Filed 8/28/12 Matson v. Dean CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CAROLE MATSON, Plaintiff and Respondent, v. RONALD DEAN et al., Defendants and Appellants.	B234024 (Los Angeles County Super. Ct. No. BC410845)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael L. Stern, Judge. Affirmed.

E. Thomas Moroney for Defendants and Appellants.

Gwire Law Offices, William Gwire and Ujvala Singh for Plaintiff and Respondent.

* * * * * *

Following a four-day bench trial, the trial court found that an attorney-client fee agreement between attorney Ronald Dean and his law firm (Dean) and client Carole Matson (Matson) was void due to unconscionability, and ordered Dean to disgorge $71,367 plus interest. On appeal Dean contends (1) Matson's claim that the fee agreement is unenforceable is time-barred, (2) the fee agreement is not unconscionable, and (3) his attorney fees should not be limited to quantum meruit. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Background

At the time of trial in January 2011, Matson was 62 years old and suffering from adenoid cystic carcinoma, a rare form of terminal cancer. In 1999 she had a laryngectomy to remove her cancerous larynx, and since that time has been able to speak only by using a prosthesis. She has undergone radiation treatments and has numerous lung tumors. She supports her adult son, who is disabled from a brain injury. Matson is divorced, but receives no financial support. In 2000 Matson was hired by IKON Office Solutions, Inc. (IKON) as a sales professional to manage major accounts and to obtain a major account controlled by her friend. She earned a low base salary plus commissions and bonuses.

Matson stopped working in January 2002 due to her deteriorating health. On her own, she applied for six months of short term disability benefits through IKON and its then insurer, Liberty Mutual Assurance Company of Boston (Liberty) (which would entitle her to 60 percent of her income). Liberty denied her short-term benefits claim, Matson appealed, and Liberty denied her appeal on the ground there was no medical evidence to indicate that her health had worsened since her surgery. Matson filed a separate claim for long term disability benefits (which would entitle her to 70 percent of her income until the age of 65), which Liberty denied for the same reason on August 14, 2002. Liberty gave Matson six months to appeal the final denial.

Matson Contacts Dean

On November 12, 2002, Matson sent an e-mail to Dean, a sole practitioner with 35 years of experience in the area of employee benefits litigation, whose hourly rate was $475.[1] Matson was referred to Dean by her attorney in a medical malpractice case who was representing her on a contingency fee basis. Dean responded to Matson the same day, stating that he took strong cases on a contingency fee basis, and requested more information. Matson mailed "everything" she had to Dean, who reviewed her file and advised her how to obtain additional medical records. In early December 2002, Dean informed Matson they needed "to reach some arrangement as to fees," and that it would cost between $6,000 to $10,000 at his hourly rate to pursue an administrative appeal. He sent a draft generic contingency fee agreement for Matson to review.

On December 27, 2002, Liberty informed Matson that the deadline for her appeal was January 17, 2003, rather than the promised six-month date of February 14, 2003. Matson was surprised and informed Dean of the changed date on January 2, 2003. Dean helped her draft a letter to Liberty requesting an extension. On January 9, 2003, Liberty eventually reset the deadline for February 14, 2003.

In the meantime, on January 4, 2003, Dean informed Matson of the following: he could no longer give her "free" advice, he could not have her appeal ready by what they believed was the January 17 deadline, he was leaving town the next day for nearly a week, he had two cases that would require his immediate attention upon his return, and he could be of no further assistance to her. Matson immediately responded that she did not expect free advice, that she had been waiting for him to tell her whether he wanted to handle her case hourly or on a contingency basis, and she asked him again how he wanted to proceed. Without responding to her question, Dean worked on her case the next day. On January 13, Matson again asked Dean whether he would take her case, and again received no response to her question. The next day, on January 14, Matson sent

---

[1] Due to Matson's difficulty speaking, all of Matson's and Dean's communications were in writing, primarily by e-mail.

Dean a check for $500, on which she wrote "PLS! TAKE THE CASE!!" Dean cashed the check, which he did not deposit in a trust account, and thanked Matson for the money. Matson testified at trial that while she did not have $6,000 to $10,000 on hand to cover Dean's estimate for his fees on an hourly basis, she could have borrowed the money from a family member.

On Friday, February 7, 2003, a week before the appeal deadline, Matson again asked Dean whether he would take her case on an hourly or contingency basis, stating she was "getting worried" because the deadline was approaching. In response, Dean sent a revised contingency fee agreement as an e-mail attachment, stating, "It's more complicated than the previous draft I sent, but it comes to the same result."

The Fee Agreement

The contingency portion of the fee agreement provided:

"In the event recovery on a client's claim is made, lawyer shall receive both 1 and 2 below:

"1. The amount of attorney's fees awarded by the court or paid in settlement, plus an additional amount, paid out of settlement, and calculated as follows:

"2.A. An amount equal to a percent of the NET RECOVERY [defined as "The recovery, including any attorney fees but after deduction for costs of litigation"] as follows: [¶] Recovery before a lawsuit is filed: 25%

"[¶] . . . [¶]

"2.B. The amount arrived at in 2.A. shall then be reduced by a number equal to the number in 1, but not below zero. [¶] These fees and percentages ARE NOT SET BY LAW. They are negotiable between client and attorney, and the percentages set forth above are the result of those negotiations.

"[¶] . . . [¶]

"IMPORTANT: PLEASE NOTE: The above percentages apply not only to the amounts received at the time of settlement or judgment, but also apply to ALL

AMOUNTS THAT ARE PAID TO CLIENT IN THE FUTURE for the benefits sought by attorney. . . ."

When Matson received the draft agreement on February 7, 2003 she did not fully understand it, and wrote to Dean on February 10: "I'm not very good at legalese. . . I'm trying to understand the agreement. I have a few questions. . . What does 2.B. mean? . . . . How are your attorney's fees calculated? . . . . Why did you add (1.) on the new retainer?"

Dean responded the same day, stating in part: "Paragraphs 1 and 2b cancel each other out. If you paid the entire premium for the LTD coverage, we can remove them. [¶] However, if the employer paid any part of the premium, that part of the benefit is taxable to you (i.e., generally, if the employer paid 2/3rds of the premium, then 2/3rd of the benefit is taxable to you. [¶] However, there remains the argument that statutory attorney fees are not taxable to the client. No court has yet specifically ruled on this. Thus, if the settlement includes any statutory fees, I would get them, and then reduce the percentage amount by the amount I receive as statutory fees. In that way, if the argument is good, you will not be taxed on the fees as well as the benefits. [¶] . . . [¶] I get worried when you ask how the fees are calculated. I've worked on this form retainer for decades to make it easy to understand and to take out as much legalese as I could. If you don't understand how the fee is calculated, then we have to work on a retainer that you do understand."

The same day, Matson responded that she would reread the agreement and explained that she was "very 'slow' when it comes to reading and understanding." Dean responded: "[I]f there is ANY indication that you don't understand it, we have to start over. [¶] If you are slow at reading and understanding, then we have to do it slowly. But we have to do it. Otherwise, if we don't have a common understanding of how my fee is to be calculated, then we have no agreement at all." Matson responded: "I understand . . . . thanks for your patience! I'm going to reread it again (for the 30th time). I don't want to have to redo it . . . Aren't we running out of time! I'm worried!"

On February 11, Dean informed Matson that he could not contact her doctor for additional information because he did not represent her until he was retained. At trial, Dean admitted this statement was "not true," that he "absolutely could have" called her doctor, and that he had previously been in contact with her doctor.[2] He also testified that he "was trying to put pressure on her to come to a resolution" "about the terms of the retainer." In that same e-mail, Dean told Matson that he was leaving town the next day until February 17. Matson responded: "Just send me the retainer agreement . . . I can sign asap so you can call him. What about the Liberty deadline . . . . If you're going to be out of town . . . what'll happen with that?" Dean responded that he would send out what he could before he left.

Matson signed the fee agreement on February 11, 2003. At trial, she testified that she did not have anyone help her review the agreement, she was unsatisfied with some of Dean's answers, and when she signed the agreement she was panicked about the looming appeal deadline.

Dean's Letter to Liberty

On February 12, 2003, Dean wrote a three-page letter to Liberty appealing the denial of Matson's short-and long-term disability benefits, and listed disabilities identified by Matson in e-mails to him dated December 2, 2002 and January 4, 2003. About three weeks after the letter was sent, on March 7, 2003, without any further effort on Dean's or Matson's part, Liberty reversed its position on her long-term disability benefits claim, and approved benefits retroactively to July 15, 2002. Six weeks later, IKON's new insurer, Metropolitan Life Insurance Company (MetLife) affirmed the award of long term disability benefits without requiring any further documentation of disability, and later approved Matson's short term disability benefits claim.

---

[2] Dean had also previously informed Liberty on February 7, 2003 that "Carole Matson has retained me."

After MetLife corrected certain offsets at Dean's request, the only remaining issue was the amount of compensation on which IKON had calculated Matson's disability benefits. IKON based its disability calculations on compensation of $93,000, while Matson claimed that her compensation was $127,000 in the year before she became disabled. After informal efforts to resolve the issue failed, in September 2003 Dean filed a formal administrative appeal with IKON for Matson's increased benefits and threatened to file a class action lawsuit on behalf of other IKON employees. Matson asked Dean if he would give her a discount if he filed and won a class action lawsuit. He responded: "That's the beauty of the class action. Double coupon day, every day."

The Class Action

Six months later when IKON had still failed to substantively respond to Matson's administrative appeal, she agreed to proceed with a class action lawsuit rather than trying to settle alone with IKON. She did not "want to cause others who are entitled to more to lose out," and also wanted to benefit Dean. On March 29, 2004, Dean sent IKON a draft of the class action complaint with Matson as the class representative. On April 5, 2004, IKON formally denied Matson's appeal for increased benefits and invited her to file a second-level appeal. Instead, on April 13, 2004, Dean asked IKON to accept service of the class action complaint, and mailed it to federal court, where it was filed on April 15, 2004. On April 14, 2004, IKON reversed its position and awarded Matson $39,463.17 in retroactive long term disability benefits and increased her monthly benefit to $5,636.75. Matson paid Dean 25 percent of the retroactive amount and 25 percent of the increased monthly disability payments. Matson still had claims for interest on the retroactive long term disability benefits and for retroactive adjustment to her short term disability benefits which were based on the lower income figure. When Matson asked Dean about obtaining interest on the retroactive long-term disability payments, Dean responded that he had mentioned it to IKON but did not want to "press" the issue because if she were paid all the interest owed, she would no longer be able to serve as a class representative on the long-term disability benefits claim.

IKON identified 10 or 11 other employees as potential class members, which Dean accepted, and the class action proceeded. After nearly two years of negotiations, the class action settled. The class received approximately $110,000 in retroactive benefits, of which Matson received $12,085 as a retroactive adjustment to her short term disability benefits. Dean did not charge her any fee or percentage of this amount. IKON also paid Dean $34,545 in attorney fees.[3] Throughout the pendency of the class action, Matson paid Dean the full 25 percent of her long term disability benefit each month.

Periodic Reviews

MetLife periodically reviewed Matson's long-term disability benefits claim and Dean assisted her in responding to these reviews. During the 2003 review, MetLife terminated benefits because Matson's doctors were not providing the required information. Dean wrote a suggested letter for the doctors to submit and MetLife reversed its decision. The last review in which Dean participated occurred in September 2007.

Fee Negotiations

At the end of March 2006 Matson was struggling financially and asked Dean if he would be willing to reduce the monthly 25 percent contingency fee she was paying him. Dean agreed to accept a flat fee of $1,000 per month in lieu of the $1,409 per month Matson was paying, on the condition that she not attempt any further negotiation of the fee. Matson began paying Dean $1,000 per month. A little more than a year later on June 18, 2007, Matson asked Dean if she could stop making payments to him for about eight months while she pursued (and ultimately won) an unrelated lawsuit, stating she was "embarrassed" to make such a request. While Dean was sympathetic, he refused.

---

[3] This amount represented Dean's claim for 51.4 hours at $525 an hour, plus an associated attorney's claim for 30 hours at $300 an hour.

In April 2008, Matson stopped paying Dean and essentially asked to end the fee agreement. Dean placed a lien on her benefits. On April 10, 2008, Dean wrote to MetLife stating, "I am the attorney for Ms. Matson with respect to her claims for benefits," and asked that his name be added to her monthly disability checks. Instead, MetLife wrote Dean separate monthly checks for the entire 25 percent contingency fee between October 2008 and February 2009.

On June 3, 2008, Matson wrote to Dean stating: "Ron, I have paid you over $84,000. I am terminally ill. I have a brain-injured son who cannot work and will rely heavily on what I leave him as inheritance. . . . [¶] My lung tumors are now growing and my doctor wants me to do surgery. It has now come to the point of 'health regression.' I want to save as much money as I can for Eric and my grandson, Jacob. [¶] I'm asking as a friend. Please reconsider your stance. Do you really need my $1,000 per month more than Eric? Have you really put so much time into my case that I owe you more than $84,000?" On July 18, 2008, Matson wrote again to Dean: "[Y]ou worked a total of approximately 20 days on my case of which you have earned over $84,000. . . . Paying over $84,000 for legal services for approximately 20 days (plus residual) is not just or right and is fair to negotiate. When I signed the contract, I was expecting to die within 2 years. . . . Thank the Lord I have continued to live this long, but now payments for services have gone way beyond justifiable."

The Instant Lawsuit

Matson sought out legal advice at the end of 2008. On March 30, 2009, she filed a complaint against Dean for declaratory relief, breach of contract, breach of fiduciary duty, fraud and negligent misrepresentation. A week later she filed a first amended complaint (FAC), alleging the fee agreement was unenforceable and unconscionable. Dean filed a cross-complaint against Matson and MetLife for breach of contract and declaratory relief, alleging that Matson breached the fee agreement by stopping payment. In her answer to the cross-complaint, Matson raised the affirmative defense of unconscionability. Dean dismissed MetLife as a defendant after the parties agreed that

MetLife would deposit the $1,409 monthly payment to Dean into an account jointly held by Matson's and Dean's attorneys. Through March 2009, Dean was paid $119,312 for his work, including work on the class action lawsuit.

The action proceeded to a bench trial in January 2011. The trial court entered judgment in favor of Matson on both the FAC and cross-complaint. The court made the following findings: The fee agreement was procedurally and substantively unconscionable and therefore void; Dean breached the fee agreement, but Matson did not prove fraud or negligent misrepresentation on his part; Dean was entitled to collect attorney fees for legal services performed for Matson in quantum meruit only; Matson was entitled to recover $71,367 plus interest from March 30, 2004; all funds held in trust would be released to Matson; and all future long term disability benefits would be paid entirely to Matson. Dean requested a statement of decision, and the trial court adopted the statement proposed by Matson. This appeal followed.

DISCUSSION

I. The Statute of Limitations Does Not Bar Matson's Claim

Matson filed her lawsuit against Dean on March 30, 2009. Dean contends Matson's claim that the fee agreement is unconscionable and unenforceable is time-barred. We disagree.

The parties agree that attorney fee disputes are governed by Code of Civil Procedure section 340.6 (section 340.6). (See *Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 Cal.App.4th 419, 430 [attorney-client fee disputes and legal malpractice claims fall under section 340.6]; *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, 881–882 [more specific statute of limitations under section 340.6 overrides more general statutes of limitation].) Section 340.6, subdivision (a) provides in relevant part, "An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the

date of the wrongful act or omission, whichever occurs first." Section 340.6, subdivision (a) sets forth four exceptions during which the statute is tolled: "(1) The plaintiff has not sustained actual injury. [¶] (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred. [¶] (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation. [¶] (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action."

Dean argues "this is not a case in which the discovery rule applies at all," reasoning that Matson knew all along what amount she was paying to Dean. In its statement of decision, the trial court found that Matson's claim was timely because she did not discover Dean's wrongdoings until after March 31, 2008 when she consulted new attorneys regarding her rights. This finding is supported by substantial evidence. (See *Adams v. Paul* (1995) 11 Cal.4th 583, 588 ["in legal malpractice actions statute of limitations issues, including injury, are at base factual inquiries"].) Matson testified at trial that it was not until after she consulted her trial attorneys in the latter part of 2008 that she had any awareness Dean had done anything improper or unethical in representing her. This visit took place less than a year before Matson sued Dean. The fact that Matson knew all along how much she was paying Dean does not equate to an awareness or knowledge that Dean had committed any wrongdoing toward her. Nor does Dean point to any place in the record suggesting that Matson should have suspected or been aware prior to her visit with the attorneys that Dean had harmed her.

Dean's argument that the statute of limitations was not tolled because he did not continuously represent her fares no better. First, there is no need for tolling because the evidence supports the finding that Matson did not discover Dean's alleged wrongdoing until less than a year before filing her lawsuit against him. Second, as the trial court found in its statement of decision, the evidence showed that Dean admitted he continued to represent Matson on her disability claims at least through April 10, 2008. By letter this date, Dean informed MetLife, "I am the attorney for Ms. Matson with respect to her

claims for benefits." Dean copied Matson on this letter. Dean cannot have it both ways, insisting he is her lawyer when it suits him but disputing such representation when it does not.

We are satisfied that Matson's claim that the fee agreement is unenforceable is not time-barred.

II. Substantial Evidence Supports the Finding That the Fee Agreement Is Unconscionable

A. Relevant Law and Standard of Review

"'Unconscionability is a judicially created doctrine, which the Legislature codified in 1979. (Civ. Code, § 1670.5, subd. (a). [Citations.]) Whether an agreement is unconscionable depends on circumstances at the time it was made.'"[4] (*Nyulassy v. Lockheed Martin Corp*. (2004) 120 Cal.App.4th 1267, 1280.) Unconscionability has both a "'procedural'" and a "'substantive'" element, with the former focusing on "'"oppression"'" or "'"surprise"'" due to unequal bargaining power, and the latter on "'"overly harsh"'" or "'"one-sided"'" results. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114.) In other words, "procedural unconscionability focuses on the manner in which the contract was negotiated and the circumstances of the parties," while "[s]ubstantive unconscionability focuses on the actual terms of the agreement." (*American Software, Inc. v. Ali* (1996) 46 Cal.App.4th 1386, 1390.) The prevailing view is that procedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause, but they need not be present in the same degree. (*Ibid*.) Courts essentially use a "'sliding scale'" approach, such that "the more substantively oppressive

---

[4] Civil Code section 1670.5, subdivision (a) provides: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Ibid*.)

There are additional considerations when the contract is an attorney-client fee agreement. Such contracts must be fair, reasonable and fully explained to the client, and are strictly construed against the attorney. (*Alderman v. Hamilton* (1988) 205 Cal.App.3d 1033, 1037.) While in general the negotiation of a fee agreement is an arm's-length transaction, such an agreement will not be enforced if there are "issues of duress, unconscionability, or the like." (*Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 913.) Moreover, "[f]ee agreements that violate the Rules of Professional Conduct may be deemed unenforceable on public policy grounds." (*Cotchett, Pitre & McCarthy v. Universal Paragon Corp.* (2010) 187 Cal.App.4th 1405, 1417.) Rule 4-200(B) of the California State Bar Rules of Professional Conduct sets forth a "nonexclusive list of factors, both procedural and substantive, that may be relevant when determining whether a legal fee is unconscionable." (*Cotchett, supra,* at p. 1420.)[5]

"'Unconscionability is ultimately a question of law for the court.' [Citations.] However, numerous factual issues may bear on that question. [Citation.] Where the trial court's determination of unconscionability is based upon the trial court's resolution of conflicts in the evidence, or on the factual inferences which may be drawn therefrom, we

---

[5] Rule 4-200(B) of the State Bar Rules of Professional Conduct provides: "Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following: [¶] (1) The amount of the fee in proportion to the value of the services performed. [¶] (2) The relative sophistication of the member and the client. [¶] (3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly. [¶] (4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member. [¶] (5) The amount involved and the results obtained. [¶] (6) The time limitations imposed by the client or by the circumstances. [¶] (7) The nature and length of the professional relationship with the client. [¶] (8) The experience, reputation, and ability of the member or members performing the services. [¶] (9) Whether the fee is fixed or contingent. [¶] (10) The time and labor required. [¶] (11) The informed consent of the client to the fee."

consider the evidence in the light most favorable to the court's determination and review those aspects of the determination for substantial evidence." (*Gutierrez v. Autowest, Inc*. (2003) 114 Cal.App.4th 77, 89; *Flores v. Transamerica HomeFirst, Inc*. (2001) 93 Cal.App.4th 846, 851; *A & M Produce Co. v. FMC Corp*. (1982) 135 Cal.App.3d 473, 489.)

B. Procedural Unconscionability

In its statement of decision, the trial court provided a lengthy explanation of its conclusion that the fee agreement was procedurally unconscionable: "Here, Dean strung Matson along for about three months before agreeing to take her case, during which time he accepted $500 from her with no mutual understanding of its purpose, and no fee agreement; nor did he deposit this amount in a client trust account. Then, about a week before Matson's deadline to file her appeal for disability benefits from her employer, Dean sent her a draft retainer agreement to review and sign, stating that it was more complicated than an earlier draft. This delay prevented her from exploring her options. Further, Dean falsely assured Matson that the new more complicated fee agreement came to the same result as his earlier draft, when it did not. Further, Dean provided cryptic, false and misleading explanations to her questions about the terms of the fee agreement, which failed to clear up Matson's uncertainties, and instead implied that she was stupid. [¶] In the few days before Matson's deadline to file her appeal for disability benefits, Dean pressured Matson to sign the fee agreement, including, without limitation, making false statements to her that he had not yet been retained, and that he could not contact her physicians before the retainer agreement was signed. Indeed, Dean conceded on the stand that the false statement about his ability to contact her physicians was intended to induce her to sign the fee agreement. [¶] Dean further added to Matson's feeling of pressure and panic to sign the fee agreement in the few days before her deadline ran by telling her that he was going to be out of town. Assuming it was true that Dean was going to be out of town, he should have sent Matson the draft agreement earlier, allowing time for review and consideration (by her and possibly by independent counsel), and time

for her questions to be fully answered and for more negotiations. Indeed, Dean could not have withdrawn at that point with Matson's deadline a few days away, without violating Rule 3-700 of the California Rules of Professional Conduct."[6]

These findings are supported by substantial evidence, and Dean does not argue otherwise. Indeed, Dean agrees in his opening brief that the record supports the findings that Matson was asked to review and agree to a complicated fee agreement with a deadline looming, that he did not commit to representing her in the months before February despite her inquiries, that Matson felt rushed and that she had no other options at the time but to hire Dean, and that he should not have told her he could not contact her doctor until the agreement was signed. He nevertheless argues that the fee agreement was not procedurally unconscionable because it was not a contract of adhesion, pointing out that he answered Matson's questions about the agreement and told her they could not proceed unless she understood the agreement. (See *Flores v. Transamerica HomeFirst, Inc.*, *supra*, 93 Cal.App.4th at p. 853 ["Analysis of unconscionability begins with an inquiry into whether the contract was a contract of adhesion—i.e., a standardized contract, imposed upon the subscribing party without an opportunity to negotiate the terms"].) But the record clearly shows that Matson found some of Dean's responses to her inquiries about the fee agreement inadequate, that she remained confused by the fee agreement's formula at the time she signed it, that she felt panicked due to the looming deadline and Dean's representation that he was going out of town, and that she felt she had no choice but to sign the fee agreement. Under these circumstances, Matson had no meaningful opportunity to negotiate the fee agreement.

We are satisfied that the record amply supports the trial court's finding of procedural unconscionability.

---

6 State Bar Rules of Professional Conduct, Rule 3-700(A)(2) provides: "A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules."

C. Substantive Unconscionability

We agree with Matson that this case involves a high degree of procedural unconscionability and therefore only a small degree of substantive unconscionability is required for the fee agreement to be found unconscionable. (*Armendariz v. Foundation Health Psychcare Services, Inc., supra*, 24 Cal.4th at p. 114.) "The *substantive* element has to do with the effects of the contractual terms and whether they are overly harsh or one-sided." (*Flores v. Transamerica HomeFirst, Inc., supra*, 93 Cal.App.4th at p. 853.) "As already noted, substantive unconscionability focuses on the one-sidedness of the contract terms." (*Id*. at p. 854.)

Dean argues that the fee agreement was not substantively unconscionable because courts have found that charging a client a contingency fee of 25 percent is not exorbitant or unreasonable. But the trial court did not take issue with the amount of the contingency fee. Rather, as set forth in its statement of decision, the trial court found the fee agreement to be "unenforceably vague, confusing, and egregiously unfair" because "the formula has the client paying a contingency percentage of attorney's fees awarded to the attorney in litigation or settlement, an award that the client never receives." The court then set forth an "application of the fee calculation using the hypothetical discussed during Dean's testimony ($600,000 in total benefits recovered, 25% contingency percentage, no costs, and $35,000 attorney's fee award paid by IKON)" to illustrate the agreement's "unfairness and confusion."[7] After setting forth the illustration, the court

---

[7] "Step 1. The fee is calculated based on NET RECOVERY, a specially defined term, equals the attorneys fees awarded or paid by the other side plus the total amount of disability benefits recovered for the client minus costs. In this example, NET RECOVERY=$635,000 ($600,000 as total benefits plus $35,000 as attorney's fee minus $0 as no costs).

"Step 2. 'In the event recovery on client's claim is made, lawyer shall receive both 1 and 2 below' (emphasis in [fee agreement]). The prelude to the method of calculation; Mr. Dean's fee is the sum of the numbers determined in ¶¶ 1 and 2. Mr. Dean emphasizes the word 'both' in the agreement.

stated: "There could never be an off-set. The fee calculation not only results in a windfall for Dean, it is manifestly unfair as the formula has the client paying a contingency percentage of Dean's attorney's fee award (25% of $35,000), an award the client never receives."

Dean complains that the statement of decision posits a hypothetical situation that never occurred because Matson never paid any contingency fee on the attorney fees award of $34,545 paid to Dean by IKON as part of the settlement of the class action lawsuit. But whether an agreement is unconscionable is measured at the time the agreement is entered into, not by the subsequent actions of the parties. (*Nyulassy v. Lockheed Martin Corp., supra*, 120 Cal.App.4th at p. 1280; Civ. Code, § 1670.5, subd. (a).)

Dean also complains that the trial court misread the fee agreement in making its mathematical calculation using the hypothetical numbers. Using the same numbers, he arrives at a different result. Matson counters that "the application of *any* set of numbers

---

"Step 3. ¶ 1 provides: 'The amount of attorneys fees awarded by the court or paid in the settlement plus an additional amount, paid out of the settlement, and calculated as follows:' (emphasis in [fee agreement]), further establishing that Mr. Dean's fee was the product of two components: the attorney's fee award plus the amount determined by the calculation set out in paragraph 2.A.

"Step 4. ¶ 2.A. provided: 'An amount equal to a percent of the NET RECOVERY' establishing the percentage to be applied against the '**NET RECOVERY**.' Mr. Dean agreed to 25%, even though the class action had been filed. [] Here, ¶ 2.A. yields $158,750 (25% of $635,000).

"Step 5. The final step in the calculation is ¶ 2.B., which provides: 'The amount arrived at in 2.A. shall then be reduced by a number equal to the number in 1, but not below zero.' Here, 2.A. yields $158,750, based on which ¶ 1 yields a total of $193,750 (the amount of attorneys fees ($35,000) plus the figure in 2.A. ($158,750)). Since the calculation in 2.B. ($158,750 minus $193,750) results in a negative number (-$35,000), and the provision does not allow for a number below zero, Mr. Dean's fee would be the figure for ¶ 1 ($193,750), or the entire contingent fee award ***and*** the court awarded or paid attorneys fees. The illustration is not an anomaly. Whenever attorney's fees are awarded or paid in settlement, the calculation will always result in a negative figure in 2.B., because the figure in 1 will always be larger than that in 2.A."

to the fee calculation formula that Dean devised will yield the same result as the Trial Court's hypothetical," and sets forth in her brief seven different calculations using hypothetical numbers to prove her point.

We agree with the trial court that the fee agreement's fee calculation is vague and confusing. This is made abundantly clear by the fact that different results can be obtained using the same numbers. We would even go a step further to find that as drafted, the fee calculation is nearly incomprehensible, especially to a layperson. But the trial court's main concern with the fee agreement is that it calculates the client's percentage contingency fee based on a percentage of an attorney fees award which the client never receives. We read the fee agreement in the same manner as the trial court, and agree that this formula is "manifestly unfair" to the client.

Accordingly, we find no error in the trial court's conclusion that the fee agreement is substantively unconscionable.

III. There is No Merit to the Quantum Meruit Challenge

Because the trial court found that the fee agreement was void and unenforceable due to unconscionablity, it determined that Dean was entitled to collect his attorney fees for legal services performed for Matson in quantum meruit only. The trial court set forth its quantum meruit calculation in the statement of decision: "According to Matson's expert in legal billing, Brand Cooper, Dean could have reasonably spent between 40-45 hours representing Matson in the contingent fee matter. Dean estimates that he spent 160 hours. Dean kept no record of his time on the matter. Matson contends that the 40-45 hours is the more realistic number because Dean spent about 50 hours on the entire class action lawsuit, and himself estimated a $6,000-$10,000 cost for the initial administrative appeal. Calculated at $475 an hour (the agreed upon reasonable hourly rate), *quantum meruit* would be between $19,000 (40 hours @ $475/hour) and $76,000 (160 hours @ $475/hour). [¶] After a full and deliberate review of all of the evidence, including party and expert testimony, this Court finds that the reasonable value of Dean's services in the contingent fee matter (namely, Matson's disability claim, as distinguished

from the class action on which he was paid $34,545.00) is $21,000.63, or, in other words, about 44 hours worth of work at $475/hour. On the contingent fee matter (namely, Matson's disability claim, as distinguished from the class action on which he was paid $34,545.00), Dean's services were concluded on March 30, 2004, and he has been paid $92,367.63. Accordingly, this Court orders that Dean disgorge to Matson $71,367, plus interest at the legal rate from March 30, 2004 . . . ."

Dean challenges the trial court's admissibility of Cooper's expert testimony, asserting: "Cooper has no expertise in ERISA matters; yet he was permitted to opine as to the number of hours Dean worked on Matson's claim. ERISA is a specialized field, practiced by a discrete number of attorneys. Cooper has no better idea as to what an ERISA lawyer does in the review and pursuit of a claim, than does the trier of fact based upon Dean's testimony and the file." But Cooper's testimony established that he has testified more than 80 times as an expert on legal fees, analyzing the reasonableness of fee bills and arrangements. Cooper, an attorney with more than 30 years of experience, testified that nothing about the nature of his expert services in this case depended on having any expertise in ERISA law, and that he was familiar with state disability claims which he did not believe were that different from ERISA claims. In essence, Dean is asking this court to reweigh Cooper's testimony against his own and that of Dean's experts, which we are not at liberty to do. That is the province of the trial court. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; *In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358 ["Where statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision"].)

Dean also asserts that "the appropriate quantum meruit value is not Dean's number of hours times rate; but the agreed upon fee—25% of the benefit recovered, past and future." But Dean provides no reasoned argument supporting his assertion. Moreover, the law is to the contrary. (See *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 463 ["Where services are rendered under a contractual compensation arrangement that is

unenforceable as against public policy, but the subject services are not otherwise prohibited, quantum meruit may be allowed"].)

DISPOSITION

The judgment is affirmed. Matson is entitled to recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

I concur:

_____, J.

ASHMANN-GERST

I dissent.

I would reverse the judgment on two grounds. First, there was no substantive unconscionability in the fee agreement. Even assuming, without deciding the existence of procedural unconscionability, there was no evidence presented of substantive unfairness in the agreement. Second, Matson's claim was time-barred.

Substantive Unconscionability

While I agree with the majority that the law requires the existence of both procedural and substantive unconscionability before a court may exercise its discretion to refuse to enforce a contract, we disagree that this contract is substantively unconscionable.

In the Statement of Decision prepared by Matson and adopted without modification by the trial court, it is noted that the "fee calculation is unenforceably vague, confusing, and egregiously unfair. It defies reasonably certain calculation, and it is manifestly unfair as the formula has the client paying a contingency percentage of attorney's fees awarded to the attorney in litigation or settlement, an award that the client never receives." The basis for that conclusion is the fiction that Matson was somehow obligated by the terms of the retainer agreement to pay fees on fees from a then unanticipated class action case. Specifically, Matson signed the contingency fee retainer agreement on February 11, 2003. Recovery on the claims for disability benefits were essentially resolved in Matson's favor in March 2003. Twenty-five percent fees were paid on the benefit recovered and continued until 2006 when Dean agreed to reduce his fee at Matson's request. In April 2004, a class action (in which Matson was the class representative) was filed regarding long-term disability benefits. That matter was resolved in January 2006 when Matson received a lump sum of her accumulated benefits (upon which no attorney fee was levied).

No evidence was presented that there was anything other than a 25 percent contingent fee agreement. No evidence was presented that Matson ever paid more than the agreed upon 25 percent fee on benefits recovered. The only "confusion" was that which Matson created when she combined the two separate settlements and suggested

that the class action attorney fees which were paid to Dean directly were somehow subject to the fee agreement. This does not result in substantive unconscionability. Clearly a 25 percent contingency fee on a complex ERISA case was not unconscionable.[1] (See *Setzer v Robinson* (1962) 57 Cal.2d 213, 218 ["Contingent fee contracts for one-third of the recovery have frequently been upheld"].)

The trial court erred in its application of the law to the undisputed facts and the matter should be reversed.

Statute of Limitations

The parties agree that the applicable statute of limitations is found in Code of Civil Procedure section 340.6 (section 340.6). Matson claims that she did not know of the wrongful nature of the fee agreement until late 2008 when she consulted new counsel and the March 30, 2009 filing of her complaint was thus within one year of discovery of the wrongful act. This conclusion is not supported in the law. Rather than starting the limitation period from the time that the legal consequence of the act is known, it commences when the fact giving rise to the legal right is known -- or once Matson agreed to pay the 25 percent fee. But certainly within four years of the act (or date the retainer agreement was signed) unless there was ongoing legal representation. (See *Samuels v Mix* (1999) 22 Cal.4th 1.) The statute of limitations would have run in 2007, four years after the agreement was signed and long before the complaint was filed. (§ 340.6, subd. (a).)

---

[1] Dean's expert witness, Glenn Kantor testified to the fair and reasonable nature of this fee agreement given the complex nature of ERISA litigation. Expert Robert Sall added his opinion that the retainer agreement comported with the ethical requirements for California attorneys and the actual charges to Matson were "fair and reasonable and did not deviate from acceptable standards within the community as to charging reasonable fees and not charging an unconscionable fee."

Section 340.6, subdivision (a) includes an exception to the this limitation when "[t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred." (§ 340.6, subd. (a)(2).) In support of the application of this exception, Matson urges that Dean continued to represent her through April 2008 when he wrote a letter to the insurance company seeking to have his name added to the benefit check. The letter identifies Dean as the attorney who handled Matson's claim and then reminds the reader that he "[has] a lien on her recovery for my fees. [¶] [Matson] and I have a dispute about those fees, so until further notice please respect my lien by placing my name, along with [Matson's] name, on any further payments made under the above claim." This is not a relationship of continued representation from the professional services involving Matson's insurance benefits. (See *Foxborough v Van Atta* (1994) 26 Cal.App.4th 217, 229.) Matson has cited no authority that convinces me that Dean's efforts to protect his fee is the equivalent of continued legal representation for purposes of applying the section 340.6 exception of continued representation. Rather, the uncontroverted evidence is that Dean's representation of Matson ended when the cases were resolved -- in September 2007, well over a year before the complaint was filed.

Therefore I would also reverse the judgment because Matson's claim was time-barred.

_____, J.

CHAVEZ