

Unenforceability of Unconscionable Engagement Letter

A claim for breach of contract can be defended on the basis that it is unconscionable — i.e., that it is so one-sided that it oppresses or unfairly surprises an innocent party. A claim of this nature would present a question of law to be determined by the court. In the instance of a letter engaging a lawyer, however, this concept requires closer scrutiny “(b)ecause the attorney-client relationship involves professional and fiduciary duties on the part of the lawyer that generally are not present in other relationships.” ABA Comm. On Ethics & Prof’l Responsibility, Formal Op. 02-425.

A recent case illustrates the need not only to craft the letter with great care but also to address the agreement with a client in such a way that there is no question of any overreaching by the lawyer in the engagement process, especially when the client is unsophisticated.

In *Feacher v. Hanley*, 2014 WL 119382 (D.Utah), the court refused to enforce the arbitration provision in an engagement letter, finding the contract in general unconscionable, based both on its substance as well as on the circumstances in which the acknowledgment of the letter was procured.

In *Feacher*, the clients needed the help of a lawyer to negotiate a home-loan modification. An engagement letter, which contained an arbitration clause, was emailed to the clients. Although there was a factual dispute as to how much time the clients were given to sign the letter and return it to the lawyer, the lawyer agreed that it was no more than 48 hours. Moreover, the letter contained language that limited the lawyer’s liability for any malpractice claim to the amount the clients had paid in fees. Even though the oral agreement was that the lawyer was being retained to represent the clients in the renegotiation of a loan, the engagement letter contained language expressly stating that the legal services being provided did not include loan-modification services. The lawyer acknowledged that this form agreement was the only one used by his law firm. Further, “the Contract allow[ed] [the lawyer] to withdraw immediately from representing [the clients] or place their file on hold but provide[d] no opportunity to cancel the Contract to [the clients].” Finally, neither the lawyer nor any of his staff explained any of these provisions to the clients.

The clients lost their home in a mortgage foreclosure sale, for which they blamed the lawyer. As a result they brought suit against the lawyer and others, asserting malpractice against the lawyer, among other claims. In response, the lawyer and the other defendants “filed a motion to stay this case and compel arbitration based on the arbitration clause in the [engagement letter].” The clients opposed the motion, contending that, under the circumstances of the engagement, the court should find the contract reflected by the engagement letter unconscionable and, as a result, the arbitration provision should be deemed unenforceable. The clients also contended that the limitation-of-damages provision was unenforceable for the same reason.

In denying the motion, the court addressed the issue of whether the contract was substantively unconscionable considering the “relative fairness of the obligations assumed.” Or, to state it differently, whether the contract contained “a term [that] is ‘so one-sided as to oppress or unfairly surprise an innocent party.’ ” Under Utah law, “[t]he terms of the contract should be considered ‘according to the mores and business practices of the time and place.’ ”

The court rejected the limitation-of-liability provision because Rule 1.8 of Utah’s Rules of Professional Conduct, which is worded the same as Pennsylvania’s Rule 1.8, prohibits a lawyer from making “an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement.” In this case, the client had not been so represented. Although a violation of the Rules is not per se a basis for a civil cause of action, the court found Rule 1.8 “relevant evidence of ‘the mores and business practices of the time and place.’ ”

The court did not suggest that an arbitration provision in an engagement letter is improper as a matter of law or that the provision in the letter to the clients referred disputes to an arbitration process that would not be impartial. Instead it found the provision unenforceable because the lawyer “should have explained the possible consequences of entering into the agreement” but did not.

Although the court recognized the qualified right of counsel to withdraw from a case, it was concerned about that provision of the engagement letter “when placed in the context of the entire contract. What makes this particularly so in the eyes of the court is that this representation did not involve litigation wherein counsel needs leave of court to withdraw, which requirement offers a layer of protection for the client.”

The court also had difficulty with the provision stating that the lawyer would not be providing loan-modification services when the oral agreement had been to the contrary. In the court’s view the parties did not have a meeting of the minds with respect to the nature of the representation

Avoiding Liability



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that the lawyer was to provide. As a result, the court found “the Contract as a whole [to be] substantively unconscionable” ... “[b]ecause the Contract specifically precludes the one service the [clients] sought, and because other terms ... demonstrate[d] an unfair imbalance favoring [the lawyer] over the [clients].”

The court also found that the engagement letter was procedurally unconscionable. In the court’s view, 48 hours was not sufficient time for the clients to have found and consulted another lawyer to advise them on those issues that require independent advice of counsel, such as the limitation-of-liability provision. Under these circumstances there was no opportunity to negotiate. The court noted that the clients were not provided with “a period of time after execution during which [they] could have cancelled the Contract.” Moreover, according to the clients, they were told that the contract contained certain guarantees that it did not, including that they would not lose their home. The court rejected the lawyer’s argument that the contract could not be deemed unenforceable because the clients admittedly had not read it, holding that “[w]hile a party to a contract generally has a duty to read the contract, procedural unconscionable behavior can negate that duty.”

The lesson taught by *Feacher* is that an engagement letter must contain conditions that are fair to the client. Otherwise counsel runs the risk that a court will later nullify its enforceability for unconscionability, even when the client has not bothered to read it before signing.