363.1 renders any arbitration agreement unenforceable].)[3]

## CONCLUSION AND DISPOSITION

In accordance with our notification to the parties that we might do so, we will direct issuance of a peremptory writ in the first instance. (See *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177-180.) Plaintiffs' right to relief is obvious, and no useful purpose would be served by issuance of an alternative writ, further briefing and oral argument. (*Ng v. Superior Court* (1992) 4 Cal.4th 29, 35; see *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1236-1237, 1240-1241; see also *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1240-1244.)

Let a peremptory writ of mandate issue directing respondent superior court to vacate its November 10, 2010 order granting Kaiser's renewed petition to compel arbitration, and to issue a new and different order denying that petition. This decision shall be final as to this court within five (5) court days. (Cal. Rules of Court, rule 8.490(b)(3).) The previously issued stay shall dissolve upon issuance of the remittitur. (*Id.*, rules 8.272, 8.490(c).) Plaintiffs shall recover their costs. (*Id.*, rule 8.493(a)(1)(B), (2).)

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**3** In light of our conclusion, it is unnecessary to address plaintiffs' additional argument.