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Contracts: An Agent's Authority to Bind a Principal to Arbitration

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interest in personal liberty as "fundamental" for equal protection purposes, coupled with its broad definition of this interest, creates a potentially sweeping precedent for intrusive judicial scrutiny of diverse legislative classifications affecting the liberty interest. The court, however, could restrict its potential range of review under this analysis to age-based classifications. In this manner legislative integrity may be preserved while introducing a requirement of substantive equality between juveniles and adults in the criminal justice system.

David Utevsky

V
CONTRACTS
AN AGENT'S AUTHORITY TO BIND A PRINCIPAL TO ARBITRATION

Madden v. Kaiser Foundation Hospitals. The California Supreme Court upheld an amendment to a standard health care service contract which required binding arbitration of medical malpractice claims, even though the plaintiff had never consented to arbitration nor authorized anyone to consent for her. The provision was negotiated by an agent, empowered by the state legislature to act on plaintiff's behalf. In the opinion, the court rejected plaintiff's three contentions: that the agent did not have authority to agree to arbitration, that the contract was one of adhesion, and that the agreement to arbitrate was invalid since the parties had not expressly waived their right to a jury trial.

The court was influenced by the well-publicized "malpractice crisis" and its desire to approve arbitration as an alternative to time-

2. Id. at 708, 552 P.2d at 1184, 131 Cal. Rptr. at 888.

The 1972 Annual Report to members of the American Arbitration Association summarized the "crisis":

Insurance rates are constantly rising, and some insurance companies have discontinued the writing of malpractice policies altogether. Doctors and hospitals are unhappy because, among other reasons, they believe that some claims lacking merit are settled by insurance companies to avoid the cost of litigation. Moreover, they complain that the prospect of malpractice litigation is having an adverse effect on the quality of medical services. Attorneys for claimants and the patients themselves are dissatisfied with the present state of affairs be-
consuming and expensive malpractice litigation. The timing of the decision, however, is unfortunate. In 1974, after the facts of Madden had occurred, the California Legislature set standards for arbitration provisions in health care contracts. Under those standards, arbitration provisions must be conspicuous and must clearly inform consumers that by agreeing to arbitration, they are waiving their right to a jury trial. The court in Madden did not share the legislature's concern about protecting health care consumers who sign standard form contracts, and its opinion provides little guidance for courts interpreting the arbitration provisions that will proliferate under the new legislation.

Although arbitration may be preferable to litigation of medical malpractice claims, the court should have invalidated the arbitration provision in Madden. Based on the facts of the case, the court should have held that the agent exceeded its authority in agreeing to arbitration in Madden's behalf and ended the inquiry. But the court pro-

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(a) Any contract for medical services which contains a provision for arbitration of any dispute as to professional negligence of a health care provider shall have such provision as the first article of the contract and shall be expressed in the following language: "It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration."

(b) Immediately before the signature line provided for the individual contracting for the medical services must appear the following in at least 10-point bold red type:

"NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT."

(c) Once signed, such a contract governs all subsequent open-book account transactions for medical services for which the contract was signed until or unless rescinded by written notice within 30 days of signature. Written notice of such rescission may be given by a guardian or conservator of the patient if the patient is incapacitated or a minor.

(d) Where the contract is one for medical services to a minor, it shall not be subject to disaffirmance if signed by the minor's parent or legal guardian.

(e) Such a contract is not a contract of adhesion, nor unconscionable nor otherwise improper, where it complies with subdivisions (a), (b) and (c) of this section.
ceed to deal with the plaintiff's adhesion contract argument and through dicta may have limited the availability of the adhesion doctrine as a tool to protect consumers entering into standard-form contracts with economically powerful providers of goods or services. This Note will first describe the factual context of the case and will then deal separately with the agency and adhesion issues that are raised.

I. The Factual Context

The Board of Administrators of the State Employees Retirement System [the “Board”]

5 negotiated a contract under which the Kaiser Foundation Health Plan offered health care services to state employees.6 Terry Madden enrolled in the Health Plan in 1965. At that time, the master contract did not contain an arbitration provision, but was “subject to amendment . . . by mutual agreement between [Kaiser] and . . . [the] Board without the consent or concurrence of the Members.”

In April 1971, Kaiser sent all Health Plan members a descriptive brochure, which Madden never received.8 The 21-page brochure contained 1 sentence on page 15 stating that claims involving professional liability and personal injury would have to be submitted to arbitration.9 On May 28, 1971, Kaiser and the Board amended their contract in several respects and included a provision for binding arbitration of “any claim arising from the violation of a legal duty incident to this Agreement.”

After surgery in August 1971, Madden filed a malpractice complaint against the Kaiser Plan, Kaiser Hospitals, her surgeon, and two blood banks.11 Kaiser moved to stay the action and compel arbitration.

5. The legislature in 1945 enacted the State Employees' Retirement Law, Cal. Gov't Code §§ 20000-21500 (West 1963) and authorized a Board to administer the law. Cal. Gov't Code §§ 20100, 20103 (West 1963). At least one-third of the Board members must be elected to the Board by the public employees enrolled under the Employees' Retirement System. In 1967, the name was changed to the Public Employees' Retirement Law. Cal. Gov't Code § 20000 (West Supp. 1976).


7. 17 Cal. 3d at 704, 552 P.2d at 1180-81, 131 Cal. Rptr. at 884-85. It is not clear from the opinion whether the information sent from Kaiser to subscribers included the amendment provision. The opinion does not claim that Madden ever saw the master contract or that it was even available for her to see.

8. Id. at 705, 552 P.2d at 1181, 131 Cal. Rptr. at 885.


10. 17 Cal. 3d at 704, 552 P.2d at 1181, 131 Cal. Rptr. at 885.

11. Plaintiff sued Kaiser Foundation Health Plan, which contracted with the
In opposition to the motion, plaintiff filed a declaration stating that she was unaware of the execution of the arbitration agreement by the Board and Kaiser and that she had never consented to arbitration nor agreed to waive her right to a jury trial. The trial court denied Kaiser's motion, finding both an adhesion contract and a lack of specific notice to Madden. The defendant appealed the trial court decision and the supreme court reversed, ordering arbitration.

II. The Agency Question

The court required arbitration because it found that Madden was bound by the Board's agreement with Kaiser. The Board's authority derived from a statute—the Meyers-Geddes State Employees' Medical and Hospital Care Act—designed to increase economy and efficiency in state service, enable the state to attract and retain qualified employees by providing health plans competitive with private industry, and protect the state's investment in its permanent employees. The act authorized the existing Board of Administration of the State Employees' Retirement System to negotiate health care contracts and offer them to state employees.

The court found that the Board, in negotiating health plans under the Meyers-Geddes Act, was the agent of state employees. As an agent, the Board was authorized under section 2319 of the Civil Code to do "everything necessary or proper and usual in the ordinary course Board to furnish medical services to state employees, the Kaiser Foundation Hospitals and Southern California Permanente Group, which contracted with the Health Plan to provide the hospital and medical services, and Angela Young, M.D., a surgeon associated with the Southern California Permanente Health Group. All of these defendants appealed from the trial court order and will be referred to as "Kaiser." Defendants California Transfusion Service and the American Red Cross were not subject to the arbitration provision and did not appeal from the trial court order.

17 Cal. 3d at 715, 552 P.2d at 1188, 131 Cal. Rptr. at 892 (Mosk, J., dissenting).
15. Id. §§ 22752 (West 1963).
16. Id. § 20100 (West 1963).
17. Id. §§ 22774, 22790, 22793 (West Supp. 1976).
18. An amicus brief filed in the supreme court by a law firm specializing in tort litigation argued that the Board negotiated contracts as the agent of the state, Madden's employer, not as the agent of state employees. The brief stated, "The Board, by the inclusion of the [arbitration] clause, was able to obtain a more favorable premium for its employer, the State of California, by bargaining away the constitutional right of public employee Madden to a jury trial." Amicus Brief at 6. This argument, based on the fact that the state paid part of the health care premiums, CAL. GOV'T CODE §§ 22825-22829 (West 1963), was ignored in the court's opinion. The court declared that the Board was the agent of the employees under the Meyers-Geddes Act. 17 Cal. 3d at 705-06, 552 P.2d at 1181-82, 131 Cal. Rptr. at 885-86.
of business, for effecting the purpose of his agency."19 By cataloguing
the advantages of arbitration as an expeditious method20 of dispute re-
solution in various contexts,21 the court determined that the arbitration
amendment was "proper and usual" for effecting the Board's agency.22

The court's discussion merely demonstrated that arbitration is a
"proper and usual" means of settling disputes; it does not follow that
agreeing to arbitration is a "proper and usual" action for an agent. The
court's authority for the second proposition is Doyle v. Giulucci.23 In
Doyle, the court held a minor to the arbitration provision in a health
care contract signed by her father. By applying Doyle to the facts of
Madden, the court rejected plaintiff's effort to distinguish between a
parent's authority to contract on behalf of a child and a statutory agent's
authority to contract for a large group of state employees:

Both parent and agent serve as fiduciaries with limited powers, and
if, as Doyle holds, the implied authority of a parent includes the
power to agree to arbitration of the child's malpractice claims, we
perceive no reason why the implied authority of an agent should
not similarly include the power to agree to arbitration of the prin-
cipal's malpractice claims.24

19. CAL. CIV. CODE § 2319 (West 1954). The court did not claim that the arbi-
tration amendment was "necessary" to carry out the powers specifically imposed on
the Board by the Meyers-Geddes Act and did not even cite a section of the Act that
might have supported this argument, CAL. GOV'T CODE § 22773 (West 1963). An action is
"necessary" only if it is "practically indispensable" to the execution of the agency. Con-
solidated Nat'l Bank v. Pacific Coast S.S. Co., 95 Cal. 1, 12, 30 P. 96, 98 (1892). Cf.
Harris v. San Diego Flume Co., 87 Cal. 526, 25 P. 758 (1891); Nuffer v. Insurance
Co. of N. America, 236 Cal. App. 2d 349, 45 Cal. Rptr. 918 (4th Dist. 1965).

Although arbitration may be convenient and advantageous for Kaiser subscribers,
it is not indispensable to the Board's job of negotiating contracts with health care provid-
ers; the Board may refuse to contract with Kaiser if it does not approve of its terms
or may decide to offer only contracts that do not require arbitration.

Rptr. 149, 154 (3d Dist. 1971).

271 Cal. App. 2d 675, 702, 77 Cal. Rptr. 106, 117-18 (2d Dist. 1969); Horn v. Guer-
witz, 261 Cal. App. 2d 255, 261, 67 Cal. Rptr. 791, 796 (1st Dist. 1968); Roberts v.
Fortune Homes, Inc., 240 Cal. App. 2d 238, 244, 49 Cal. Rptr. 429, 433 (2d Dist.
1966).

In labor controversies: Firefighters Union v. City of Vallejo, 12 Cal. 3d 608, 622,
Cal. 2d 169, 363 P.2d 313, 14 Cal. Rptr. 297 (1961); Leon Handbag Co. v. Local 213,
court did not, however, acknowledge the unique status of arbitration in labor-manage-
ment relations. See United Steelworkers of America v. American Mfg. Co., 363 U.S.
564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363
U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp.,
363 U.S. 593 (1960) ("The Steelworkers Trilogy").

22. 17 Cal. 3d at 707, 552 P.2d at 1183, 131 Cal. Rptr. at 887.
24. 17 Cal. 3d at 709, 552 P.2d at 1184, 131 Cal. Rptr. at 888.
The court’s reliance on Doyle, however, is misplaced for two reasons. First, the Doyle decision is based on a specific policy inapplicable to the facts of Madden: the need to circumvent statutes allowing minors to disaffirm most contracts.25 If parents could not agree to arbitration on behalf of their children, minors could routinely disaffirm agreements to arbitrate, even after awards had been made. In other words, an arbitrator’s decision would never be binding on a minor; if the decision were unfavorable, the minor could disaffirm the agreement to arbitrate and institute court proceedings. This would undermine the proper use of binding arbitration as a substitute for litigation. Since competent adults have no statutory right to disaffirm their own arbitration agreements, the policy that supports Doyle does not apply to the situation in Madden.

Second, the attenuated agency relationship in Madden bears little resemblance to the parent-child relationship in Doyle. State employees, like Madden, may be completely unaware that their agreement with Kaiser is based on a contract negotiated by the Board, or that the Board is empowered by the legislature to negotiate and amend that contract on their behalf.28 The state employer, who administers the program for Kaiser,27 is more visible to employees and is likely misunderstood to be the “middleman” in the contract transaction. Under these circumstances, it is unfair to expand the Doyle doctrine to cover the agency in Madden.

The most serious criticism of the court’s decision on the agency question, however, is that it did not adequately consider the effect of the arbitration agreement on the rights of state employees. In an analogous case, the court determined that an attorney, who by virtue of his employment had authority to bind his client on procedural matters,

25. CAL. CIV. CODE § 35 (West 1954) provides that a minor may disaffirm contracts, subject to the exceptions provided in sections 36 and 37. Doyle has been cited by the California Supreme Court as requiring parental consent for the provision of certain medical services to minors because of the minor’s right to disaffirm contracts made in the minor’s own behalf. Ballard v. Anderson, 4 Cal. 3d 873, 878, 484 P.2d 1345, 1348, 95 Cal. Rptr. 1, 4 (1971). Cf. Cobbs v. Grant, 8 Cal. 3d 229, 244, 502 P.2d 1, 10, 104 Cal. Rptr. 505, 514 (1972).

26. The cover of the brochure sent to Kaiser subscribers stated that the Health Plan was “contracted for” by the Board of Administration of the Public Employees Retirement System under the Meyers-Geddes State Employees Medical and Hospital Care Act, but it did not identify the party whom the Board represented in negotiations with Kaiser. See note 18 supra.

27. The employer usually withholds an amount from an employee’s salary to cover the employee’s contribution to the health plan. In Elfstrom v. New York Life Ins. Co., 67 Cal. 2d 503, 432 P.2d 731, 63 Cal. Rptr. 35 (1967), the court held that an employer acts as the agent of the insurer in undertaking responsibility for administering an insurance plan. On the other hand, in negotiating an insurance policy, the employer acts as an agent for himself or his employees, not for the insurer. Bloo v. Bankers Life Co., 133 Cal. App. 2d 147, 283 P.2d 744 (1st Dist. 1955).
had no authority to impair his client's substantive rights. Therefore, the attorney could not stipulate to submitting a case on the record of a trial previously held without the consent of his client, since the stipulation would deny the client's right to have the trier of fact observe the demeanor of witnesses.

If the court had followed this reasoning in Madden, it would have found that the Board acted outside the scope of its authority, since it compromised the substantive constitutional right of state employees to have their medical malpractice claims decided by a jury. The Board agreed, on behalf of many others, to substitute a professional decisionmaker for the ordinary jury as the trier of fact. Arbitration awards are not common enough to be contrasted with jury verdicts in medical malpractice cases to determine if plaintiffs lose more often (or recover lower amounts) in arbitration. But the two procedures are quite different, and the choice between them is not one that an agent in the Board's position should make. For example, a party may have a greater chance of convincing some jurors of the worth of a claim or defense than one arbitrator. The arbitrator is less likely to

29. CAL. CONST. art. I, § 7, in force at the time Madden was decided by the trial court, provided in part:
   The right of trial by jury shall be secured to all, and remain inviolate.
   A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law.
This article was revised in 1974, and CAL. CONST. art. I, § 16 now reads in part:
   Trial by jury is an inviolate right and shall be secured to all. In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute.
The applicable statute is CAL. CIV. PROC. CODE § 631 (West 1976).

30. In Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956), a federal district court had denied defendant's motion to stay court proceedings pending arbitration on the ground that under state law an agreement to arbitrate was not enforceable. The Supreme Court agreed with the district court because of the differences between arbitration and court proceedings, stating:
   If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action.
   Id. at 203.
31. See Kalven, The Jury, the Law, and the Personal Injury Damage Award, 19 OHIO ST. L.J. 158, 176-77 (1958), describing the "miracle of the jury" that is somehow able to reach agreement despite the divergent views with which it enters deliberation.
be influenced by sympathy for the plaintiff or by esoteric expert testimony. Also, an arbitrator would strictly apply the law to the case, never allowing for the possibility of interpretation by a jury.\textsuperscript{32} Although these characteristics of jury trials may not be applauded by all commentators,\textsuperscript{33} they are commonly acknowledged and make jury trials very different, and perhaps more favorable to plaintiffs than arbitration. But the relative outcomes of cases in the two forums should not be determinative. Even if juries actually favor doctors and hospitals over injured plaintiffs, the constitutional right to jury trial is a substantive right; it should not be compromised by an agent whose relationship with a principal is as attenuated as the relationship between the Board and Madden. The \textit{Madden} decision opens the way for agents contracting on behalf of a group to compromise, or totally bargain away, any substantive rights of their principals.

\textbf{III. The Adhesion Question}

\textit{a. The Adhesion Doctrine in California}

After deciding that the Board had implied authority to bind state employees to arbitrate malpractice claims, the court was compelled to examine the contract between the Board and Kaiser to see if it was an adhesion contract.\textsuperscript{34} California courts have applied the adhesion doctrine to insurance contracts,\textsuperscript{35} deeds of trust,\textsuperscript{36} pension plan contracts,\textsuperscript{37} and
\textsuperscript{32} In criminal cases, the jury has the extreme power of nullification. See Scheflin, \textit{Jury Nullification: The Right to Say No}, 45 S. CAL. L. REV. 168 (1972); Simson, \textit{Jury Nullification in the American System: A Skeptical View}, 54 TEX. L. REV. 488 (1976).
\textsuperscript{34} The term "adhesion contract" was introduced into American usage by Patterson, \textit{The Delivery of a Life Insurance Policy}, 33 HARV. L. REV. 198, 222 (1919).
\textsuperscript{35} The idea that adhesion contracts may frustrate the reasonable expectations of the weaker party was advanced long before the age of mass transactions and the growth of standardized contracts in Kessler, \textit{Contracts of Adhesion—Some Thoughts about Freedom of Contract}, 43 COLUM. L. REV. 629 (1943).
\textsuperscript{36} The California Supreme Court defined the term in Steven v. Fidelity & Cas. Co., 58 Cal. 2d 862, 882, 377 P.2d 284, 297, 27 Cal. Rptr. 172, 185 (1962): "[A] standardized contract prepared entirely by one party to the transaction for the acceptance of the other; such a contract, due to the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a "take it or leave it" basis, without opportunity for bargaining and under such conditions that the "adherer" cannot obtain the desired product or service save by acquiescing in the form agreement.
\textsuperscript{39} Bellus v. City of Eureka, 69 Cal. 2d 336, 350-51, 444 P.2d 711, 720, 71 Cal.
and standard-form commercial contracts\textsuperscript{38} drafted by the stronger party to a transaction and offered to the weaker on a "take-it-or-leave-it" basis. If there is any ambiguity in an adhesion contract, a court will interpret it against the stronger party.\textsuperscript{39} In particular, provisions limiting the stronger party's liabilities or duties are not enforced unless they are "conspicuous, plain and clear,"\textsuperscript{40} and will not operate to defeat the reasonable expectations of the weaker party.\textsuperscript{41}

Moreover, even a clear provision limiting liability will not be upheld if its enforcement will contravene public policy. In \textit{Tunkl v. Regents of the University of California},\textsuperscript{42} a patient entering a charitable research hospital was required, as a condition for admission, to sign a contract releasing the hospital from all future liability for negligence. The court held that because of the nature of hospital services and the would-be patient's inability to bargain over the terms of the admission agreement,\textsuperscript{43} the hospital's waiver requirement was against public policy and therefore invalid under section 1668 of the California Civil Code.\textsuperscript{44}

\begin{itemize}
\item \textsuperscript{39} One court upheld a standard form deed of trust, after deciding it was an adhesion contract, because it was unambiguous. Lomanto v. Bank of America, 22 Cal. App. 3d 663, 99 Cal. Rptr. 442 (4th Dist. 1972). In Vernon v. Drexel Burnham & Co., 52 Cal. App. 3d 706, 125 Cal. Rptr. 147 (2d Dist. 1975), the court held that an arbitration provision in a "Margin Account Agreement" prepared by the defendant stockbroker was not adhesory because it was clear and readable on the agreement form.
\item \textsuperscript{41} Clarity of contract terms is often legislated by statute. U.C.C. § 1-201(10). Section 1295 of the California Code of Civil Procedure now legislates the type size and color requirements of arbitration provisions in health care contracts. See note 4 supra.
\item \textsuperscript{42} 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).
\item \textsuperscript{43} \textit{Tunkl} limited its holding to contracts that are in the public interest—contracts having all of the following characteristics: the contract concerns a business of a type generally suitable for public regulation; the party seeking exculpation is performing a service of great importance to the public which is often a matter of practical necessity; the party holds himself out as willing to perform that service for any member of the public; the party seeking exculpation has a decisive advantage of bargaining strength; the stronger party confronts the public with a standardized contract of exculpation with no opportunity for members of the public to pay additional money to protect themselves against the other's negligence; and the person or property of the purchaser is placed under the control of the provider, subject to the risk of the provider's carelessness. \textit{Id.} at 98-101, 383 P.2d at 445-46, 32 Cal. Rptr. at 37-38.
\item \textsuperscript{44} \textit{CAL. CIV. CODE} § 1668 (West 1973) states:
\begin{quote}
All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or
\end{quote}
\end{itemize}
b. The Analysis and Implications of Madden

Having found that the Board was Madden's agent, the court asserted that the Board was the bargaining equal of Kaiser. If the court had pointed to evidence that the parties were actually equal, it could have ended its analysis, since equality by definition precludes the use of the adhesion doctrine. But the court continued and, in language that may be dictum, stated that the adhesion doctrine was relevant only to a contractual provision that limited the obligations or liability of the stronger party. In making this statement the court ignored the fact that the adhesion doctrine should apply equally if a provision in a standard-form contract frustrates the expectations of the parties or operates unfairly. Moreover, the breadth of the court's language indicates that the court would bind a consumer to an arbitration provision in a standard-form contract, even if that contract is not negotiated by an agent, but rather is offered on a take-it-or-leave-it basis by the drafting party. This result would undermine the adhesion doctrine, giving the Madden opinion a long-term impact far beyond the facts of the case.

The Madden opinion stressed that the arbitration provision did not limit Kaiser's liability but merely substituted an arbitral forum for a courtroom. Even on its face, this statement is not necessarily true, since Kaiser's financial and legal liability may well be limited, or at least

property of another, or violation of law, whether willful or negligent, are against the policy of the law.

45. 17 Cal. 3d at 711, 552 P.2d at 1185, 131 Cal. Rptr. at 889.

46. The court also stated that the adhesion doctrine did not apply because Madden was offered a choice of health care plans when she became a state employee. However, she still did not have an opportunity to bargain with Kaiser over the terms of its plan. Moreover, the choice element diminishes as various providers offer similar contract terms. For example, if all health care providers include an arbitration provision in their standard contracts, consumers will have no opportunity to purchase health care services unless they agree to arbitration. This phenomenon was recognized by Kessler in 1948:

The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses.


47. 17 Cal. 3d at 711, 552 P.2d at 1185, 131 Cal. Rptr. at 889.

48. The value of the rest of the Madden opinion is undermined by the legislative amendment prescribing the form and content of arbitration provisions in health care contracts. See note 4 supra. Moreover, the agency question is one of fact, and an agency defined by statute, such as that in Madden, is not common.

In Wheeler v. St. Joseph Hosp., 63 Cal. App. 3d 345, 133 Cal. Rptr. 775 (4th Dist. 1976), however, the court found an arbitration clause in a hospital admission form invalid and adhesory because the patient was not specifically informed of the clause before signing the form and because the clause was ambiguous. In its analysis, the court relied principally on Tunkl rather than Madden, reading the Madden decision as grounded on agency principles and not controlling on the adhesion issue.
reduced, by allowing a professional arbitrator rather than a lay jury to
decide a plaintiff's malpractice claim.\textsuperscript{40} Even if the court is correct on
the limitation-of-liability issue, however, it should not have stopped
there; the court, in using the adhesion doctrine, should focus on the
fairness of the arbitration provision and not the narrower question of
whether the provision expressly limits liability. California courts have
already declined to enforce unclear or unexpected arbitration provi-
sions without any showing that they limit one party's liability.\textsuperscript{50} No
court has invalidated an arbitration provision as unclear solely because
a party did not read the contract and was unaware of the provision.\textsuperscript{51}
Courts have, however, struck down arbitration provisions in standard-
form contracts when the party who did not draft the contract could show
that arbitration would be contrary to reasonable expectations or would
be unfair, even when the transaction was between merchants who are
presumably capable of protecting their own interests.\textsuperscript{52}

When the transaction is not between merchants, the possible un-
fairness of upholding an arbitration clause drafted by one party is even
more disturbing. In \textit{Spence v. Omnibus Industries},\textsuperscript{53} the court stated:

\begin{quote}
49. See text accompanying notes 30-33 \textit{supra}.

(4th Dist. 1975); Windsor Mills, Inc. \textit{v. Collins \& Aikman Corp.}, 25 Cal. App. 3d 987,
995-96, 101 Cal. Rptr. 347, 352-53 (2d Dist. 1972); Player \textit{v. George M. Brewster \&
Son}, 18 Cal. App. 3d 526, 96 Cal. Rptr. 149 (3d Dist. 1971); Commercial Factors Corp.

51. Compare New York law requiring an agreement to arbitrate to be clear, direct, and
not dependent upon implication, inveiglement, or subtlety. \textit{Application of Doughboy

52. In \textit{Federico v. Frick}, 3 Cal. App. 3d 872, 84 Cal. Rptr. 74 (2d Dist. 1970),
the court affirmed an arbitrator's award against an employer who claimed he had not
read the arbitration provision in the standard musician's contract presented by the plain-
tiff. The court determined that the record did not support the claim that the contract
was adhesory and that the employer's failure to read the contract did not excuse him
from the arbitration provision. \textit{Cf. Larrivus v. First Nat'l Bank}, 122 Cal. App. 2d 884,
266 P.2d 143 (1st Dist. 1954) (depositor bound by reasonable bank rules in passbook
even though he had not read them). \textit{But see Weaver v. American Oil Co.}, 257 Ind.
458, 276 N.E.2d 144 (1971) (duty to read is insufficient to bind a party to unusual
or unfair clauses unless they are at least brought to his attention and explained). \textit{See
generally Calamari, Duty to Read—A Changing Concept}, 43 \textit{Fordham L. Rev.} 341,

53. In a number of cases, California courts of appeal have upheld arbitration provi-
sions in contracts between sophisticated parties partly on the theory that the parties ex-
pected disputes to be submitted to arbitration. \textit{See Vernon v. Drexel Burnham \& Co.}, 52
Cal. App. 3d 706, 125 Cal. Rptr. 147 (2d Dist. 1975) (suit by investor against broker
concerning interest charges on margin accounts); \textit{Berman v. Dean Witter \& Co.}, 44 Cal.
App. 3d 999, 119 Cal. Rptr. 130 (2d Dist. 1975) (suit by purchaser against broker re-
garding commodities futures); \textit{Frame v. Merrill Lynch, Pierce, Fenner \& Smith, Inc.},
20 Cal. App. 3d 668, 97 Cal. Rptr. 811 (1st Dist. 1971) (salesman against broker re-
garding forfeiture of profit-sharing rights).

While there is a strong judicial policy favoring arbitration, there is just as strong a judicial concern regarding the weaker bargaining powers of consumers. The use of standardized or mass-produced agreements containing a profusion of provisions which allow the stronger party to dictate the terms to the weaker party is viewed with judicial concern.\(^5\) Thus, if both parties knowingly waive the right to a jury trial to gain the benefits of arbitration, a court should enforce that bargain. But when the party drafting a standard form contract gives up the right to a jury and imposes a waiver of that right on the other party, courts should use the adhesion doctrine to strike a provision that is unclear or unfair.\(^5\) A one-sentence description similar to that in the Kaiser brochure, for example, would not clearly and plainly inform a health care subscriber that by continuing to accept the agreement he is foreclosed from proceeding on a malpractice claim in a jury trial. It is perfectly understandable for a consumer to interpret such a statement as requiring arbitration before litigation, not as absolutely substituting the factfinding powers of an arbitrator for those of a jury. Rather than analyzing the issue of surprise and unfairness, however, the court mechanically described the adhesion doctrine as applying only to contract provisions that limit the stronger party's liability, and decided that arbitration was not such a limitation. As in the court's discussion of the agency issue, if it had carefully analyzed the effect of arbitration on the plaintiff's rights, it would have recognized that arbitration is such a limitation, or that even if it is not, the adhesion doctrine should also be used to invalidate unfair contractual provisions imposed by the drafter of a standard form contract.

**Conclusion**

Although the court confronted the agency and adhesion contract issues in *Madden*, it could have invalidated the arbitration provision with reference to the standards articulated by the legislature in section 1295 of the Code of Civil Procedure.\(^6\) Even though the legislative amendment took effect after the agreement in *Madden* had been negotiated, the court could have looked to the policy behind the legislation to invalidate the arbitration provision in the Kaiser contract. Such a decision would have upheld the principle of medical malpractice arbitration and avoided the unfairness of imposing arbitration on the

\(^5\) Id. at 974, 119 Cal. Rptr. at 173.

\(^6\) *But see* Henderson, *supra* note 3, at 994. Henderson argues that because an arbitration provision in a health care contract does not limit the provider's liability, it can exceed the expectations of the average patient only if it operates in a coercive or oppressive manner.

\(^{56}\) See note 4 *supra*. 