Employment Arbitration for Lawyers -- Avoid the Pitfalls or Fail with Flair!!

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SOME ISSUES IN ARBITRATION LAW AND EMPLOYMENT DISCRIMINATION

Jonathan M. Hyman

January 19, 2011

I. Some Basic Propositions

Agreements to arbitrate disputes arising out of employment are generally binding, even in the absence of a collective bargaining agreement.

Claims that an employer has violated the LAD, a federal antidiscrimination statute, or similar must be resolved in private arbitration rather than in court the employer and employee have made a valid contract to arbitrate the dispute.

See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

The Federal Arbitration Act preempts state statutes or decisions that would invalidate arbitration agreements for identifiable kinds of disputes.

See Doctor's Assocs. v. Casarotto, 517 U.S. 681 (1996).

II. Using Contract Law to Avoid Arbitration

Whether a dispute is subject to arbitration thus depends on contract doctrine. The three contract doctrines most pertinent to this question are:

Interpretation

Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, (2001) (arbitration clause read narrowly to exclude LAD claim because of public policy supporting enforcement of LAD, including the procedures provided in the statute.)

Is the Garfinkel standard still applicable? Compare *EPIX Holdings Corp. v. Marsh & Mclennan Companies, Inc.*, 410 N.J. Super. 453, 476 (App. Div. 2009) (noting that arbitration clauses impacting on the LAD should be read more narrowly than those in other situations) with *Wigfall v. Denholtz Associates*, Dkt. A-0046-09T1 (App. Div. Dec. 22, 2010) (reading an arbitration provision in an employment contract broadly to include arbitration.)

Consideration

Did the employer provide consideration in exchange for the employee's promise to submit to arbitration? Lack of consideration will only rarely be found, perhaps only when a employer unilaterally adds an arbitration clause during the term of a contract of employment for a specified term. Will it apply to arbitration provisions added by an employer during employment at will?

Unconscionability

Arbitration agreements that limit the standard of liability or remedies provided in the LAD will probably fail for unconscionability.

Most of the recent developments regarding unconscionability of arbitration agreements have occurred in the areas of patient-caretaker relations and small value consumer matters. To what extent will they be applicable to employment contracts?

Medical Services:

> *Ruszala v. Brookdale Living*, 415 N.J. Super. 272 (App. Div. 2010) (holding that the Federal Arbitration Act preempted New Jersey statutory law protecting residents of assisted living facilities and upholding arbitration agreement between an assisted living facility and an injured resident, but striking as substantively unconscionable provisions of the arbitration agreement that, among other things, limited discovery and limited remedies. Note that the agreement had a severance clause, making it easier for the court to strike the offending provisions and still require arbitration.)
>
> *Moore v. Woman to Woman, Inc.*, 416 N.J. Super. 30 (2010) (upholding in general the validity of agreements between doctors and patients to arbitrate medical malpractice claims, as against a claim of substantive unconscionability, but remanding to consider whether the agreement was procedurally unconscionable due to the circumstances in which it was signed, included the patient's medical condition and the failure of the doctor's office to give the patient a copy of the agreement)

Small Value Consumer Contracts:

> *Muhammad v. County Bank of Rehoboth Beach*, 189 N.J. 1 (2006), *cert. denied*, 549 U.S. 1338 (2007) (striking down as substantively unconscionable a provision in a payday loan agreement that required arbitration but precluded the borrower from presenting the matter in the form of class litigation; the small stakes of the plaintiff's claim made it virtually impossible to pay for counsel unless the claims of class members could be aggregated, thus effectively depriving plaintiff of any meaningful remedy, rather than just substituting the arbitration forum for the judicial one.)

The consumer products industry responded by trying to pull the stinger from the Muhammad style of analysis. AT&T, for instance, adopted an arbitration provision for its cell service that made it easier for customers to get legal counsel, and that also gave them the option to litigate in small claims court. As described in the AT&T Mobility brief in the United States Supreme Court, the provisions included:

> . **Cost-free arbitration for non-frivolous claims:** "[ATTM] will pay all [American Arbitration Association ("AAA")] filing, administration and arbitrator fees" unless the arbitrator determines that the claim "is frivolous or brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b))"; n2

n2 Even if an arbitrator concludes that a consumer's claim is frivolous, the AAA's consumer arbitration rules would cap a consumer's arbitration costs at $ 125. Pet. App. 21a n.2.

. **Convenience:** Arbitration takes place "in the county * * * of [the customer's] billing address," and for claims of $ 10,000 or less, customers have the exclusive right to choose whether the arbitrator will conduct an in-person hearing, a hearing by telephone, or a "desk" arbitration in which "the arbitration will be conducted solely on the basis of documents submitted to the arbitrator."

. **Flexible consumer procedures:** Arbitration is conducted under the AAA's Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer-Related Disputes, which the independent, non-profit AAA designed with consumers in mind;

. **Small claims court option:** Either party may bring a claim in small claims court in lieu of arbitration;

. **Full remedies available:** The arbitrator may award the claimant any form of individual relief (including statutory attorneys' fees, statutory damages, punitive damages, and injunctions) that a court could award; and

. **No confidentiality requirement:** Customers and their attorneys are not required to keep the results of the arbitration confidential.

The features that are designed to encourage consumers to pursue claims through bilateral arbitration include:

. **$ 7,500 minimum recovery if arbitral award exceeds ATTM's last settlement offer:** If the arbitrator awards a California customer relief that is greater than ATTM's last "written settlement offer made before an arbitrator was selected" but less than $ 7,500, ATTM will pay the customer $ 7,500 rather than the smaller arbitral award;

. **Double attorneys' fees:** If the arbitrator awards the customer more than ATTM's last written settlement offer, then ATTM will "pay [the customer's] attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses, that [the] attorney reasonably accrues for investigating, preparing, and pursuing [the] claim in arbitration"; n4 and

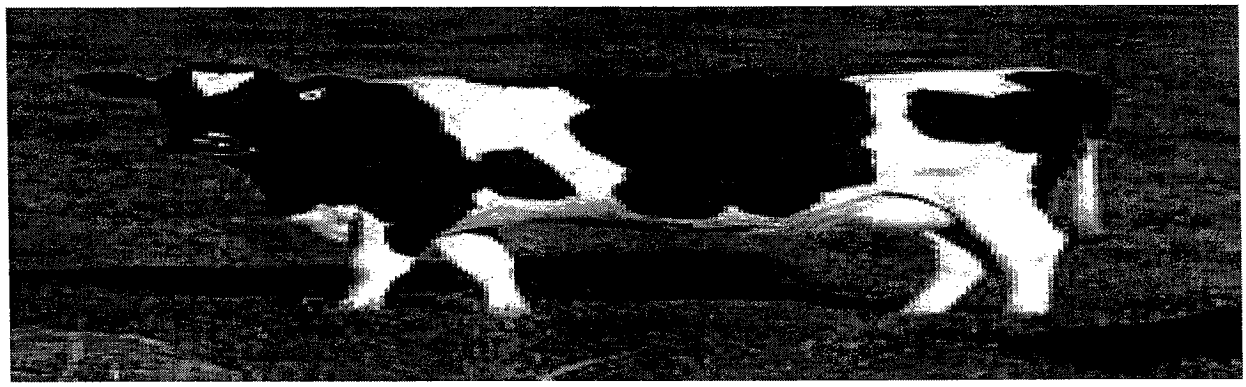
. **ATTM disclaims right to seek attorneys' fees:** "Although under some laws [ATTM] may have a right to an award of attorneys' fees and expenses if it prevails in an arbitration, [ATTM] agrees that it will not seek such an award [from the customer]."

n4 This contractual right to double attorneys' fees "supplements any right to attorneys' fees and expenses [that the customer] may have under applicable law." Pet. App. 61a. Thus, a customer who does not qualify for this contractual award is entitled to an attorneys' fee award to the same extent as if the claim had been brought in court.

> Moreover, ATTM has made its arbitration procedures easy to use. A customer need only fill out and mail a one-page Notice of Dispute form that ATTM has posted on its web site. Pet. App. 22a-23a. ATTM's legal department generally responds to a notice of dispute with a written settlement offer. *Id.* at 23a. If the dispute is not resolved within 30 days, the customer may invoke the arbitration process by filling out a one-page Demand for Arbitration form (also available on ATTM's web site) and sending copies to the AAA and to ATTM. To further assist its customers, ATTM's web site includes a layperson's guide on how to arbitrate a claim. *Ibid.*

The Court of Appeals for the Ninth Circuit nevertheless struck the class action bar as unconscionable under California law, for reasons similar to *Muhammad*. *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009).

ATT argued that the Ninth Circuit used a definition of unconscionability that would prevent arbitration and thus violated Section 2 of the Federal Arbitration Act. The Supreme Court granted certiorari and heard oral argument on November 9, 2009, where it became the "case of the 9,000 foot cow."



Excerpt from Oral Argument, at 13-14:

MR. PINCUS: Well, and the only -- as I said, there are two questions in this case and I think it's helpful to keep them separate. One is: Is it permissible, simply because the rule applies to both litigation and arbitration, is that sufficient to satisfy -13

JUSTICE BREYER: No. I would guess it's like Switzerland having a law saying, we only buy milk from cows who are in pastures higher than 9,000 feet. That discriminates against milk from the rest of the continent. But to say we want cows that have passed the tuberculin test doesn't. So I guess we have to look at the particular case.

> And here, my impression is -- correct me if I am wrong -- the class arbitration exists. It's not a -- it's not like having a jury trial. You could have it in arbitration. You can have it in litigation. So ***where is the 9,000-foot cow***, or whatever it is? Where is the discrimination?
>
> MR. PINCUS: Well, I think this is exactly the 9,000-foot meadow, Your Honor, because I think the problem here is there is -- it is not possible, based on the language of section 2 or any other basis that we can think of, to say a statute that requires the full use of discovery procedures in court and in arbitration or factual determinations by a panel of six individuals selected at random – (Emphasis added)

III. How to Deal with Arbitration

Discovery Problems

> Since pre-hearing discovery is largely in the discretion of the arbitrator, and since arbitration is supposed to provide a resolution at less time and cost than court adjudication, discovery may be substantially more limited than in court. What are the limits? *See Ruszala, supra.*

Creating an Arbitration Agreement

> If you had the opportunity to negotiate and draft a broad arbitration clause for an employment contract, what would you want to include? Should it specify what kind of pre-hearing disclosures are required? Should it incorporate by reference the discovery rules of the New Jersey Rules of Court? Should it explicitly limit discovery is some way?

SELECTED PROVISIONS FROM THE FEDERAL ARBITRATION ACT (9 U.S.C. SECS. 1-16) AND THE NEW JERSEY UNIFORM ARBITRATION ACT (N.J. STAT. 2A:23B-1 ET SEQ.)

BINDING NATURE OF AGREEMENT TO ARBITRATE

Federal Arbitration Act 9 U.S.C.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

New Jersey Arbitration Act, N.J.Stat. 2A:23B

§ 2A:23B-6. Validity of agreement to arbitrate

a. An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.

b. The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

c. An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

d. If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

DISCOVERY

Federal Arbitration Act 9 U.S.C.

[No specific provisions; depends on state law and the rules of the arbitration provider (such as the American Arbitration Association), if any.]

New Jersey Arbitration Act, N.J.Stat. 2A:23B

§ 2A:23B-17. Witnesses; subpoenas; depositions; discovery

a. An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena shall be served in the manner for service of subpoenas in a civil action, and upon filing a summary action with the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in any civil action.

b. In order to make the proceedings fair, expeditious, and cost effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions pursuant to which the deposition is taken.

c. An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.

d. If an arbitrator permits discovery pursuant to subsection c. of this section, the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this State.

e. An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State.

f. All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this State.

g. The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another State upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost effective. A subpoena or discovery-related order issued by an arbitrator in another State shall be served in the manner provided by law for service of subpoenas in a civil action in this State and, upon filing a summary action with the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in any civil action in this State.

VACATING AN AWARD

Federal Arbitration Act 9 U.S.C.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

New Jersey Arbitration Act, N.J.Stat. 2A:23B

§ 2A:23B-23. Vacating award

a. Upon the filing of a summary action with the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(1) the award was procured by corruption, fraud, or other undue means;

(2) the court finds evident partiality by an arbitrator; corruption by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15 of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding;

(4) an arbitrator exceeded the arbitrator's powers;

(5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to subsection c. of section 15 of this act not later than the beginning of the arbitration hearing; or

(6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 9 of this act so as to substantially prejudice the rights of a party to the arbitration proceeding.

b. A summary action pursuant to this section shall be filed within 120 days after the aggrieved party receives notice of the award pursuant to section 19 of this act or within 120 days after the aggrieved party receives notice of a modified or corrected award pursuant to section 20 of this act, unless the aggrieved party alleges that the award was procured by corruption, fraud, or other undue means, in which case the summary action shall be commenced within 120 days after the ground is known or by the exercise of reasonable care would have been known by the aggrieved party.

c. If the court vacates an award on a ground other than that set forth in paragraph (5) of subsection a. of this section, it may order a rehearing. If the award is vacated on a ground stated in paragraph (1) or (2) of subsection a. of this section, the rehearing shall be before a new arbitrator. If the award is vacated on a ground stated in paragraph (3), (4), or (6) of subsection a. of this section, the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The arbitrator shall render the decision in the rehearing within the same time as that provided in subsection b. of section 19 of this act for an award.

d. If the court denies an application to vacate an award, it shall confirm the award unless an application to modify or correct the award is pending.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0046-09T1

CHINEIDA WIGFALL,

Plaintiff-Appellant,

v.

DENHOLTZ ASSOCIATES, INC.; DENHOLTZ MANAGEMENT CORP.; PARKSIDE PARTNERS, L.P.; MARK FLANNERY[1]; JOSEPH MAYO; STEVEN CASSIDY; and BRIAN MCMURRAY,

Defendants-Respondents.

Submitted December 1, 2010 - Decided December 22, 2010

Before Judges R. B. Coleman and J. N. Harris.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-4381-09.

Fischer, Porter, Thomas & Reinfeld, P.C., attorneys for appellant, Chineida Wigfall (Arthur "Scott" L. Porter, Jr., of counsel; Alan C. Thomas, on the brief).

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[1] Defendant Mark Flannery had filed a notice of cross-appeal, but voluntarily dismissed it pursuant to Rule 2:8-2.

LeClairRyan, attorneys for respondents, Denholtz Associates, Inc.; Denholtz Management Corp.; Parkside Partners, L.P.; Steven Cassidy; and Brian McMurray (James P. Anelli, of counsel; Laura H. Corvo, on the brief).

Jackson Lewis, LLP, attorneys for respondent, Joseph Mayo (Gregory T. Alvarez, of counsel and on the brief; Diane M. Shelley, on the brief).

Law Offices of Alan L. Zegas, attorneys for respondent, Mark Flannery, joins in the briefs of all other respondents.

PER CURIAM

Plaintiff Chineida Wigfall appeals from the dismissal of her civil rights and tort action in favor of having the dispute resolved in an agreed-upon arbitral forum. We affirm.

I.

On May 18, 2009, Wigfall filed a six-count complaint against Denholtz Associates, Inc.; Denholtz Management Corporation (Denholtz); Parkside Partners, L.P.;[2] and four individual co-workers: Mark Flannery, Joseph Mayo, Steven Cassidy, and Brian McMurray. The complaint alleged sexual

[2] According to Wigfall's complaint, Denholtz Associates, Inc. is a "privately held development company" headquartered in an office building in Rahway. Denholtz Management Corp. — Wigfall's former employer — is the management company that operates the Rahway building. Parkside Partners, L.P. owns the actual building and is allegedly responsible for the maintenance and security of the first floor restrooms.

harassment and racial discrimination in violation of the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 to -49; invasion of privacy; intentional infliction of emotional distress; premises liability; and civil conspiracy.

All defendants except Flannery and Mayo filed a motion to dismiss the complaint and compel arbitration on grounds that all of Wigfall's claims were subject to a valid and binding agreement to arbitrate contained in her application for employment with Denholtz.[3] On July 17, 2009, Judge Diane Pincus granted the motion to dismiss with prejudice and compelled arbitration. This appeal followed.

II.

We have gathered the following factual background from the pleadings and submissions of the parties in connection with the motion to dismiss the complaint and compel arbitration. In August 2006, Denholtz received Wigfall's resume and completed three-page application for employment. The application contained an arbitration provision on page three, which stated in relevant part:

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[3] Mayo did not file his own motion to dismiss, but "joined" the others' motion. Flannery argued that the motion should be denied as to him, because he was not a party to Wigfall's employment agreement. As already noted, Flannery's cross-appeal was voluntarily dismissed.

> As a condition of my consideration for and/or employment with Denholtz Associates and/or its affiliates collectively, ("the Company"), I agree to arbitrate any and all disputes relating in any way to, or arising out of, my application for employment with the Company, my employment with the Company, or the termination of my employment with the Company. In agreeing to arbitrate any and all disputes relating to or arising out of my application to or employment with the Company, I recognize, understand and acknowledge that I am waiving my right to an administrative proceeding or jury trial with respect to any such claim.

Wigfall's signature, on the same line as the date of "8-7-06," appears less than one inch below the arbitration provision. On September 11, 2006, Wigfall was officially extended an offer of employment with Denholtz where she served as an administrative assistant in the IT and construction departments until November 30, 2008.

According to the complaint, Wigfall was subjected to various acts of sexual and racial discrimination originating from her supervisors Flannery, Cassidy, and Mayo. When Wigfall reported the putative improper behavior to McMurray, who was Denholtz's head of human resources, he purportedly told her "that it was her responsibility to deal with the problems herself."

In the spring of 2008, Wigfall observed a small black object affixed to the ceiling of the first-floor women's

restroom but was unable to identify what it was, and did not report it to any of her superiors. Then, on or around May 8, 2008, a fellow employee noticed the object and discovered that it was a video camera concealed in an altered ceiling tile, and aimed at a private location of the restroom. The employee attempted to remove the camera but was unable to do so. After reporting the camera to supervisors, the camera was spirited away by the time the employee returned to the restroom. A police investigation ensued.

Following this incident, Wigfall asserts that she utilized a gasoline station restroom located across the street for fear that she would be secretly videotaped in her employer's building. Wigfall also contends that she sought treatment from a psychiatrist who diagnosed her with "major depression disorder, post traumatic stress disorder and anxiety disorder." As a result of the conduct of defendants, Wigfall claims that she was unable to work, and took a temporary disability leave commencing on September 5, 2008. On November 20, 2008, Denholtz terminated Wigfall's employment.

Wigfall asserts that Judge Pincus's ruling, which validated the arbitration provision, should be reversed because the arbitration clause was obscure, ambiguous, not prominent, and within the context of an adhesion contract. We do not agree.

III.

Arbitration is a highly favored dispute resolution method. Wein v. Morris, 194 N.J. 364, 375-76 (2008); Martindale v. Sandvik, Inc., 173 N.J. 76, 92 (2002); Barcon Assocs., Inc. v. Tri-County Asphalt Corp., 86 N.J. 179, 186 (1981). The New Jersey Supreme Court has clearly stated its respect for arbitral fora on many occasions. See generally Muhammad v. Cnty Bank of Rehoboth Beach, 189 N.J. 1, 23 (2006), cert. denied, 549 U.S. 1338, 127 S. Ct. 2032, 167 L. Ed. 2d 763 (2007); Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124, 132-33 (2001); Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993).

Notwithstanding this State's strong policy in favor of arbitration, an arbitration provision is only enforceable if it "constitutes a valid contract to arbitrate." Martindale, supra, 173 N.J. at 86; see also Lederman v. Prudential Life Ins. Co. of Am., Inc., 385 N.J. Super. 324, 337-38 (App. Div.), certif. denied, 188 N.J. 353 (2006). In making this determination, ordinary contract principles apply. Singer v. Commodities Corp., 292 N.J. Super. 391, 402 (App. Div. 1996).

In Garfinkel, the Court sustained the plaintiff's right to file a civil action alleging employment discrimination, even though he had signed an agreement to arbitrate claims against

his employer. The arbitration clause provided that "any controversy or claim arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration." Garfinkel, supra, 168 N.J. at 127. The Court held that "because of its ambiguity[,] the language contained in the arbitration clause does not constitute an enforceable waiver of plaintiff's statutory rights under the LAD." Ibid. However, the Court also found no bar to an employee waiving the right to trial of NJLAD claims, in favor of arbitration, so long as the waiver is voluntary, clear, and unambiguous:

> In respect of specific contractual language, "[a] clause depriving a citizen of access to the courts should clearly state its purpose. The point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." As we have stressed in other contexts, a party's waiver of statutory rights "must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively."
>
> [Id. at 132 (citations omitted).]

In Garfinkel, the language of the arbitration clause suggested that the plaintiff only waived a trial on disputes "involving a contract term, a condition of employment, or some other element of the contract itself." Id. at 134. "Moreover, the language does not mention, either expressly or by general reference, statutory claims redressable by the LAD." Ibid.

One year later, in Martindale, supra, the Court concluded that the following arbitration clause, set forth in an employment application, was enforceable:

> AS A CONDITION OF MY EMPLOYMENT, I AGREE TO WAIVE MY RIGHT TO A JURY TRIAL IN ANY ACTION OR PROCEEDING RELATED TO MY EMPLOYMENT WITH SANDVIK.
>
> I UNDERSTAND THAT I AM WAIVING MY RIGHT TO A JURY TRIAL VOLUNTARILY AND KNOWINGLY, AND FREE FROM DURESS OR COERCION.
>
> I UNDERSTAND THAT I HAVE A RIGHT TO CONSULT WITH A PERSON OF MY CHOOSING, INCLUDING AN ATTORNEY, BEFORE SIGNING THIS DOCUMENT.
>
> I AGREE THAT ALL DISPUTES RELATING TO MY EMPLOYMENT WITH SANDVIK OR TERMINATION THEREOF SHALL BE DECIDED BY AN ARBITRATOR THROUGH THE LABOR RELATIONS SECTION OF THE AMERICAN ARBITRATION ASSOCIATION.
>
> [Martindale, supra, 173 N.J. at 81-82.]

In holding that this clause was broad enough to require arbitration of the plaintiff's LAD claim, the Court refined its holding in Garfinkel concerning the enforceability of such arbitration clauses:

> In so holding, we stated: "The Court will not assume that employees intend to waive [their statutory rights] unless their agreements so provide in unambiguous terms." Id. at 135. However, we did not require a party to "refer specifically to the LAD or list every imaginable statute by name to effectuate a knowing and voluntary waiver of rights." Ibid. Instead, we instructed that "a waiver-of-rights provision should at least provide that the employee agrees to

> arbitrate all statutory claims arising out of the employment relationship or its termination." Ibid.
>
> [Martindale, supra, 173 N.J. at 95 (quoting Garfinkel, supra, 168 N.J. at 135).]

Comparing the arbitration provision in this case to those considered in Garfinkel and Martindale, we conclude that the language here qualifies as a waiver of Wigfall's statutory right to a judicial forum pursuant to the LAD. Wigfall's tort claims are likewise readily embraced within the instant arbitration provision. Although the arbitration language does not explicitly refer to claimed violations of statutory rights, it uses sweeping and unambiguous language to include "any and all disputes relating to or arising out of my application to or employment with the Company, [and] waiv[es] my right to an administrative proceeding or jury trial with respect to any such claim." These words are substantively similar to the language that was endorsed in Martindale.

Additionally, well-developed principles of contract interpretation support this position. "'[C]ourts have generally read the terms "arising out of" or "relating to" [in] a contract as indicative of an "extremely broad" agreement to arbitrate any dispute relating in any way to the contract.'" Curtis v. Cellco P'ship, 413 N.J. Super. 26, 37-38 (App. Div.) (quoting Griffin

v. Burlington Volkswagen, Inc., 411 N.J. Super. 515, 518 (App. Div. 2010)), certif. denied, 203 N.J. 94 (2010).

Unlike in Garfinkel, the arbitration provision in this case was not limited to disputes arising out of the employment agreement itself. It explicitly covered "all disputes relating in any way to, or arising out of, my application for employment with the Company, my employment with the Company, or the termination of my employment with the Company." Moreover, the clause contained affirmative language waiving Wigfall's right to a jury trial, which bolsters a finding that an employee was on notice that all claims would be resolved through arbitration. Martindale, supra, 173 N.J. at 96.

Wigfall further insists that the arbitration clause should not be enforced because it was obscured in the context of the employment application, and because the language was not sufficiently "clear, distinct, prominent and easy to read." The entire employment application was reproduced in Wigfall's appellate appendix, and we have had an opportunity to inspect it. From our viewpoint we cannot agree with Wigfall's assessment of the clause.

Citing to Rockel v. Cherry Hill Dodge, 368 N.J. Super 577, 587 (App. Div.), certif. denied, 181 N.J. 545 (2004), Wigfall suggests that the paragraph was not sufficiently set apart by

typeface, size, and spacing. She further submits that the arbitration clause is not effectively distinguished from other information in the paragraph, such as Denholtz's right to conduct a background investigation. As a result, Wigfall claims that she did not knowingly "sign[] away" certain statutory and constitutional rights.

In Rockel, the court acknowledged that "the size of the print," and the location of the provision, especially within a contract of adhesion, are significant factors in "any determination to compel arbitration." Id. at 585. In that case, the court found the arbitration provision to be "difficult to locate and, once found, onerous to read in light of the small size of the print." Id. at 586. Apart from the location and typeface of the arbitration language, the court also determined the agreement to be "highly ambiguous" due to the execution of two separate documents, each containing "separate and somewhat disparate arbitration clauses." Id. at 581. The existence of "two conflicting . . . provisions," which the court held "confound[ed] any clear understanding of the parties' undertaking," was "fatal to the compelling of the arbitration of plaintiff's [statutory] claims." Id. at 581, 583.

The circumstances present in Rockel are simply not present here. The Law Division found the arbitration provision in

Wigfall's employment application to be sufficiently clear and prominent, such that she understood her obligation to arbitrate, stating:

> First, the language appears directly above the signature line. Therefore plaintiff's eyes would naturally have to read through it in order to reach the line for her signature.
>
> Second, the print is in bold. Finally, the size of the print is roughly the same as that found throughout the application.

We agree with this reasonable assessment. Furthermore, in contrast to the arbitration provision in Rockel, the instant clause was not "difficult to locate" or otherwise confounded by the execution of more than one agreement. Id. at 586. Rather, the paragraph at issue was the only part of the employment application containing affirmative statements by the employer, and not blank spaces to be completed by the applicant.

Wigfall further submits that reversal is in order because the arbitration clause was contained in a contract of adhesion. In support of her position, Wigfall points to the unequal bargaining power between the parties and the compelling public interests affected by the contract, namely the statutory rights protected under the NJLAD. We remain unpersuaded by this argument.

A contract of adhesion is one "'presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity of the "adhering party" to negotiate except perhaps on a few particulars.'" Martindale, supra, 173 N.J. at 89 (quoting Rudbart v. N. Jersey Dist. Water Supply Comm'n., 127 N.J. 344, 353, cert. denied, 506 U.S. 871, 113 S. Ct. 203, 121 L. Ed. 2d 145 (1992)). Importantly, classifying an agreement as such has no bearing on its enforceability. Martindale, supra, 173 N.J. at 89. Instead, courts must conduct a fact-sensitive analysis in which they consider the standardized nature and subject matter of the particular contract, the relative bargaining power of the parties, "'the degree of economic compulsion motivating the adhering party,'" and the public interests affected by the contract in determining whether to enforce a contract of adhesion. Id. at 90 (quoting Rudbart, supra, 173 N.J. at 356); Muhammad v. Cnty. Bank of Rehoboth Beach, 379 N.J. Super. 222, 237 (App. Div. 2005) ("[A] finding that a contract is one of adhesion is the 'beginning, not the end, of the inquiry.'").

In Martindale, the court did not find "determinative the fact that plaintiff was required to sign an employment application containing an arbitration agreement in order to be considered for employment." Martindale, supra, 173 N.J. at 91.

Likewise here, Denholtz cannot be faulted for failing to ask Wigfall if she understood the plain words of the agreement or if she desired to take it home for further inspection. Young v. Prudential Ins. Co. of Am., Inc., 297 N.J. Super. 605, 619 (App. Div.) (holding that defendant had "[n]o . . . obligation [to alert plaintiff to an arbitration clause in a contract] . . . where the provision is not hidden"), certif. denied, 149 N.J. 408 (1997). As the motion court noted, nothing prevented Wigfall from requesting an explanation of the provision — she simply declined to do so. Nor is there any indication that she was prevented from taking the application home to review it further or that Denholtz would have refused to hire her if she objected to the terms presented to her. See Martindale, supra, 173 N.J. at 91. As in Martindale, Wigfall was an educated individual pursuing a career in business. See ibid. Therefore, absent a showing of fraud, coercion, or other oppressive conduct, the agreement should be enforced as written.

Finally, Wigfall contests the Law Division's consideration of her educational background in finding that she was capable of understanding the nature and terms of the agreement. In particular, she submits that her level of education should not have been considered because the provision was ambiguous. See Garfinkel, supra, 168 N.J. at 136.

In rendering its decision, the trial court noted that at the time she applied for a position with defendants, Wigfall had a college degree and was pursuing an M.B.A. in Finance from Seton Hall University. Although a plaintiff's intent must be unambiguously reflected in the plain language of the agreement, courts have frequently considered the circumstances surrounding the execution of a contract in determining that it was entered into knowingly and voluntarily. See Martindale, supra, 173 N.J. at 91, 96-97; Raroha v. Earle Fin. Corp., 47 N.J. 229, 234 (1966); Bancredit, Inc. v. Bethea, 65 N.J. Super. 538, 544-45 (1961). Accordingly, it was not improper for the motion court to consider Wigfall's educational background in determining that she was capable of reading and comprehending the agreement.

To the extent that we have not expressly explicated and addressed any of Wigfall's remaining contentions, we have not done so because they are meritless and do not warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

415 N.J.Super. 272

The ESTATE OF Anna RUSZALA by Marie MIZERAK (Executrix), Plaintiff–Respondent,

v.

BROOKDALE LIVING COMMUNITIES, INC., d/b/a Alterra/Sterling House of Florence, Alterra, Inc., d/b/a Sterling House of Florence, Sterling House of Florence, Kad Randal, Valeyncia Price, Annie Lewis, and Sharon Luflin, Defendants–Appellants.

Ida Azzaro, as Proposed Administrator Ad Prosequendum and Administrator for the Estate of Pasquale Azzaro, Plaintiff–Respondent,

v.

Brookdale Living Communities, Inc., d/b/a Alterra Healthcare Corporation, Defendant–Appellant.

Superior Court of New Jersey, Appellate Division.

Argued (A–4403–08T1) Feb. 9, 2010.

Submitted (A–4404–08T1) Feb. 9, 2010.

Decided Aug. 10, 2010.

Background: Wife of one resident and administrator of estate of another resident brought separate actions against assisted living facilities arising from death of residents following injuries. The Superior Court, Law Division, Burlington County, denied facilities' motions to compel arbitration based on residency agreements. Facilities sought leave to appeal, which was granted.

Holdings: On consolidation, the Superior Court, Appellate Division, Fuentes, J.A.D., held that:

(1) arbitration provisions were subject to Federal Arbitration Act (FAA);

(2) FAA preempted specific prohibition of arbitration provisions in facilities' contracts contained in Nursing Home Responsibilities and Rights of Residents Act;

(3) residency agreements were adhesion contracts; and

(4) certain provisions of arbitration clauses were substantively unconscionable.

Affirmed in part, reversed and remanded in part.

1. Alternative Dispute Resolution ⇐114
Commerce ⇐80.5

Pursuant to Congress' commerce clause power, the Federal Arbitration Act (FAA) will reach transactions in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice subject to federal control. U.S.C.A. Const. Art. 1, § 8, cl. 3; 9 U.S.C.A. § 1.

2. Alternative Dispute Resolution ⇐116
Commerce ⇐80.5

Assisted living facility residency agreements involved interstate commerce, and therefore arbitration provisions contained in agreements were subject to Federal Arbitration Act (FAA) for purposes of negligence actions brought on behalf of deceased residents of facilities; facilities at issues purchased supplies, such as food, medicine, and medical equipment, primarily from out-of-state vendors, facilities were incorporated in a foreign jurisdiction, and facilities admitted residents who originally resided outside the state. 9 U.S.C.A. § 1.

3. Alternative Dispute Resolution ⇐117
States ⇐18.15

Federal Arbitration Act (FAA) preempts any state law or regulation that seeks to preclude the enforceability of an arbitration provision on grounds other than those which exist at law or in equity

for the revocation of any contract. 9 U.S.C.A. § 2.

4. Alternative Dispute Resolution ⇐117
States ⇐18.15

Federal Arbitration Act (FAA) preempted specific prohibition of arbitration provisions in nursing home contract or assisted living facilities' contracts contained in Nursing Home Responsibilities and Rights of Residents Act; FAA specifically preempted any state law or regulation that sought to preclude the enforceability of an arbitration provision on grounds other than those which existed at law or in equity for the revocation of any contract. 9 U.S.C.A. § 2; N.J.S.A. 30:13–1.

5. Alternative Dispute Resolution ⇐134(3, 6)

General contract law defenses, such as fraud, duress, and unconscionability may be invoked to invalidate an arbitration agreement without contravening the Federal Arbitration Act (FAA). 9 U.S.C.A. § 2.

6. Contracts ⇐1

"Procedural unconscionability," so as to render a contract unenforceable, involves a variety of inadequacies, such as age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process; moreover, adhesion contracts invariably evidence some characteristics of procedural unconscionability.

See publication Words and Phrases for other judicial constructions and definitions.

7. Contracts ⇐1

A "contract of adhesion" is presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity for the adhering party to negotiate except perhaps on a few particulars.

See publication Words and Phrases for other judicial constructions and definitions.

8. Alternative Dispute Resolution ⇐134(6)

Residency agreements between residents and assisted living facilities were contracts of adhesion, supporting unenforceability of arbitration provisions contained in agreements for purposes of negligence actions brought on behalf of deceased residents; although agreements stated that plaintiffs were encouraged to discuss agreements with an attorney, agreements gave no indication that any of the terms were negotiable as a result of arms-length good faith negotiations, and exact agreements were previously found to be adhesion contracts.

9. Alternative Dispute Resolution ⇐134(6)

Provisions in arbitration clauses of residency agreements between residents and assisted living facilities that placed limitations on discovery, capped compensatory damages, and prohibited punitive damages were substantively unconscionable for purposes of negligence actions brought on behalf of deceased residents; statutory protections for nursing home and assisted living facility residents highlighted disparity in economic resources between residents and facilities, and provisions ran counter to State's public policy. N.J.S.A. 30:13–8.1.

10. Contracts ⇐1

The determination that a contract is one of adhesion represents only the first step in the analysis into whether a contract, or any specific term therein, should be deemed unenforceable based on policy considerations.

11. Contracts ⇐1

To determine substantive unconscionability of a contract, the Court of Appeals must look to apply to following four factors: (1) the subject matter of the contract; (2) the parties' relative bargaining positions; (3) the degree of economic compulsion motivating the adhering party; and (4) the public interests affected by the contract.

12. Contracts ⇐1

The most important factor to the analysis used to determine whether a contract is substantively unconscionable is the public interests affected by the contract; this factor requires the Court of Appeals to determine whether the effect of the contract shields defendants from compliance with the laws of the State.

13. Health ⇐831

In the context of nursing home abuse, punitive damages serve an admonitory function.

14. Damages ⇐87(1)

Punitive damages are awarded to punish the wrongdoer, and to deter both the wrongdoer and others from similar conduct in the future.

15. Damages ⇐87(1)

The doctrine of punitive damages survives because it continues to serve the useful purposes of expressing society's disapproval of intolerable conduct and deterring such conduct where no other remedy would suffice.

Joel I. Fishbein argued the cause for appellants (Spector, Gadon & Rosen, P.C., attorneys; Mr. Fishbein, on the brief).

Law Office of Thomas P. Frascella, L.L.C., attorneys for respondent the Estate of Anna Ruszala (Thomas P. Frascella, Princeton, on the brief).

Andrew J. D'Arcy, Galloway, argued the cause for respondent Ida Azzaro (D'Arcy Johnson Day, P.C., attorneys; Mr. D'Arcy, on the brief).

Before Judges SKILLMAN, FUENTES, and GILROY.

The opinion of the court was delivered by

FUENTES, J.A.D.

[277]These back-to-back appeals, consolidated for the purpose of this opinion, require us to determine the enforceability of arbitration provisions in nursing home contracts. Specifically, we must decide whether § 2 of the Federal Arbitration Act (FAA), 9 *U.S.C.A.* § 2, which declares arbitration provisions in contracts "valid, irrevocable, and enforceable," preempts the public policy of this State as expressed by the Legislature in *N.J.S.A.* 30:13–8.1, one of the key components of the "Nursing Home Responsibilities and Rights of Residents" act (the Act). *N.J.S.A.* 30:13–8.1 renders void and unenforceable "[a]ny provision or clause waiving or limiting the right to sue ... between a patient and a nursing home."

Although not dispositive of this controversy, this question pits our State's laws protecting the elderly and infirm against a national policy favoring arbitration as an alternative forum for resolving civil disputes. Ultimately, we diffuse this tension by both respecting the supremacy of federal law while relying on well-established principles of contract law to declare certain provisions of the arbitration agreements unenforceable under the doctrine of substantive unconscionability.

These abstract considerations are played out in the real life tribulations of two

elderly residents as they struggled to arrange for the care necessary to end their lives with compassion and dignity. The two plaintiffs, Ida Azzaro and Marie Mizerak, each signed residency agreements with two New Jersey assisted living facilities operated by Alterra Healthcare Corporation (Alterra), which is owned by Brookdale Living Communities, Inc. (Brookdale), both out-of-state companies. Ms. Azzaro signed the agreement on behalf of her husband, Pasquale Azzaro; Mizerak signed for Anna Ruszala, for whom she had power of attorney. Each [278]resident suffered significant injuries at their facility and later died as a result. Plaintiffs brought suits sounding in negligence and wrongful death against Alterra, Brookdale, and other individuals associated with the ownership and operation of these facilities.

Both of the contracts signed by plaintiffs contain identical arbitration and limitation of liability provisions. The arbitration provisions require that all claims, except eviction proceedings, be resolved through binding arbitration. Other sections of the arbitration and limitation of liability clauses significantly restrict discovery, limit compensatory damages, and prohibit punitive damages.

These cases came before the trial court on defendants' motions to compel binding arbitration. The trial court initially denied defendants' motion without prejudice and directed the parties to conduct limited discovery on the issue of the enforceability of the arbitration provisions.

Defendants renewed their motions to compel arbitration at the end of this limited discovery period. The court denied defendants' motions without an evidentiary hearing, finding three legally independent grounds for not enforcing the arbitration provisions: (1) the arbitration provisions were void as against public policy under *N.J.S.A.* 30:13–8.1; (2) the FAA is not applicable because the transactions between the parties did not involve interstate commerce; and (3) even if *N.J.S.A.* 30:13–8.1 is preempted by the FAA, the arbitration agreements are part of a consumer contract of adhesion and the particular limitations and prohibitions contained therein are unenforceable under the common law defense of unconscionability.

By leave granted, defendants now appeal arguing that the trial court erred when it found that the FAA does not preempt the anti-arbitration provision in *N.J.S.A.* 30:13–8.1, that there is insufficient evidence to support the trial court's conclusion that these residency agreements are contracts of adhesion, and that the provisions restricting discovery, setting caps on compensatory damages, and precluding punitive damages are not unconscionable.[279] Alternatively, defendants contend that if the clauses are unconscionable, the remedy should be the severance of the particular provisions, not invalidation of the entire arbitration agreement.

We now consolidate these two appeals because they share a common core of legal issues. After reviewing the record developed before the trial court, we reverse the court's finding that the FAA is inapplicable to the arbitration agreements at issue. We are satisfied that the FAA preempts the anti-arbitration provision in *N.J.S.A.* 30:13–8.1. The economic activities performed by these nursing facilities in servicing the residency contracts "involve" interstate commerce. We affirm, however, the trial court's determination that some of the arbitration provisions in the residency agreements signed by plaintiffs are unenforceable based on the doctrine of substantive unconscionability. These residency agreements were contracts of adhesion as they were presented on a "take-it-or-leave-it" basis, evidencing indicia of procedural

unconscionability as discussed by the court in *Muhammad v. County Bank of Rehoboth Beach*, 189 *N.J.* 1, 15, 912 *A.*2d 88 (2006), *cert. denied*, 549 *U.S.* 1338, 127 *S.Ct.* 2032, 167 *L.Ed.*2d 763 (2007). However, the limited record before us is insufficient to demonstrate a level of procedural unconscionability that would invalidate the parties' arbitration agreement. This paucity of evidence, however, does not affect our ability to review these provisions under the doctrine of substantive unconscionability, *id.* at 16, 912 *A.*2d 88, using the factors identified by the Court in *Rudbart v. North Jersey District Water Supply Commission*, 127 *N.J.* 344, 356, 605 *A.*2d 681, *cert. denied*, 506 *U.S.* 871, 113 *S.Ct.* 203, 121 *L.Ed.*2d 145 (1992). Applying these principles to the arbitration provisions in question, we are satisfied that the discovery restrictions, limitations on compensation for non-economic damages, and the outright preclusion of punitive damages are substantively unconscionable. Therefore, we strike these offending provisions and remand the Ruszala matter to arbitration. Finally, we remand the Azzaro matter to the trial court to determine whether a valid contract was formed between the parties.

[280]The following facts will inform our discussion of these legal issues.

I

Sterling House of Florence (Sterling House) and Clare Bridge of Westampton (Clare Bridge) are assisted living facilities managed by Alterra, a Delaware corporation with its principal place of business in Milwaukee, Wisconsin. Brookdale owns Alterra and is also a Delaware corporation. Brookdale's principal place of business is in Chicago, Illinois.

Sterling House and Clare Bridge purchase supplies, such as food, medicine, and medical equipment, "primarily from out-of-state vendors" through "mail, electronic mail, telephone[,] and facsimile transmissions."[1] These facilities' vendors include: "the Sysco Corporation of Texas; Medline of Illinois; and Direct Supply of Wisconsin." Both facilities "accept out-of-state residents," and Alterra "accepts Medicaid waiver payments on behalf [of] residents" of both Sterling House and Clare Bridge. Ten percent of Sterling House residents and eleven percent of Clare Bridge residents are eligible for Medicaid.[2]

Anna Ruszala

On or about January 21, 2002, eighty-five-year-old Anna Ruszala became a resident at Sterling House. From the start of her residency and continuing for approximately two and one-half years, there was no evidence that she, or anyone acting on her behalf, executed a formal residency agreement with Sterling House.

[281]Sometime before April 2004, Ruszala executed a power of attorney designating Marie Mizerak[3] as her attorney in fact. Mizerak entered into a residency agreement on Ruszala's behalf on April 28, 2004, with an effective date of April 1, 2004. According to an affidavit executed by Alterra's Vice President for Legal, Ruszala received a "loyalty discount" in part for agreeing to the arbitration and limited lia-

1. This information is taken from an affidavit submitted by Alterra's Vice President of Legal to the trial court in support of defendants' motion to compel arbitration.

2. Neither resident involved in this litigation received funding through Medicaid or Medicare.

3. Although not entirely clear from the record, it appears that Mizerak was Ruszala's niece.

bility provisions in the 2004 residency agreement.[4]

Ruszala resided at Sterling House until July 11, 2006, when she was taken to Virtua Hospital in Marlton, New Jersey. By 2006, Ruszala was no longer ambulatory and "slept in a 'special bed' [that] was lowered to protect her from potential injury[-inducing] falls."

The details of the incident that led to her hospitalization are not clear. The initial reports indicate that Ruszala fell from a two-foot high bed. The hospital records, however, reflect possible geriatric abuse. Ruszala died ten days after her admission to Virtua Hospital; she was ninety-three years old.

Pasquale Azzaro

On December 8, 2005, Ida Azzaro entered into a residency agreement with Alterra to admit her husband Pasquale Azzaro to the Clare Bridge assisted living facility. Mr. Azzaro resided at Clare Bridge from December 9, 2005, until January 1, 2006; he died three days later on January 4, 2006.

In an affidavit submitted to the trial court in opposition to defendants' motion to compel arbitration, Ms. Azzaro indicated that she and her husband first met with a representative of Alterra one week before her husband's admission into Clare [282] Bridge. According to Ms. Azzaro, "the purpose of this visit was [for the Alterra representative] to explain the benefits of the facility and how it would be able to meet the needs of my husband." The meeting lasted approximately one hour.

According to Ms. Azzaro, Alterra's representative did not explain the legal implications of the residency agreement or suggest that she seek independent legal advice before signing it. Ms. Azzaro's affidavit contains the following allegations concerning Alterra's efforts to inform her and her husband about the limitations embodied in the arbitration provisions:

> We were never advised that we should seek legal counsel to review the Agreement prior to signing it, nor were we in any way cautioned that the agreement included language that may limit my husband's legal rights or require that claims against the facility be pursued in an arbitration forum rather than a court of law. Certainly, had such a comment or reference been made, I would have asked follow-up questions and we would have sought the advice of our attorney. I would never have knowingly signed an agreement waiving legal rights of my husband nor[,] in my opinion[,] would he have signed such a document. At no point in time, either on that day or at any time while my husband was a resident at the facility, were we advised that it would be important to review this document and/or have its provisions evaluated by an attorney. Had we know that this facility required my husband to waive legal rights as part of admission, I am certain we would have found another facility for my husband to reside.
>
> I do recall that the representative from the facility advised that, as a resident at the facility, my husband had legal rights under New Jersey's laws and that the facility made it a priority to see that those rights were not violated. We were pleased and encouraged to hear that fact. We relied upon that representation in our decision making process to choose this facility.

4. The affiant also indicated that "[n]ew residents at Clare Bridge ... and other Alterra Healthcare Corp. facilities, and those who refused to sign the Residency Agreement rolled out in April 2004, did not receive the loyalty discount."

It was my understanding that this document was a form document that was part of the admission process and that it could not be changed in any way.

. . . .

It was never explained to me or my husband at any time by any representative of the facility what an arbitration clause means or even what the word arbitration means. I do not recall the word "arbitration" being mentioned in any context whatsoever.

. . . .

Based on the facility representative's representations to me, I did not have any expectation or understand that any document that I was signing could in any way prevent me or my husband from asserting claims for abuse and/or neglect in a court of law if such a claim ever arose.

[288]Although Ms. Azzaro signed the residency agreement as a "responsible party," she emphatically denied ever having had power of attorney over her husband's affairs, or at any time representing herself as having such authority. She claimed that she signed the residency agreement because the representative of Alterra told her that her signature was required "as an individual who agreed to be financially responsible for any bills associated with the admission."

II

The residency agreements executed by both Ms. Azzaro and Mizerak are identical and both include Section V: "Arbitration and Limitation of Liability Provision." This Section contains three subsections: Subsection A, entitled "Arbitration Provision"; Subsection B, entitled "Limitation of Liability Provision"; and Subsection C, entitled "Benefits of Arbitration and Limitation of Liability Provisions."

Subsection A(1) states that

[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Resident's stay at Alterra, excluding any action for eviction, and including disputes regarding interpretation of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory[,] or punitive damages and whether sounding in breach of contract, tort[,] or breach of statutory duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted, shall be submitted to binding arbitration, as provided below, and shall not be filed in a court of law. **The parties to this Agreement further understand that a jury will *not* decide their case.** The New Jersey State Statutes concerning arbitration shall govern the procedure, except if inconsistent with this Arbitration Provision or expressly stated otherwise in this Agreement. Further, nothing in this Agreement is to be construed to contradict any applicable New Jersey statutory grievance or mediation procedure. Any party who demands arbitration must do so for all claims or controversies that are known, or reasonably should have been known, by the date of the demand for arbitration, and if learned of during the course of the arbitration proceeding shall amend the claims or controversies to reflect the same. All current damages and reasonably foreseeable damages arising out of such claims or controversies shall also be incorporated into the initial demand or amendment thereto.

The remaining provisions of Subsection A detail the manner by which arbitration between the parties would be initiated and

[284] conducted. Subsection A(6) sets out perimeters for discovery, including a limitation on depositions to only those of experts. Subsection A(13) incorporates by reference the Limitation of Liability Provision found in Subsection B into the arbitration provision. Subsection A(14) states that the Arbitration and Limitation of Liability Provisions "shall survive the death of the Resident."

The Limitation of Liability Provision found at Subsection B states, in italics, "*Read Carefully Before Signing.*" In several ways, this provision limits liability for any "claims by, or on behalf of, a Resident, Resident Party, or by a Resident's Estate, Agent or Legal Representative, arising out of the care or treatment received by the Resident or the Resident's occupancy or presence at Alterra, including, without limitation, claims for medical negligence[.]" This section provides that all "[n]et economic damages" awarded must be "offset by any collateral source payments such as payments made by medical insurance." It also: (1) limits noneconomic damages, such as pain and suffering, to "a maximum of $350,000.00"; (2) prohibits payment of "[i]nterest and/or late fees on unpaid assisted living charges"; and (3) precludes any award for punitive damages.

Subsection C details the "Benefits of Arbitration and Limitation of Liability Provisions." The section describes arbitration as providing "cost-effectiveness and time-savings." The language selected by the drafter further states that "[t]he parties' decision to select arbitration and to agree to a limitation of liability" results in "more affordable" services for the resident. The alleged time-savings derived from arbitration is portrayed as preferable for the "often ... elderly [residents with] limited life-expectanc[ies]." This subsection ends with the following caveat:

> The Resident, Responsible Party, or his or her legal guardian, or authorized Power of Attorney understands that other assisted living companies' Agreements may *not* contain an arbitration provision, or limitations of liability provision. The parties agree that the reasons stated above are proper consideration for the acceptance of the Arbitration and Limitation of Liability Provisions. **The undersigned acknowledges that he or she has been encouraged to discuss this Agreement with an attorney.**
>
> [285] **The parties to this Agreement further understand that a jury will *not* decide this case.**

Other than restating that "a jury will not decide this case," this section contains no corresponding details regarding the rights and benefits a party may be giving up by agreeing to these provisions.

After each subsection in Section V, a line is provided next to an "x" under which it states: "Please initial as having read and understood the provisions." The initials "M.K.M.—P.O.A.," for Marie Mizerak, are contained on each such line of Ruszala's residency agreement. The initials "I.A.," for Ida Azzaro, are contained on each such line of Mr. Azzaro's agreement.

Section VI(A) contains an additional provision stating that "[i]f it is determined by a court of law that the Arbitration Provision provided in this Agreement is invalid, the parties hereto make clear their express desire to waive a jury trial and resolve their claims against each other in the appropriate court solely before a judge."

Finally, the residency agreement contains two severance provisions. The first is found within the limited liability provision of the arbitration clause. It provides that "[s]hould sub-sections a [offset of net economic damages by payments from collateral sources], b [economic damages cap of $350,000], c [no interest or late fees to

be awarded on unpaid assisted living charges], and/or d [prohibition of punitive damages], provided above, be deemed invalid, the validity of the remaining subsections will not be affected." The second severance provision is contained in Section VI(I) and states that "[s]hould any part of this Agreement be invalid, the validity of the other parts of this Agreement will not be affected."

III

On June 11, 2007, the Estate of Anna Ruszala filed suit against Alterra and a number of its employees in the Superior Court of Burlington County alleging that the negligent care decedent received while a resident at Sterling House was a proximate cause of [286] the injuries she sustained and that these injuries contributed to her death. The Estate sought compensatory damages, including an award for the pain and suffering decedent endured before her death, wrongful death damages, punitive damages, and counsel fees and costs.

Plaintiff immediately began the discovery process, serving defendants with written interrogatories, demands for production of documents, and notices to take depositions. Defendants were initially uncooperative with plaintiff's discovery demands. Plaintiff thereafter moved before the Law Division to obtain discovery relief. It was in response to plaintiff's discovery motion that defendants first moved to compel enforcement of the arbitration provisions in the contract.

On November 27, 2007, Ms. Azzaro, as proposed administrator ad prosequendum and administrator for the estate of Pasquale Azzaro, filed a complaint against Alterra and other unidentified individuals alleging negligence, statutory violations of *N.J.S.A.* 30:13–1 to –17, wrongful death, and breach of contract.[5] The legal action sought compensatory damages, punitive damages, wrongful death damages, and statutory attorneys fees and costs.[6] The complaint asserted that defendants' inadequate care of Mr. Azzaro while he was a resident at Clare Bridge caused him to suffer severe injuries, ultimately leading to his death.[7] In contrast to the procedural posture of the Ruszala suit, defendants filed a [287] motion in lieu of an answer, seeking to compel the enforcement of the arbitration provision.

The court denied defendants' motions without prejudice and directed the parties to conduct discovery "on issues pertaining to the issue of interstate commerce and the validity of the arbitration clause." The Ruszala suit was pending at the time the court issued this order.

Although the Ruszala and Azzaro cases had not been consolidated, the trial court recognized that they both shared a common, possibly dispositive question of law. The judge hearing defendants' motion to compel arbitration thus decided to hear and decide the matters in one comprehensive opinion. After considering the arguments of counsel and the limited record developed, the court denied defendants' motion to compel arbitration, finding sev-

5. Ms. Azzaro withdrew the claim for breach of contract at the motion to compel arbitration hearing.

6. Pursuant to *N.J.S.A.* 30:13–8(a), any person or resident of a nursing home whose rights under the statute have been violated "shall have a cause of action against any person committing such violation." In addition to recovering "actual and punitive damages," the statute further provides that "[a]ny plaintiff who prevails in any such action shall be entitled to recover reasonable attorney's fees and costs of the action."

7. The record indicates that Mr. Azzaro "suffered ... an acute subdural hematoma due to trauma[.]"

eral grounds to invalidate the arbitration and limitation of liability provisions of the residency agreements.

As a threshold issue, the trial court found these provisions to be "void, unenforceable[,] and contrary to public policy" because they "restrict[ed] the options available to residents for the resolution of claims involving negligence or malpractice, contrary to [*N.J.S.A.* 30:13–1–17]." In this context, the court found it unnecessary to reach the questions of whether Ms. Azzaro had the authority to waive her husband's rights or whether either plaintiff had properly waived their statutory rights under this act.

The court rejected defendants' argument that the FAA preempted the restrictions placed on arbitration of negligence and malpractice claims by our State's Nursing Home Responsibilities and Rights of Residents act. Relying on the rationale articulated in *Bruner v. Timberlane Manor Ltd. Partnership,* 155 *P.*3d 16 (Okla. 2006), the court found that the facts of these cases indicated a de minimus presence of interstate commerce, thus rendering the FAA inapplicable.

Finally, the court held that, even if the FAA applied, generally accepted contract principles precluded enforcement of the arbitration[288] and limitation of liability provisions as unconscionable, based on the four factors established by our Supreme Court in *Rudbart* and applied in *Muhammad.* These factors are: "[1] the subject matter of the contract, [2] the parties' relative bargaining positions, [3] the degree of economic compulsion motivating the 'adhering' party, and [4] the public interests affected by the contract." *Rudbart, supra,* 127 *N.J.* at 356, 605 *A.*2d 681.

Before applying the *Rudbart* factors, the trial court emphatically stated: "The subject Residency Agreements are contracts of adhesion. They were presented as take-it-or-leave-it, in standardized print form, with little to no opportunity to negotiate." With this conclusion firmly in place, the trial court found the Residency Agreements involved a "particularly vulnerable population that requires special protections." The "unequal bargaining power" between the parties, in the court's view, was "self-evident." Without specific reference to the personal circumstances of either of the two decedents, the court found "clear economic compulsion driving an assisted living resident to enter into this agreement."

As to the question of the public interests involved, the trial court found that "deter[ring] abuse and neglect in assisted living facilities and nursing homes" was an important factor in ensuring the ability to sue for malpractice or negligence. In the court's view, the cap on compensatory damages, the prohibition on punitive damages, and the limitation of depositions to those of only experts constituted unconscionable restrictions of a resident's right to sue, and thus, violated the public interest at issue.

Based on these findings and conclusions of law, the trial court denied defendants' motion to compel arbitration.

IV

We begin our analysis by addressing the trial court's ruling that the FAA does not apply to these two cases because defendants have not shown that the operation of these facilities substantially affects interstate commerce. Plaintiffs argue that the court correctly applied the holding in *Bruner, supra,* 155 *P.*3d 16, to find no [289]nexus between interstate commerce and the two facilities operated by Alterra.

The trial court gave the following explanation for holding that the FAA is not

applicable to these two nursing home agreements:

> Here, the court does not find the presence of interstate commerce. While assisted living services may constitute economic activity, the general practice of assisted living services is not subject to federal control under the Commerce Clause. The Medicare and Medicaid statutes by which Congress regulates this activity were enacted pursuant to Congress' Spending Power, and not its Commerce Power. Additionally, assisted living services, when taken in the aggregate, do not have a substantial impact on interstate commerce. Finally, the case-specific facts here are that the defendants purchased supplies from out-of-state vendors, that these supplies were purchase[d] using mail, e-mail, telephone and facsimile transmissions, that the supplies are shipped over state lines, and that approximately ten percent of the residents at Sterling House at Florence and eleven percent of the residents at Clare Bridge of Westampton are eligible for Medicaid. *See* Affidavit of Timothy Cesar. On this record, these case-specific facts result in only a de minimus impact on interstate commerce, insufficient to trigger FAA preemption. As such, assisted living services, taken in the aggregate, do no[t] establish an interstate commerce connection that triggers FAA preemption of the Residents Rights Act.

We disagree. Section 2 of the FAA provides that:

> A written provision in any maritime transaction or *a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction,* or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
>
> [9 *U.S.C.A.* § 2 (emphasis added).]

Under this section, the FAA preempts any state law purporting to invalidate an arbitration agreement "involving interstate commerce." *Young v. Prudential Ins. Co. of Am.*, 297 *N.J.Super.* 605, 616, 688 *A.*2d 1069 (App.Div.), *certif. denied*, 149 *N.J.* 408, 694 *A.*2d 193 (1997). Section 1 of the FAA further defines "commerce" to include "commerce among the several States." 9 *U.S.C.A.* § 1.

The United States Supreme Court has interpreted the term "involving commerce" to be the "functional equivalent of the ... term 'affecting commerce[,]' ... provid[ing] for the enforcement of arbitration agreements within the full reach of the Commerce [290] Clause." *Citizens Bank v. Alafabco, Inc.*, 539 *U.S.* 52, 56, 123 *S.Ct.* 2037, 2039, 156 *L.Ed.*2d 46, 51 (2003). (internal quotations omitted); *see also Alfano v. BDO Seidman, LLP*, 393 *N.J.Super.* 560, 574, 925 *A.*2d 22 (App.Div.2007) (explaining that contracts involving commerce should be broadly construed to extend the FAA's application to the limits of Congress' Commerce Clause power).

[1] The Court in *Citizens Bank* established that "the FAA encompasses a wider range of transactions than those actually ... within the flow of interstate commerce." *Citizens Bank, supra*, 539 *U.S.* at 56, 123 *S.Ct.* at 2040, 156 *L.Ed.*2d at 51 (internal quotation omitted). Pursuant to Congress' Commerce Clause power, the FAA will reach transactions "in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice subject

to federal control." [8] *Ibid.* (internal quotations omitted).

In *Alfano,* we held that "[a] nexus to interstate commerce is found when citizens of different states engage in the performance of contractual obligations in one of those states because such a contract necessitates interstate travel of both personnel and payments." *Alfano, supra,* 393 *N.J.Super.* at 574, 925 *A.*2d 22. That case clearly involved interstate commerce because the transactions at issue occurred between a New Jersey resident and a German corporation in a New York office and involved international investments. *Ibid.*

The facts in *Crawford v. West Jersey Health Systems,* 847 *F.Supp.* 1232, 1240 (D.N.J.1994), are more applicable to the facts before us here. *Crawford* involved a contract between a New |291 Jersey doctor and a New Jersey hospital that treated Pennsylvania patients, was "paid through out-of-state or multi-state insurance carriers," and "receive[d] goods and services from numerous out-of-state vendors." *Ibid.* Because the plaintiff's employment "facilitated defendants' interstate business activities," the court found that her employment agreement involved interstate commerce. *Ibid.*

A similar approach was adopted by the Law Division in *Bleumer v. Parkway Insurance Co.,* 277 *N.J.Super.* 378, 649 *A.*2d 913 (Law Div.1994). Confronted with facts similar to *Crawford,* the court found that a contract regarding a New Jersey resident employed by a New Jersey insurance company "involve[d] or affect[ed] interstate commerce" because policyholders inevitably suffered accidents outside of the state and the insurance company had to supervise its employees while they investigated and resolved those claims outside of the state. *Id.* at 390–91, 649 *A.*2d 913.

[2] The affidavit of Alterra's Vice President for Legal contains the only competent evidence concerning Alterra's business activities and their impact on interstate commerce. He avers that Sterling House and Clare Bridge purchase supplies, such as food, medicine, and medical equipment, "primarily from out-of-state vendors" through "mail, electronic mail, telephone, and facsimile transmissions." The vendors include the Sysco Corporation, located in Texas; Medline, in Illinois; and Direct Supply, in Wisconsin. Alterra and Brookdale are out-of-state corporations and both Sterling House and Clare Bridge accept out-of-state residents.

Clearly these nursing home facilities cannot function without the materials procured from these out-of-state suppliers. The delivery of these goods from their points of origin to the doors of these facilities thus "affects" interstate commerce and involves the federally regulated industry of interstate transportation. Further, these companies are incorporated in a foreign jurisdiction and they admit residents who originally resided outside of this State.

|292 When these facts are viewed through the prism of the Commerce Clause and the FAA, there is little doubt that the residency agreements at issue here involve interstate commerce. Finally, although plaintiffs' individual residency agreements may not have had a specific affect upon interstate commerce, the facilities' economic activities, in the aggregate, represent a general practice subject to federal control, rendering the arbitration provisions subject to the FAA. We thus hold that the

8. In *Citizens Bank,* the Court further clarified that the Court's decision in *United States v. Lopez,* 514 *U.S.* 549, 115 *S.Ct.* 1624, 131 *L.Ed.*2d 626 (1995), which placed some limits on Congress' Commerce Clause power, "did not restrict the reach of the FAA ... over concededly economic activity[.]" *Id.* at 58, 123 *S.Ct.* at 2040, 156 *L.Ed.*2d at 52–53.

arbitration provisions in the residency agreements attributable to plaintiffs are subject to the FAA.

V

We must next determine the legal ramifications which flow from our conclusion that the FAA applies to the challenged arbitration provisions.

The Residents' Rights Act

In 1976 the New Jersey Legislature passed the "Nursing Home Responsibilities and Rights of Residents" act (the Act), *N.J.S.A.* 30:13–1 to –17, in an effort "to ameliorate the harsh conditions of the elderly in nursing homes[.]" *In re Conroy*, 98 *N.J.* 321, 377, 486 *A.*2d 1209 (1985).[9] The Act imposes certain responsibilities on nursing homes, *N.J.S.A.* 30:13–3, and declares the "[r]ights of nursing home residents," *N.J.S.A.* 30:13–5. These rights include a right to "considerate and respectful care that recognizes the dignity and individuality of the resident," and a right "[n]ot [to] be deprived of any constitutional, civil[,] or legal right solely by reason of admission to a nursing home." *N.J.S.A.* 30:13–5(j), (m).

[293] *N.J.S.A.* 30:13–8 creates a private cause of action for damages for "[a]ny person or resident whose rights ... are violated [under the Act] ... against any person committing such violation." *N.J.S.A.* 30:13–8 a. Regulations promulgated under the Act create corresponding standards for assisted living residences, comprehensive personal care homes, or assisted living programs. *N.J.A.C.* 8:36–1.1 to –23.

In 2003, the Legislature amended the Act to include the following provision:

> [a]ny provision or clause waiving or limiting the right to sue for negligence or malpractice in any admission agreement or contract between a patient and a nursing home or assisted living facility licensed by the Department of Health and Senior Services pursuant to the provisions of *P.L.* 1971, *c.* 136 (C. 26:2H–1 *et seq.*), whether executed prior to, on or after the effective date of this act, is hereby declared to be void as against public policy and wholly unenforceable, and shall not constitute a defense in any action, suit or proceeding.
>
> [*N.J.S.A.* 30:13–8.1.]

[3] Under § 2 of the FAA, arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 *U.S.C.A.* § 2. The FAA thus preempts any state law or regulation that seeks to preclude the enforceability of an arbitration provision on grounds other than those which "exist at law or in equity for the revocation of any contract." 9 *U.S.C.A.* § 2; *see also Martindale v. Sandvik, Inc.*, 173 *N.J.* 76, 85, 800 *A.*2d 872 (2002).

[4] Our State's prohibition of arbitration agreements in nursing home contracts, designed to protect the elderly, is thus irreconcilable with our national policy favoring arbitration as a forum for dispute resolution. Under our federal system of government, national policy prevails. Therefore, the FAA's clear authorization nullifies the specific prohibition of arbitra-

9. In 1977, the Legislature established additional protections for the elderly through the creation of the Office of the Ombudsman for the Institutionalized Elderly. *See N.J.S.A.* 52:27G–1. This statute was amended in 1983 to create further safeguards because "elderly patients in certain institutions or care facilities have been subjected to either physical or mental abuses [that have] either gone unreported or came to light many months later when it was too late to take official action." *In re Conroy, supra*, 98 *N.J.* at 379, 486 *A.*2d 1209.

tion provisions in nursing home or assisted living facilities' contracts contained in *N.J.S.A.* 30:13–8.1.

Contract Law Defenses

[5] It is now well-settled that general "contract [law] defenses, such as fraud, duress, and unconscionability may be invoked to [294] invalidate an arbitration agreement without contravening § 2" of the FAA. *Doctor's Assocs., Inc. v. Casarotto*, 517 *U.S.* 681, 687, 116 *S.Ct.* 1652, 1656, 134 *L.Ed.*2d 902, 909 (1996). Our Supreme Court also recognized this general principle in *Muhammad, supra*, 189 *N.J.* at 12, 912 *A.*2d 88. Thus, even though the FAA preempts the specific anti-arbitration provision in *N.J.S.A.* 30:13–8.1, the trial court held that the arbitration provisions in the residency agreements were unenforceable under the doctrine of unconscionability.

Plaintiffs urge us to adopt the court's reasoning in this respect. Defendants argue that the arbitration provisions are, as a whole, not unconscionable. However, even if some sections of the arbitration clause were deemed legally unsustainable, defendants contend that the remedy should be severance, not outright invalidation of the entire arbitration clause.

The trial court's analysis of the unconscionability question is inextricably linked to its threshold determination that the residency agreement, including the arbitration provision, is a contract of adhesion. From this analytical foundation, the court then examined the particular features and restrictions in the arbitration provision and ultimately found them overbearing and unconscionable. Thus, we must first determine whether the record supports the trial court's finding that the residency agreement, including the arbitration provision, is a contract of adhesion that evidences indicia of procedural unconscionability.

[6, 7] As explained by the Court in *Muhammad*, procedural unconscionability involves a "variety of inadequacies, such as age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process." *Muhammad, supra*, 189 *N.J.* at 15, 912 *A.*2d 88. Moreover, "adhesion contracts invariably evidence some characteristics of procedural unconscionability." *Id.* at 16, 912 *A.*2d 88. A contract of adhesion "is presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity for the 'adhering' party to negotiate except [295] perhaps on a few particulars." *Rudbart, supra*, 127 *N.J.* at 353, 605 *A.*2d 681.

Here, although age as a factor weighing in favor of procedural unconscionability is undisputed, the remaining indicia of procedural unfairness are simply not part of the record developed before the trial court. We have a limited account from Ms. Azzaro about what transpired during her meeting with the representative of Alterra. We do not know, however, anything about her or her husband's level of education or sophistication in legal matters. The record with respect to Ruszala is even more sparse. Although courts have employed a "sliding scale" analysis when considering, in tandem, the two factors of procedural and substantive unconscionability, *Muhammad, supra*, 189 *N.J.* at 16 n. 3, 912 *A.*2d 88, the absence of evidence showing procedural unconscionability does not undermine our ultimate conclusion that the identified restrictions are substantively unconscionable.

[8] However, we are satisfied that the residency agreements are contracts of adhesion. The first time Ms. Azzaro met with an Alterra representative was one week before her husband was admitted to Clare Bridge. The purpose of the meeting

was to inform the potential resident and his family about the services available at the facility. From this encounter, Ms. Azzaro was left with the "understanding that this document was a form document that was part of the admission process and that it could not be changed in any way."

Although Ms. Azzaro did not elaborate or explain how she arrived at this "understanding," the residency agreement itself supports her view. Both Azzaro's and Ruszala's documents are in a standardized printed form and, on their face, give no indication that any of the terms are negotiable. Further, although defendants argue that plaintiffs were "encouraged to discuss this Agreement with an attorney," there is nothing in the record to suggest that any of the provisions in the agreement were negotiable or could have been modified or deleted by the residents as a result of arms-length good faith negotiations. Finally, these exact |296agreements were found to be adhesion contracts by the District Court for the Eastern District of Pennsylvania. *Ostroff v. Alterra Healthcare Corp.*, 433 *F.Supp.*2d 538, 544 (E.D.Pa.2006). We thus affirm the trial court's determination that the residency agreements are contracts of adhesion.

[9–11] As noted by the Court in *Rudbart*, and reaffirmed in *Muhammad*, however, the determination that a contract is one of adhesion represents only the first step in the analysis "into whether a contract, or any specific term therein, should be deemed unenforceable based on policy considerations." *Muhammad, supra*, 189 *N.J.* at 15, 912 *A.*2d 88. To determine substantive unconscionability, we must next look to and apply the four factors set forth by the Court in *Rudbart:* "[1] the subject matter of the contract, [2] the parties' relative bargaining positions, [3] the degree of economic compulsion motivating the 'adhering' party, and [4] the public interests affected by the contract." *Rudbart, supra*, 127 *N.J.* at 356, 605 *A.*2d 681.

We start with factor one, the subject matter of the contract. Although the FAA preempts that portion of the Act which renders unenforceable arbitration provisions in residency agreements for nursing home and assisted living facilities, the other sections of the Act which protect the elderly and infirm remain legally viable. As noted by the trial court, in passing these laws, the Legislature recognized the need to protect a discrete class of citizens who, by virtue of their age and infirmity, are particularly vulnerable to sharp commercial practices, especially in the area of health care, housing, and end-of-life decisions.

The second and third prongs under *Rudbart* concern the parties' relative bargaining positions and "the economic compulsion motivating the adhering party." The only specific information we have relevant to these considerations is: (1) plaintiffs are not Medicaid eligible; (2) the monthly residency fee is $5,000; and (3) Mizerak received a "loyalty discount" as consideration for agreeing to sign the residency contract.

|297There are, however, certain global characteristics that every potential nursing home resident shares. These consumers are, by definition, unable to continue to live in their homes due to ill health, advanced age, or both. Beyond this profile, the Legislature has identified these individuals as a uniquely vulnerable group of consumers, entitled to special protection against economic abuse,[10] personal privacy

10. *See N.J.S.A.* 30:13–4.1, setting strict guidelines for the investment and disposition of nursing home security deposits; *see also N.J.S.A.* 30:13–5(a), preserving the right of nursing home residents to manage their own financial affairs.

abuse,[11] the deprivation of their right to choose their own healthcare professionals,[12] and an array of other abuses that speak to the core of human dignity.[13] These statutory protections highlight the disparity in economic resources between these particular consumers and the owners and operators of these specific facilities. This imbalance of resources invariably creates a relative inferiority in bargaining position for such individuals.

The unconscionability issue in this matter centers on the limitations of discovery, the capping of compensatory damages to a seemingly arbitrary figure, and the outright prohibition of punitive damages. In determining whether these restrictions run counter to our State's public policy, we need look no further than to the plain language in *N.J.S.A.* 30:13–8.1:

> Any provision or clause waiving or limiting the right to sue for negligence or malpractice in any admission agreement or contract between a patient and a nursing home or assisted living facility licensed by the Department of Health and Senior Services ... whether executed prior to, on or after the effective date of this act, is hereby declared to be void as against public policy and wholly unenforceable, and shall not constitute a defense in any action, suit or proceeding.

Although the FAA preempts the application of this statute to bar arbitration as a contractually provided means of dispute
|298 resolution, the statute otherwise continues to protect these consumers' right to sue. With this in mind, we turn our attention back to the analysis of the fourth prong under *Rudbart*.

[12] The fourth prong under *Rudbart* concerns the public interests affected by the contract. As the Court noted in *Muhammad*, *supra*, this is "the most important [factor] to the present analysis [because it] considers the public interests affected by the contract." 189 *N.J.* at 19, 912 *A.*2d 88. This factor requires us to determine whether the effect of the arbitration clause provisions that significantly restrict discovery, limit compensatory damages, and prohibit punitive damages "shield defendants from compliance with the laws of this State." *Ibid.*

The discovery restrictions are arguably the most palpably egregious because they are clearly intended to thwart plaintiffs' ability to prosecute a case involving resident abuse. Under these restrictions, a plaintiff cannot depose any of the nursing home staff members who are directly responsible for the day-to-day care of the resident. Indeed, no depositions can be taken of any fact witness, including individuals without any particular affiliation to the nursing home who, nevertheless, may have witnessed an act of abuse or neglect or may have information material to the case. This limitation is thus clearly inconsistent with the protection provided in *N.J.S.A.* 30:13–8.1.

The limits on compensatory damages have the insidious effect of permitting nursing home operators to budget potential liability as a mere cost of doing business, leaving seriously injured residents unable to obtain the full measure of relief warranted by the evidence. This section of the arbitration clause is likewise unenforceable under *N.J.S.A.* 30:13–8.1.

[13–15] The preclusion of punitive damages touches upon the societal interest of expressing the community's disapproval of outrageous conduct. In the context of

11. *N.J.S.A.* 30:13–5(b)–(f).

12. *N.J.S.A.* 30:13–5(g).

13. *N.J.S.A.* 30:13–5(h)–(n).

nursing home abuse, punitive damages also serve an "admonitory" function. *Fischer* v. [299]*Johns–Manville Corp.*, 103 *N.J.* 643, 657, 512 *A.*2d 466 (1986). As Justice Coleman explained in *Fischer*,

> [punitive damages] have been described as a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine. They are awarded to punish the wrongdoer, and to deter both the wrongdoer and others from similar conduct in the future. The doctrine of punitive damages survives because it continues to serve the useful purposes of expressing society's disapproval of intolerable conduct and deterring such conduct where no other remedy would suffice.
>
> [*Ibid.* (internal quotations and citations omitted).]

When considered together, the restrictions on discovery, limits on compensatory damages, and outright prohibition of punitive damages form an unconscionable wall of protection for nursing home operators seeking to escape the full measure of accountability for tortious conduct that imperils a discrete group of vulnerable consumers. This is precisely the evil the Legislature sought to enjoin by passing *N.J.S.A.* 30:13–8.1. We thus hold that these provisions in the arbitration clause of the residency agreement are void and unenforceable under the doctrine of substantive unconscionability.[14]

As was the case in *Muhammad*, our ruling does not focus solely on plaintiffs' ability to individually vindicate their common law rights to obtain complete and fair compensation for their alleged injuries. Our consideration of "the public interests affected by the contract" under *Rudbart* compels a broader inquiry into how the identified restrictions affect our State's public policy of protecting a vulnerable and discrete class of consumers. *Muhammad*, *supra*, 189 *N.J.* at 25, 912 *A.*2d 88.

[300]Finally, this limited record precludes us from determining whether Ms. Azzaro had actual or implied authority to execute the residency agreement on behalf of her late husband. This question must be presented to the trial court for resolution because it is necessary to determine whether a valid contract was ever formed and executed by the parties. *Muhammad*, *supra*, 189 *N.J.* at 12, 912 *A.*2d 88; *see also N.J.S.A.* 2A:23B–6(b). We therefore remand the Azzaro matter to the trial court for consideration of this threshold issue.

VI

As the Court did in *Muhammad*, the remedy here is to enforce our federal policy in favor of arbitration, while excising the unconscionable restrictions that we have concluded are unenforceable under *N.J.S.A.* 30:13–8.1. We thus sever the restrictions on discovery and remand for the parties to present their case to an arbitrator governed by our civil rules of discovery as provided for in the arbitration agreement. We further invalidate the $350,000 limitation on compensatory damages and the bar against punitive damages. The

14. We note that under Section V(A)(11) of the arbitration clause, the parties are equally responsible for fees and costs associated with the arbitration, unless the resident party is proven indigent. This may constitute a significant economic impediment to the prosecution of cases involving resident abuse. Section V(A)(11) also prohibits the resident from recovering attorney fees and costs. This provision appears to run afoul of the explicit language in *N.J.S.A.* 30:13–8(a), which allows any prevailing plaintiff to recover counsel fees and costs. We decline to address these issues, however, because they were not raised by the parties in this appeal. *Nieder v. Royal Indem. Ins. Co.*, 62 *N.J.* 229, 234, 300 *A.*2d 142 (1973).

arbitrator will determine the measure of damages based on the evidence presented, uninhibited by any per se limitations on compensatory damages; punitive damages may also be assessed if warranted.

By way of summary, we reverse the trial court's ruling finding the FAA inapplicable to these agreements. However, we affirm the court's determinations that these contracts are ones of adhesion and that certain restrictions in the arbitration clauses of the residency agreements are substantively unconscionable. We thus sever the offending provisions and remand the Ruszala case for immediate adjudication before an arbitrator. Finally, we remand the Azzaro matter to the trial court to determine whether a valid contract was formed between the parties.

415 N.J.Super. 301

Jacqueline BETANCOURT, Plaintiff–Respondent,

v.

TRINITAS HOSPITAL, Defendant–Appellant.

Superior Court of New Jersey, Appellate Division.

Argued April 27, 2010.

Decided Aug. 13, 2010.

Background: Daughter of patient in a persistent vegetative state filed action to enjoin hospital from implementing Do Not Resuscitate (DNR) order. The Superior Court, Chancery Division, Union County, Malone, J., restrained hospital from withholding treatment. Hospital appealed.

Holdings: The Superior Court, Appellate Division, held that:

(1) dispute was rendered technically moot by patient's death;

(2) moot issue of whether judge erred in appointing patient's daughter as guardian was not justiciable; and

(3) moot issue of whether judge erred in entering restraining order was not justiciable.

Appeal dismissed.

1. Action ⇐6

"Mootness" is a threshold justiciability determination rooted in the notion that judicial power is to be exercised only when a party is immediately threatened with harm.

See publication Words and Phrases for other judicial constructions and definitions.

2. Action ⇐6

A case is technically "moot" when the original issue presented has been resolved, at least concerning the parties who initiated the litigation.

See publication Words and Phrases for other judicial constructions and definitions.

3. Action ⇐6

An issue is "moot" when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy.

4. Action ⇐6

Courts normally will not decide issues when a controversy no longer exists, and the disputed issues have become moot.

5. Action ⇐6

Litigation between hospital and daughter of patient in a persistent vegetative state, arising out of a dispute regarding hospital's Do Not Resuscitate (DNR) order, was rendered technically moot by patient's death.

--- A.2d ----, 2010 WL 3238968 (N.J.Super.A.D.)
(Cite as: 2010 WL 3238968 (N.J.Super.A.D.))

Only the Westlaw citation is currently available.

Superior Court of New Jersey,
Appellate Division.
Koral MOORE, a minor, by and through her Guardians ad Litem, Monica Moore & Kevin Moore and Monica & Kevin Moore, Individually, Plaintiffs-Appellants,
v.
WOMAN TO WOMAN OBSTETRICS & GYNECOLOGY, L.L.C., and Lisa Vernon, M.D., Defendants,
and
Carlos Fernandez, M.D., and Premier Perinatal, L.L.C., Defendants-Respondents.
Submitted June 8, 2010.
Decided Aug. 18, 2010.

SYNOPSIS

Background: Patient brought medical malpractice action against medical providers. Providers filed motion to compel arbitration. pursuant to pre-dispute agreement requiring patient to arbitrate malpractice claims. The Superior Court, Law Division, Ocean County, entered summary judgment grating motion. Patient filed interlocutory appeal.

Holdings: The Superior Court, Appellate Division, Grall, J.A.D., held that:
(1) agreement was not per se unenforceable;
(2) agreement gave patient sufficient notice of rights she was waiving; but
(3) fact issues as to unconscionability of agreement precluded summary judgment.

Reversed and remanded.

West Headnotes

[1] Alternative Dispute Resolution 25T 119

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk118 Matters Which May Be Subject to Arbitration Under Law
25Tk119 k. In General. Most Cited Cases
Pre-dispute agreement between patient and medical providers requiring patient to arbitrate medical malpractice claims was not per se unenforceable, pursuant to section of Arbitration Act providing that agreements to submit to arbitration any existing or subsequent controversy were valid and enforceable; statute encompassed pre-dispute agreements to arbitrate and did not exclude agreements to arbitrate medical malpractice claims. N.J.S.A. 2A:23B-6.

[2] Alternative Dispute Resolution 25T 112

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk112 k. Contractual or Consensual Basis. Most Cited Cases
Arbitration is a creature of contract.

[3] Alternative Dispute Resolution 25T 134(1)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(1) k. In General. Most Cited Cases
An agreement to arbitrate a claim must be a valid agreement.

[4] Alternative Dispute Resolution 25T 112

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk112 k. Contractual or Consensual Basis. Most Cited Cases
Courts decline to enforce an arbitration agreement that is not sufficiently clear as to the rights the party is waiving; in the absence of a consensual understanding, neither party is entitled to force the other to arbitrate their dispute.

--- A.2d ----, 2010 WL 3238968 (N.J.Super.A.D.)
(Cite as: 2010 WL 3238968 (N.J.Super.A.D.))

[5] Alternative Dispute Resolution 25T 134(1)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(1) k. In General. Most Cited Cases
An arbitration agreement depriving a citizen of access to the courts should clearly state its purpose, in order to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their right to sue.

[6] Alternative Dispute Resolution 25T 134(3)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(3) k. Validity of Assent. Most Cited Cases

Alternative Dispute Resolution 25T 134(6)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(6) k. Unconscionability. Most Cited Cases
In considering the law and equity relevant to enforcement of an agreement to arbitrate, courts may decline to enforce when well-established principles addressing the absence of a consensual agreement and unfairness in contracting and the agreement warrant relief; those principles include fraud, duress, mistake, illegality, imposition, undue influence and unconscionability. N.J.S.A. 2A:23B-6.

[7] Contracts 95 1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
Contracts of adhesion are unique; the essential nature of a contract of adhesion is that it is presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity for the adhering party to negotiate except perhaps on a few particulars.

[8] Contracts 95 1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
A contract of adhesion is a contract where one party must accept or reject the contract; such a contract does not result from the consent of that party.

[9] Contracts 95 1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
For the most part, contractual unconscionability involves two factors: (1) unfairness in the formation of the contract, procedural unconscionability and (2) excessively disproportionate terms, substantive unconscionability.

[10] Contracts 95 1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
Because adhesion contracts invariably evidence some characteristics of procedural unconscionability, a careful fact-sensitive examination into substantive unconscionability is generally required in determining such contracts' enforceability.

[11] Contracts 95 1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases

While substantive unconscionability is the focus of determining enforceability of a contract of adhesion, overwhelming procedural unconscionability is considered and the relevant facts are included and weighed in the overall analysis for unconscionability.

[12] Contracts 95 ⚿1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
When making the determination that a contract of adhesion is unconscionable and unenforceable, a court considers, using a sliding scale analysis, the way in which the contract was formed and, further, whether enforcement of the contract implicates matters of public interest.

[13] Contracts 95 ⚿1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
Factors relevant to contractual unconscionability include characteristics of the party presented with a contract of adhesion, such as age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process.

[14] Alternative Dispute Resolution 25T ⚿134(1)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(1) k. In General. Most Cited Cases
Pre-dispute agreement between patient and medical providers requiring patient to arbitrate medical malpractice claims gave patient sufficient notice to patient regarding trial rights patient was waiving, as required for agreement to be enforceable, where agreement stated, in capital letters, that patient agreed to have any issue of alleged medical negligence or breach of contract decided by a binding arbitration process in which both parties were giving up their right to a trial by jury, or a trial by judge, and that parties were waiving all rights to a jury trial in a court of competent jurisdiction and were agreeing to resolve by binding arbitration all disputes arising out of or related to diagnosis, medical care and treatment. N.J.S.A. 2A:23B-6.

[15] Judgment 228 ⚿181(6)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(5) Matters Affecting Right to Judgment
228k181(6) k. Existence of Defense. Most Cited Cases
Genuine issues of material fact as to whether pre-dispute agreement between patient and medical providers requiring patient to arbitrate medical malpractice claims was unconscionable precluded summary judgment in favor of medical providers on issue of enforceability of agreement.
Weiss & Paarz, attorneys for appellants (Robert Paarz, of counsel; Pamela Brown-Jones, on the brief).

Hardin, Kundla, McKeon & Poletto, P.A., attorneys for respondents (Jeffrey A. Oshin, Springfield, on the brief).

Britcher, Leone & Roth, L.L.C., attorneys for amicus curiae New Jersey Association for Justice (E. Drew Britcher, Glen Rock, and Jessica E. Choper, on the brief).

Brach Eichler, L.L.C., attorneys for amicus curiae Medical Society of New Jersey (John D. Fanburg and Joseph M. Gorrell, of counsel; Mr. Gorrell and Lauren D. Fuhrman, Princeton, on the brief).

Before Judges GRALL, MESSANO and LeWINN.

Weiss & Paarz, attorneys for appellants (*Robert Paarz,* of counsel; *Pamela Brown-Jones,* on the brief).*Hardin, Kundla, McKeon & Poletto, P.A.,* attorneys for respondents (*Jeffrey A. Oshin,* on the brief).*Britcher, Leone & Roth, L.L.C.,* attorneys for amicus curiae New Jersey Association for Justice (*E. Drew Britcher* and *Jessica E. Choper,* on the

brief).*Brach Eichler, L.L.C.*, attorneys for amicus curiae Medical Society of New Jersey (*John D. Fanburg* and *Joseph M. Gorrell*, of counsel; *Mr. Gorrell* and *Lauren D. Fuhrman*, on the brief).

***1** The opinion of the court was delivered by GRALL, J.A.D.

Plaintiffs Monica and Kevin Moore are the parents of Koral Moore, who has Down Syndrome. Due to Monica's age, her pregnancy was considered high risk. Her doctor, defendant Lisa Vernon, M.D., practicing with defendant Woman to Woman Obstetrics & Gynecology, L.L.C., referred Monica to defendants Carlos Fernandez, M.D., and Premier Perinatal, L.L.C. (Premier). Plaintiffs filed a complaint alleging medical malpractice and seeking damages, including special damages for extraordinary medical expenses that will be incurred by Monica and Kevin during the child's infancy and by Koral thereafter.

This is an appeal from orders compelling arbitration of all three plaintiffs' claims against defendants Dr. Fernandez and Premier. Relying on an arbitration agreement signed by Monica Moore and Dr. Fernandez on Monica's first visit, which was on June 13, 2008, defendants Dr. Fernandez and Premier moved to dismiss the complaint for failure to state a claim. *R.* 4:6-2(e). Due to defendants' reliance on matters outside the pleadings, the judge treated the motion as one for summary judgment. *R.* 4:6-2. For reasons stated on the record and in a written memorandum dated July 31, 2009, the judge entered an order compelling arbitration of plaintiffs' claims against Dr. Fernandez and Premier and dismissing the complaint without prejudice as to those defendants. The judge stayed the order for sixty days to permit plaintiffs to file an interlocutory appeal and to supplement the record with an additional certification. On August 11, 2009, plaintiffs moved for reconsideration. Dr. Fernandez and Premier opposed that motion, and the judge denied it for reasons stated on the record on September 11, 2009. The July 31 and September 11 orders do not address plaintiffs' claims against defendants Woman to Woman Obstetrics & Gynecology, L.L.C., and Lisa Vernon, M.D.

On plaintiffs' motion for leave to appeal, we followed *Wein v. Morris*, 194 *N.J.* 364, 380, 944 *A.*2d 642 (2008), and entered an order directing that the notice of motion be deemed a notice of appeal. We subsequently entered orders permitting both the New Jersey Association for Justice (the Association) and the Medical Society of New Jersey (the Society) leave to file a brief as amicus curiae.

I

[1] Plaintiffs and the Association urge us to hold that all pre-dispute agreements to submit medical malpractice claims to binding arbitration are unenforceable. Their arguments are fairly summarized as follows: pre-dispute agreements to arbitrate medical malpractice claims are necessarily unconscionable contracts of adhesion; the waiver of rights of access to the court entailed in pre-dispute agreements to arbitrate medical malpractice claims cannot be knowing and voluntary; and the "undemocratic character" of arbitration's flexible rules and its closed proceedings will lead to distrust in the courts.

In essence these arguments for a general rule prohibiting pre-dispute arbitration agreements are based on the nature of the relationship between a doctor and patient; the importance of medical services and the state of mind of persons who seek them; the general fairness of pre-dispute arbitration agreements; and the wisdom of arbitration in general. These are questions of policy.

***2** In our view, the Legislature has resolved these questions in the Arbitration Act, *L.* 2003, *c.* 95 (codified as *N.J.S.A.* 2A:23B-1 to -32). The Legislature's approval of arbitration agreements is broad. Subsection a of *N.J.S.A.* 2A:23B-6 provides: "An agreement contained in a record to submit to arbitration *any existing or subsequent controversy* arising between the parties to the agreement is *valid, enforceable, and irrevocable* except upon a ground that exists at law or in equity for the revocation of a contract." (emphasis added). This provision clearly encompasses pre-dispute agreements to arbitrate.

Moreover, the Act does not prohibit agreements to arbitrate based upon the nature of the disputed claim. While the Legislature has excluded arbitration of certain labor disputes from the provisions of the Act, *N.J.S.A.* 2A:23B-3a, it has not prohibited arbitration of those labor disputes.

Finally, the Legislature has not overlooked cases in which a purported agreement to arbitrate should not be

enforced because there was no agreement to arbitrate or because there are grounds to revoke an agreement to arbitrate. As discussed in the paragraphs that follow, the Act requires courts to address those issues on a case-by-case basis.

[2] Arbitration is " 'a creature of contract.' " *Fawzy v. Fawzy*, 199 *N.J.* 456, 469, 973 *A.*2d 347 (2009) (quoting *Kimm v. Blisset, LLC*, 388 *N.J.Super.* 14, 25, 905 *A.*2d 887 (App.Div.2006), *certif. denied*, 189 *N.J.* 428, 915 *A.*2d 1051 (2007)). An agreement to arbitrate is "valid, enforceable, and irrevocable *except upon a ground that exists at law or in equity for the revocation of a contract.*" *N.J.S.A.* 2A:23B-6a (emphasis added).

[3] "The court shall decide whether an agreement to arbitrate exists...." *N.J.S.A.* 2A:23B-6b. An agreement to arbitrate a claim must be a valid agreement. *See Muhammad v. County Bank of Rehoboth Beach, De.*, 189 *N.J.* 1, 12, 912 *A.*2d 88 (2006) (noting the existence of "a valid arbitration agreement" is a "gateway" question requiring "judicial resolution" (internal quotations omitted)), *cert. denied*, 549 *U.S.* 1338, 127 *S.Ct.* 2032, 167 *L.Ed.*2d 763 (2007). Moreover, the court must decide whether there is a "ground that exists at law or in equity for the revocation of a contract." *N.J.S.A.* 2A:23B-6a. [FN1]

[4][5] Courts decline to enforce an arbitration agreement that is not sufficiently clear as to the rights the party is waiving. " 'In the absence of a consensual understanding, neither party is entitled to force the other to arbitrate their dispute.' " *Fawzy, supra*, 199 *N.J.* at 469, 973 *A.*2d 347 (quoting *In re Arbitration Between Grover & Universal Underwriters Ins. Co.*, 80 *N.J.* 221, 228-29, 403 *A.*2d 448 (1979)). This requirement of a "consensual understanding" about the rights of access to the courts that are waived in the agreement has led our courts to hold that clarity is required. *See id.* at 469-70, 973 *A.*2d 347. Thus, " '[a] clause depriving a citizen of access to the courts should clearly state its purpose. The point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue.' " *Id.* at 469, 973 *A.*2d 347 (quoting *Marchak v. Claridge Commons, Inc.*, 134 *N.J.* 275, 282, 633 *A.*2d 531 (1993)).

***3** [6] In considering the law and equity relevant to enforcement of an agreement to arbitrate as contemplated by subsection a of *N.J.S.A.* 2A:23B-6, courts may decline to enforce when well-established principles addressing the absence of a consensual agreement and unfairness in contracting and the agreement warrant relief. Those principles include fraud, duress, mistake, illegality, imposition, undue influence and unconscionability. *Muhammad, supra*, 189 *N.J.* at 12, 15, 912 *A.*2d 88; *Rudbart v. N. Jersey Dist. Water Supply Comm'n*, 127 *N.J.* 344, 353, 605 *A.*2d 681, *cert. denied*, 506 *U.S.* 871, 113 *S.Ct.* 203, 121 *L.Ed.*2d 145 (1992).

Undue influence warrants avoidance when "by virtue of the relation between [the parties, the party seeking to avoid enforcement was] justified in assuming that that person will not act in a manner inconsistent with his [or her] welfare." *Restatement (Second) of Contracts* § 177(1) (1981). The relationship between physician and patient is one that the comment indicates is within the purview of Section 177. *Id.* at cmt. a to § 177.

[7][8] The Supreme Court addressed unconscionability in the context of contracts of adhesion in *Muhammad* and *Rudbart*. *Muhammad, supra*, 189 *N.J.* at 18, 912 *A.*2d 88; *Rudbart, supra*, 127 *N.J.* at 353-56, 605 *A.*2d 681. Contracts of adhesion are unique. "[T]he essential nature of a contract of adhesion is that it is presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity for the adhering party to negotiate except perhaps on a few particulars." *Rudbart, supra*, 127 *N.J.* at 353, 605 *A.*2d 681 (internal quotations omitted). A contract of adhesion is " '[a] contract where one party ... must accept or reject the contract....' " *Ibid.* (quoting *Vasquez v. Glassboro Serv. Ass'n*, 83 *N.J.* 86, 104, 415 *A.*2d 1156 (1980)). "Such a contract 'does not result from the consent of that party.' " *Ibid.* Consequently, a "distinct body of law surrounding contracts of adhesion" has developed "to determine whether and to what extent such nonconsensual terms will be enforced." *Id.* at 353-54, 605 *A.*2d 681.

[9][10][11][12] "For the most part, the unconscionability [involves] two factors: (1) unfairness in the formation of the contract, [procedural unconscionability] and (2) excessively disproportionate terms [, substantive unconscionability]." *Sitogum Holdings, Inc. v. Ropes*, 352 *N.J.Super.* 555, 564, 800 *A.*2d 915 (Ch.Div.2002); *see Muhammad, supra*, 189 *N.J.* at 15, 912 *A.*2d 88 (discussing *Sitogum* and employing the

terms "procedural" and "substantive" unconscionability). "Because adhesion contracts invariably evidence some characteristics of procedural unconscionability, ... a careful fact-sensitive examination into substantive unconscionability" is generally required. *Muhammad, supra,* 189 *N.J.* at 16, 912 *A.*2d 88. Nonetheless, while substantive unconscionability is the focus when the contract is one of adhesion, "overwhelming procedural unconscionability" is considered and the relevant facts are "included and weighed in the overall analysis for unconscionability." *Id.* at 16 n. 3, 912 *A.*2d 88; *see Delta Funding Corp. v. Harris,* 189 *N.J.* 28, 39-40, 912 *A.*2d 104 (2006). Thus, "[w]hen making the determination that a contract of adhesion is unconscionable and unenforceable, we consider, using a sliding scale analysis, the way in which the contract was formed and, further, whether enforcement of the contract implicates matters of public interest." *Stelluti v. Casapenn Enters, LLC,* 203 *N.J.* 286, 301 & n. 10, 1 *A.*3d 678 (2010).

***4** [13] Factors relevant to unconscionability include characteristics of the party presented with a contract of adhesion, "such as age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process." *Sitogum, supra,* 352 *N.J.Super.* at 564, 800 *A.*2d 915. The "setting existing" is sufficiently broad to warrant consideration of facts such as the relationship between the parties and the services at issue. *See Muhammad, supra,* 189 *N.J.* at 15-16, 912 *A.*2d 88 (noting the relevance of " '[(1)] the subject matter of the contract, [(2)] the parties' relative bargaining positions, [(3)] the degree of economic compulsion motivating the "adhering" party, and [(4)] the public interests affected by the contract' ") (quoting *Rudbart, supra,* 127 *N.J.* at 356, 605 *A.*2d 681); *see also Stelluti, supra,* 203 *N.J.* at 301, 1 *A.*3d 678 (approving consideration of those factors).

Considering the breadth of the foregoing principles relevant to enforcement of an agreement to arbitrate, the policies upon which plaintiffs and the Association rely to urge adoption of a per se rule barring pre-dispute agreements to arbitrate claims of medical malpractice are reasonably addressed by the case-by-case approach the Legislature has directed. For that reason, we see no justification for judicial action imposing an absolute bar to enforcement of agreements to arbitrate such claims. The question is best left to the Legislature.

In *Fawzy,* the Supreme Court considered whether to bar arbitration of custody claims and held that parents may agree to arbitrate questions concerning custody of their children subject only to a special standard for judicial review of the arbitrator's decision to prevent "harm" to the child that warrants interference with parental autonomy. 199 *N.J.* at 471-80, 973 *A.*2d 347. The Court looked to the Act and relied, in part, on the Legislature's broad approval of arbitration pursuant to consensual agreement and the absence of an exception for custody disputes. *Id.* at 469-71, 973 *A.*2d 347. Our decision to reject a per se rule the Legislature has not adopted is consistent with *Fawzy.*

II

[14] We turn to consider whether it was error to compel arbitration pursuant to the pre-dispute agreement signed by Monica Moore and Dr. Fernandez. Because the orders were entered on defendants' motion for summary judgment, we apply the same standards as the trial court. *Kramer v. Ciba-Geigy Corp.,* 371 *N.J.Super.* 580, 602, 854 *A.*2d 948 (App.Div.2004). The facts and reasonable inferences must be considered in the light most favorable to plaintiffs, the non-prevailing parties, and the question is whether defendants were entitled to an order enforcing the agreement as a matter of law. *Brill v. Guardian Life Ins. Co. of Am.,* 142 *N.J.* 520, 540, 666 *A.*2d 146 (1995).

Viewed in that light, these are the pertinent facts. Monica's first appointment with Dr. Fernandez at Premier was on June 13, 2008. She was to be given an ultrasound due to her high-risk pregnancy. Monica's grandson, his mother and Monica's seven-and five-year-old sons were with her. The receptionist gave Monica a clipboard with forms she was to complete. Monica recalls a "medical questionnaire" and "forms concerning privacy and, finances or that sort of thing." She was focused on completing the forms so she could have the test and get her grandson's mother to her doctor's appointment. No one brought her attention to the arbitration agreement. Although Monica does not recall seeing or signing the arbitration agreement, she acknowledges that it bears her signature and is dated June 13, 2008. Monica was not given a copy of the agreement after she signed it or when she left the office.

--- A.2d ----, 2010 WL 3238968 (N.J.Super.A.D.)
(Cite as: 2010 WL 3238968 (N.J.Super.A.D.))

***5** The arbitration agreement is four pages. The title is in bold-face type and capitalized letters, "**ARBITRATION AGREEMENT FOR CLAIMS ARISING OUT OF OR RELATED TO MEDICAL CARE AND TREATMENT.**" Monica filled in the date, her name and her address in the blanks directly below the title. The "whereas" clauses of the agreement purport to memorialize the patient's desire to engage the "Medical Care Provider to provide medical care and treatment"; the Medical Care Provider's "request[ ] that the Patient agree that any claims arising out of or related to the medical care and treatment ... be resolved by binding arbitration"; the Medical Care Provider's "submi[ssion] to the Patient [of] the names of physicians who provide services ... and who do not require that their patients agree to arbitrate" such claims; and the Patient's "hav[ing] informed the physician that she nevertheless desires to receive medical care and treatment" and agrees that such claims "will be resolved by binding arbitration."

In pertinent part, the agreement provides:

> 1. AGREEMENT TO ARBITRATE CLAIMS REGARDING FUTURE CARE AND TREATMENT
>
> (a) Patient and Medical Care Provider agree that any controversy arising between them including, without limitation, claims for medical malpractice, personal injury ... emotional distress ... or any other claims of any kind or nature whatsoever arising out of or in any way related to the diagnosis, treatment or medical care of the Patient by the Medical Care Provider shall be resolved only by binding arbitration conducted in accordance with the provisions of this Agreement.
>
> (b) The Patient's agreement to submit any and all such claims to binding arbitration shall be binding on the Patient, his or spouse, the Patient's children (born or unborn)....
>
> (c) The Patient's agreement to submit to arbitration all claims of any kind or nature arising out of or related to the diagnosis, treatment or medical care provided by the Medical Care Provider shall also include claims against any other medical care provider ... that has provided diagnosis, treatment or medical care in conjunction with, or that is causally related to the diagnosis, treatment and medical care provided to the Patient by the Medical Care Provider ...; provided, however, that in the event any such medical care provider ... shall not agree to participate in binding arbitration ... the Patient shall have the right to pursue claims against [that provider] in a court of competent jurisdiction....
>
> .... [An agreement to arbitrate claims for past care and treatment is omitted.]
>
> 3. WAIVER OF RIGHT TO JURY TRIAL
>
> The Patient and the Medical Care Provider acknowledge that by agreeing to resolve any and all claims ... by binding arbitration, they are abandoning their constitutional right to have such claims or controversies resolved by a jury in a court of law. Both parties acknowledge that they have a full appreciation and understanding of the right to a jury trial that they are abandoning and both the Patient and the Medical Care Provider acknowledge that they are abandoning that right voluntarily and willingly.
>
> ***6** .... [Paragraphs 4-7, addressing, respectively, the statute of limitations, collateral source rule, payment and selection of arbitrators and a limitation on punitive damages, are omitted.]
>
> 8. RIGHT TO COUNSEL
>
> The Patient acknowledges that this Agreement in a legal document with binding consequences and that the patient has been afforded the right to consult with an attorney prior to entering into this Agreement. The Medical Care Provider expressly encourages the Patient to consult with an attorney before entering into this Agreement.
>
> 9. MISCELLANEOUS ITEMS
>
> ....
>
> (e) Patient's Right to Rescind Agreement. The Patient acknowledges that, notwithstanding the Patient's execution of this Agreement, the Patient retains the right to cancel and rescind the Agreement within 15 days of the date of execution by providing written notice to the Medical Care Provider. Such

notice shall be provided by returning a copy of this Agreement to the Medical Care Provider with the word "cancelled" written across the first page thereof and signed by the Patient.

Immediately above the signature line the following notice was provided:

NOTICE: BY SIGNING THIS CONTRACT, YOU ARE AGREEING TO HAVE ANY ISSUE OF ALLEGED MEDICAL NEGLIGENCE OR BREACH OF CONTRACT BETWEEN YOU AND YOUR MEDICAL CARE PROVIDER DECIDED BY A BINDING ARBITRATION PROCESS IN WHICH BOTH PARTIES ARE GIVING UP THEIR RIGHT TO A TRIAL BY JURY, OR A TRIAL BY JUDGE.

At the bottom of the same page beneath the signature lines that warning is repeated as follows:

BY ENTERING INTO THIS AGREEMENT, THE PATIENT AND THE MEDICAL CARE PROVIDERS ARE WAIVING ALL RIGHTS TO A JURY TRIAL IN A COURT OF COMPETENT JURISDICTION AND ARE AGREEING TO RESOLVE BY BINDING ARBITRATION ALL DISPUTES ARISING OUT OF OR RELATED TO [A] PATIENT'S DIAGNOSIS, MEDICAL CARE AND TREATMENT.

As noted above, Monica asserted, and defendants do not dispute, that she did not receive a copy of the agreement. She also claims that she did not receive the list of doctors referenced in the "whereas" clause or a cover letter explaining Premier's policy on arbitration. Dr. Fernandez contended that Monica was provided with both the cover letter and the list, but defendants acknowledge that for purposes of summary judgment that factual dispute must be resolved in Monica's favor.

Plaintiffs contend that the agreement was not sufficiently clear to permit a finding that she knowingly agreed to waive her rights of access to the courts. Her argument is not directed to the right to a trial but to the limited scope of judicial review of an arbitrator's award. Plaintiffs point to the absence of information about the limited right of judicial review mentioned in *Fawzy*.

We do not read *Fawzy* as holding that every party to an agreement to arbitrate must be specifically advised of "the limited circumstances under which a challenge to the arbitration award may be advanced and agree to those limitations...." 199 *N.J.* at 482, 973 *A.*2d 347. In the section of *Fawzy* referencing the importance of that information, the Court discusses "how parents may exercise their rights and bind themselves to arbitrate a child-custody dispute." *Id.* at 481, 973 *A.*2d 347. In that context, the Court refers not only to the statutory limitations but also to a standard for judicial review that is not incorporated in the Arbitration Act and is uniquely applicable in cases involving parental autonomy. *Id.* at 480-81, 973 *A.*2d 347. In the context of custody disputes, constitutional rights beyond litigation rights are at issue. Thus, while this agreement does not include information on the limitations on judicial review, we cannot conclude that the omission of information set forth in *N.J.S.A.* 2A:23B-22 to -24 is an automatic bar to enforcement of an agreement to arbitrate tort claims. This arbitration agreement gave sufficient notice of the trial rights that Monica was waiving.

*7 [15] Nonetheless, defendants were not entitled to summary judgment as a matter of law on the question of unconscionability. There are several factors of procedural and substantive unconscionability that combine to preclude entry of an order enforcing the agreement at this juncture. As noted above, our courts use "a sliding scale analysis" and consider "the way in which the contract was formed and, further, whether enforcement of the contract implicates matters of public interest." *Stelluti, supra,* 203 *N.J.* at 301 & n. 10, 1 *A.*3d 678.

The factors to which we refer are "the particular setting existing during the contract formation process" and the waivers that involve others who are not parties to the agreement. *Sitogum, supra,* 352 *N.J.Super.* at 564, 800 *A.*2d 915. In the context of a contract of adhesion, which this contract clearly is, the "subject matter" and the "parties' relative bargaining positions" as well as public policies implicated are pertinent. *Muhammad, supra,* 189 *N.J.* at 15-16, 912 *A.*2d 88.

Monica sought medical services from a specialist for a high-risk pregnancy. In that circumstance, it was reasonable for Monica to assume that the physician was acting in her interest. She was presented, along

with forms related to medical treatment and privacy rights and payment for the services, a copy of a contract of adhesion that is a pre-dispute arbitration agreement. Apart from the plain, prominent and unambiguous text of the agreement, she was not alerted to the fact that a contract waiving her rights and the rights of her husband and child was among those forms.

The contract of adhesion Monica signed gave her notice of her right to seek the advice of counsel and a right to withdraw from the agreement within fifteen days. Nonetheless, Monica was not given a copy of the agreement, which was essential to the exercise of those contractual rights. Thus, while these provisions of the agreement suggest procedural fairness through an effort to ensure that that the agreement is accepted with full understanding and after thoughtful consideration over a fifteen-day period, the failure to provide the patient with a copy of the contract, as a practical matter, renders them ineffective and gives rise to an inference of additional inequality in the parties' respective bargaining positions.

While arbitration has been approved by the Legislature and, for that reason, cannot be deemed inconsistent with public policy, the waivers exacted in this agreement are overreaching in one aspect. This agreement to arbitrate includes waivers of the rights of persons who are not parties to the agreement-the patient's spouse and unborn child. Those provisions are not agreements to "submit to arbitration any existing or subsequent controversy arising between the parties to the agreement...." *N.J.S.A.* 2A:23B-6a. While the Supreme Court has held that a parent may "bind a minor child to arbitrate future tort claims," *Hojnowski v. Vans Skate Park*, 187 *N.J.* 323, 343, 901 *A.*2d 381 (2006), we are not aware of any legal theory that would permit one spouse to bind another to an agreement waiving the right to trial on his or her claim without securing his consent to the agreement.

***8** We disagree with the trial court's legal conclusion that Monica could waive her husband's right to a trial because his claim is "derivative" of hers. The claim asserted by Kevin, as husband of Monica and father of Koral, is an individual claim. *Procanik by Procanik v. Cillo*, 97 *N.J.* 339, 348, 478 *A.*2d 755 (1984) (describing wrongful birth as a "cause of action of parents who claim that the negligent advice or treatment deprived them of [a] choice"). This is not to say that a medical care provider is precluded from conditioning the provision of obstetrical care on an agreement to arbitrate accepted by both parents, but that is not what was done here.

This agreement also includes a one-sided waiver of rights to adjudicate claims against other medical care providers who are not parties to the agreement. Those other health care providers, but not the patient, can decline to arbitrate.

Under the totality of the circumstances in this case, defendants were not entitled to summary judgment enforcing this agreement over plaintiffs' claims that this contract of adhesion was procedurally and substantively unconscionable.

The order granting summary judgment and dismissing, without prejudice, plaintiffs' claims against defendants Dr. Fernandez and Premier is reversed. The matter is remanded for further proceedings.

FN1. In contrast, pursuant to subsection c of *N.J.S.A.* 2A:23B-6, the "arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and *whether a contract containing a valid agreement* to arbitrate is enforceable." (emphasis added). As the emphasized language indicates, subsection c assumes that any dispute about the validity of the agreement to arbitrate has been resolved by the court. *N.J.S.A.* 2A:23B-6 is identical to Section 6 of the Uniform Arbitration Act (UAA) (2000). As the official comment to Section 6 of the UAA explains, the arbitrator's authority under subsection c encompasses matters of procedural prerequisites relevant to arbitration proceedings "such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate...." *UAA, Section 6: Validity Of Agreement To Arbitrate*, cmt. 2. The Commissioners' comments to the UAA are available at http://www.law.upenn.edu/bll/archives/ulc/uarba/arb1031.htm. With exceptions expressly noted, the sponsor of New Jersey's Act endorsed the Commissioners' Official Comments. *See Note* to *N.J.S.A.* 2A:23B-1 (quoting *Assembly Judiciary Committee Statement to S. 514-L.2003, c. 95*).

> The Commissioners' comment makes it clear that subsection c of Section 6 is not intended to limit the court's authority to determine questions of fraud, illegality, mutual mistake, duress or unconscionability relevant to the agreement to arbitrate. They explain: "The language in section 6(c), 'whether a contract containing a valid agreement to arbitrate is enforceable,' is intended to follow the 'separability' doctrine outlined in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 *U.S.* 395 [87 *S.Ct.* 1801, 18 *L.Ed.*2d 1270] (1967)." *Id.* at cmt. 4. In *Prima Paint*, the Court distinguished claims of fraud in the inducement related "to the arbitration clause itself-an issue which goes to the 'making' of the agreement to arbitrate-" and should be adjudicated by the courts from claims of fraud in the inducement of the contract in general, an issue which should be addressed by the arbitrator. 388 *U.S.* at 403-04, 87 *S.Ct.* 1801.

N.J.Super.A.D.,2010.
Moore v. Woman To Woman Obstetrics & Gynecology, L.L.C.
--- A.2d ----, 2010 WL 3238968 (N.J.Super.A.D.)

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189 N.J. 1

Jaliyah MUHAMMAD, on her own behalf and all others similarly situated, Plaintiff–Appellant,

v.

COUNTY BANK OF REHOBOTH BEACH, DELAWARE and Main Street Service Corporation, Defendants–Respondents,

and

Easycash, Telecash, John Doe and John Roe, Defendants.

Supreme Court of New Jersey.

Argued Feb. 14, 2006.

Decided Aug. 9, 2006.

Background: Borrower brought class action against lender and servicer of payday loan, alleging that all defendants violated the New Jersey Consumer Fraud Act, the servicer violated usury law and the New Jersey Racketeer Influenced and Corrupt Organizations Act (RICO), and the lender conspired to violate RICO. Defendants moved to compel arbitration. The Superior Court, Law Division, Union County, granted motion. Borrower appealed, and the Superior Court, Appellate Division, affirmed, 379 *N.J.Super.* 222, 877 *A.*2d 340. Borrower appealed.

Holdings: The Supreme Court, LaVecchia, J., held that:

(1) court, rather than arbitrator, was required to determine whether class-action arbitration waiver in loan agreement was valid;

(2) challenge was not a challenge to the contract as a whole but rather was a specific challenge to the arbitration agreement;

(3) as a matter of first impression, class-arbitration waiver contained in arbitration agreement was unconscionable due to public interest at stake; and

(4) class-arbitration waivers were severable such that remainder of the arbitration agreements were enforceable.

Reversed and remanded.

Rivera–Soto, J., concurred in part and dissented in part with opinion.

1. Alternative Dispute Resolution ⚿134(6)

The Federal Arbitration Act (FAA) does not preclude an examination into whether the arbitration agreement at issue is unconscionable under state law. 9 U.S.C.A. § 1 et seq.

2. Alternative Dispute Resolution ⚿134(3, 6)

Generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening the Federal Arbitration Act (FAA). 9 U.S.C.A. § 2.

3. Alternative Dispute Resolution ⚿199

The issue of whether the parties have a valid arbitration agreement at all is a gateway question that requires judicial resolution.

4. Alternative Dispute Resolution ⚿202

Court, rather than arbitrator, was required to determine whether class-action arbitration waiver in loan agreement was valid, as agreement was not silent or even ambiguous as to the availability of class arbitration.

5. Alternative Dispute Resolution ⚿199

A court must decide whether an agreement to arbitrate is valid.

6. Alternative Dispute Resolution ⚿202

Borrower's challenge to class-action arbitration waiver in loan agreement was not a challenge to the contract as a whole, but rather was a specific challenge to the

arbitration agreement such that court, rather than arbitrator, could decide validity of waiver; based on their location and subject matter, distinct class-arbitration waivers within arbitration clauses of both loan note and disclosure form and the loan application were part of the arbitration agreements, and not part of the contracts as a whole.

7. Contracts ⇐1

Courts may refuse to enforce contracts that are unconscionable.

8. Contracts ⇐1

The determination that a contract is one of adhesion is the beginning, not the end, of the inquiry into whether a contract, or any specific term therein, should be deemed unenforceable based on policy considerations.

9. Contracts ⇐1

A sharpened inquiry concerning unconscionability is necessary when a contract of adhesion is involved.

10. Parties ⇐35.1

The class-action mechanism is valuable to litigants, to the courts, and to the public interest.

11. Alternative Dispute Resolution ⇐134(6)

Contracts ⇐1

Class-arbitration waiver contained in arbitration agreement in payday loan adhesion contract was unconscionable due to public interest at stake, as class-arbitration bar effectively prevented borrower from pursuing her consumer protection rights and shielded lenders from compliance with state law; action involving complicated financial arrangements and multiple out-of-state entities, and damages amount sought by borrower added up to maximum of less $600. N.J.S.A. 31:1–1; 56:8–2.

12. Contracts ⇐1

Adhesive consumer contracts which are ordinarily enforceable nonetheless may rise to the level of unconscionability when substantive contractual terms and conditions impact public interests adversely.

13. Contracts ⇐114

Exculpatory waivers that seek a release from a statutorily imposed duty are void as against public policy.

14. Contracts ⇐1

Class-action waivers are problematic when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages.

15. Contracts ⇐1

When substantial damages are at stake, the court considering the validity of a class-action waiver in a contract of adhesion should consider whether the availability of attorney's fees, including any possible fee enhancement, in conjunction with a substantial potential damages award, including any potential statutory multipliers, would allow a substantial number of consumers to obtain counsel and seek relief such that the waiver would be valid.

16. Alternative Dispute Resolution ⇐111

The purpose of arbitration is not to discourage consumers from seeking vindication of their rights.

17. Alternative Dispute Resolution ⇐140

Unconscionable class-arbitration waivers in arbitration agreements contained in payday loan adhesion contracts were severable such that remainder of the arbitration agreements were enforceable, as use of language "to the extent permitted by law" in broad class-action waivers indicat-

ed intention that arbitration agreement would be implemented whether and to whatever extent class-wide arbitration might be barred.

18. Alternative Dispute Resolution ⇐140

If all the provisions of the arbitration clause are enforceable, then the court must compel arbitration according to the terms of the agreement; if, however, some or all of its provisions are not enforceable, then the court must determine whether the unenforceable provisions are severable.

19. Alternative Dispute Resolution ⇐140

Severability of unenforceable portions of an arbitration agreement is decided as a matter of state law.

20. Alternative Dispute Resolution ⇐140

If the offensive terms of an arbitration agreement are severable, then the court must compel arbitration according to the remaining, valid terms of the parties' agreement; the court should deny a motion to compel arbitration only where the invalid terms of the arbitration clause render the entire clause void as a matter of state law.

Michael J. Quirk, a member of the New York and District of Columbia bars, argued the cause for appellant (Trujillo, Rodriguez & Richards and Williams, Cuker & Berezofsky, attorneys; Mr. Quirk, Donna Siegel Moffa and Mark R. Cuker, on the briefs).

Marc J. Zucker and Claudia T. Callaway, a member of the District of Columbia bar, argued the cause for respondents (Weir & Partners, attorneys for County Bank of Rehoboth Beach, Delaware and Sweeney & Sheehan, attorneys for Main Street Service Corporation; Mr. Zucker, Ms. Callaway, Susan M. Verbonitz, John Michael Kunsch, on the briefs).

David G. McMillin argued the cause for amicus curiae Legal Services of New Jersey (Melville D. Miller, Jr., President, attorney; Mr. McMillin, Mr. Miller and Christopher Hill, on the brief).

Jeffrey C. Burstein, Assistant Attorney General, argued the cause for amici curiae Attorney General of New Jersey and The New Jersey Division of Consumer Affairs (Zulima V. Farber, Attorney General, attorney; Mr. Burstein and Carol G. Jacobson, Deputy Attorney General, on the brief).

David M. Gossett, a member of the Illinois and District of Columbia bars, argued the cause for amicus curiae Chamber of Commerce of the United States of America (Drinker Biddle & Reath, attorneys; Mr. Gossett, Evan M. Tager, a member of the New York and District of Columbia bars, Robin S. Conrad, a member of the District of Columbia bar, Amar D. Sarwal, a member of the District of Columbia bar, of counsel; Andrew B. Joseph, on the brief).

William J. Pinilis submitted a brief on behalf of amici curiae AARP, Consumers League of New Jersey and National Association of Consumer Advocates.

Marvin J. Brauth and Jeffrey J. Brookner submitted a brief on behalf of amicus curiae New Jersey Business and Industry Association (Wilentz, Goldman & Spitzer, attorneys; Mr. Brauth, of counsel; Mr. Brauth and Mr. Brookner, on the brief).

Justice LaVECCHIA delivered the opinion of the Court.

[6]In this appeal we must determine whether a provision in an arbitration agreement that is part of a consumer contract of adhesion is unconscionable and

therefore unenforceable because it forbids class-wide arbitration. Plaintiff entered into a short-term loan agreement, the terms of which she claims violate the State's consumer-fraud statutes. Her complaint includes allegations that the State's civil usury limits are being evaded in loan transactions such as hers by means of a conspiracy involving complex financial dealings among out-of-state financial entities. The damages allegedly caused by such transactions are small on an individual-by-individual basis, but are substantial when aggregated into a class claim. Plaintiff seeks, therefore, to pursue a class action and is willing to pursue her class-wide claim in the arbitral forum but for the arbitration agreement's class-arbitration bar. Both the trial court and the Appellate Division found the class-arbitration bar enforceable.

Applying the controlling test for determining unconscionability for contracts of adhesion set forth in *Rudbart v. North Jersey* |7*District Water Supply Commission*, 127 *N.J.* 344, 605 *A.*2d 681, *cert. denied*, 506 *U.S.* 871, 113 *S.Ct.* 203, 121 *L.Ed.*2d 145 (1992), we hold that the class-arbitration waiver in this consumer contract is unenforceable. Such a waiver would be unconscionable whether applied in a lawsuit or in arbitration. We further conclude that the appropriate remedy in these circumstances is to sever the unconscionable provision and enforce the otherwise valid arbitration agreement.

I.

Defendant County Bank of Rehoboth Beach, Delaware (County Bank) is a federally-insured depository institution chartered under Delaware law. Defendant Main Street Service Corp. (Main Street) is a loan servicer for County Bank. Main Street operates a telephone service center in Pennsylvania. Defendants Easy Cash and Telecash are registered trade names of County Bank.

On May 23, 2003, plaintiff Jaliyah Muhammad, a part-time student at Berkeley College in Paramus, received a short-term, single advance, unsecured loan of $200 from County Bank. According to the terms of the LOAN NOTE AND DISCLOSURE form that Muhammad signed, the principal, along with a finance charge of sixty dollars, was due on June 13, 2003. The annual percentage rate listed on the loan note was 608.33%. According to Muhammad, she twice extended the loan (with a sixty dollar finance charge each time) because she could not repay it, resulting in a total of $180 in finance charges. Those facts are unchallenged by defendants. Muhammad also obtained two similar loans from County Bank, dated April 28, 2003 and June 6, 2003.

Muhammad had to complete and return three pages of standard form contracts in order to receive a loan. The first two pages, entitled "LOAN APPLICATION," were signed by Muhammad on April 28, 2003. Muhammad did not have to complete that form again in connection with the loans made on May 23, 2003 and June 6, 2003. The first page of the LOAN APPLICATION requested |8general personal information. The second page contained the relevant provisions concerning arbitration:

> AGREEMENT TO ARBITRATE ALL DISPUTES: By signing below and to induce us, County Bank of Rehoboth Beach, Delaware, to process your application for a loan, you and we agree that any and all claims, disputes or controversies that we or our servicers or agents have against you or that you have against us, our servicers, agents, directors, officers and employees, that arise out of your application for a loan, the Loan Note or Agreement that you

must sign to obtain the loan, this agreement to arbitrate all disputes, collection of the loan, or alleging fraud or misrepresentation, whether under the common law or pursuant to federal or state statute or regulation, including the matters subject to arbitration, *or otherwise, shall be resolved by binding individual (and not class) arbitration* by and under the Code of Procedures of the National Arbitration Forum ("NAF") in effect at the time the claim is filed. This agreement to arbitrate all disputes shall apply no matter by whom or against whom the claim is filed....

NOTICE: YOU AND WE WOULD HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE DISPUTES THROUGH A COURT AND HAVE A JUDGE OR JURY DECIDE THE DISPUTES BUT HAVE AGREED INSTEAD TO RESOLVE DISPUTES THROUGH BINDING ARBITRATION.

AGREEMENT NOT TO BRING, JOIN OR PARTICIPATE IN CLASS ACTIONS: To the extent permitted by law, by signing below you agree that you will not bring, join or participate in any class action as to any claim, dispute or controversy you may have against us or our agents, servicers, directors, officers and employees. You agree to the entry of injunctive relief to stop such a lawsuit or to remove you as a participant in the suit. You agree to pay the costs we incur, including our court costs and attorney's fees, in seeking such relief. This agreement is not a waiver of any of your rights and remedies to pursue a claim individually and not as a class action in binding arbitration as provided above. This agreement not to bring or participate in class action suits is an independent agreement and shall survive the closing and repayment of the loan for which you are applying.

[(Emphasis added).]

Above the signature line, the LOAN APPLICATION also stated that "[b]y signing below you also agree to the Agreement to Arbitrate All Disputes and the Agreement Not To Bring, Join or Participate In Class Actions...."

In respect of the May 23, 2003 loan, Muhammad also executed a LOAN NOTE AND DISCLOSURE form that included the following language.

AGREEMENT TO ARBITRATE ALL DISPUTES: You and we agree that any and all claims, disputes or controversies between you and us and/or the Company, any claim by either of us against the other or the Company (or the employees, officers, directors, agents or assigns of the other or the Company) and any claim [9] arising from or relating to your application for this loan or any other loan you previously, now or may later obtain from us, this Loan Note, this agreement to arbitrate all disputes, your agreement not to bring, join or participate in class actions, regarding collection of the loan, alleging fraud or misrepresentation, whether under the common law or pursuant to federal, state or local statutes, regulation or ordinance, including disputes as to the matters subject to arbitration, or otherwise, *shall be resolved by binding individual (and not joint) arbitration* by and under the Code of Procedure of the National Arbitration Forum ("NAF") in effect at the time the claim is filed. This agreement to arbitrate all disputes shall apply no matter by whom or against whom the claim is filed.... This arbitration agreement is made pursuant to a transaction involving interstate commerce. It shall be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1–16....

NOTICE: YOU AND WE WOULD HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE DISPUTES THROUGH A COURT AND HAVE A JUDGE OR JURY DECIDE THE DISPUTES BUT HAVE AGREED INSTEAD TO RESOLVE DISPUTES THROUGH BINDING ARBITRATION.

AGREEMENT NOT TO BRING, JOIN OR PARTICIPATE IN CLASS ACTIONS: To the extent permitted by law, you agree that you will not bring, join or participate in any class action as to any claim, dispute or controversy you may have against us, our employees, officers, directors, servicers and assigns. You agree to the entry of injunctive relief to stop such a lawsuit or to remove you as a participant in the suit. You agree to pay the attorney's fees and court costs we incur in seeking such relief. This Agreement does not constitute a waiver of any of your rights and remedies to pursue a claim individually and not as a class action in binding arbitration as provided above.

[(Emphasis added).]

If that were not clear enough, directly above the signature line, the LOAN NOTE AND DISCLOSURE form also stated, that "BY SIGNING BELOW, YOU AGREE TO ALL OF THE TERMS OF THIS NOTE, INCLUDING THE AGREEMENT TO ARBITRATE ALL DISPUTES AND THE AGREEMENT NOT TO BRING, JOIN OR PARTICIPATE IN CLASS ACTIONS."

Thus, the contracts signed by Muhammad contain two types of class-action prohibitions. The first, referred to herein as the "class-arbitration waivers," are found within the text of the arbitration clauses and highlighted above. They specifically bar class claims in arbitration. The second, referred to herein as the "broad class-action waivers," are separate from the arbitration clauses and prohibit Muhammad from bringing or participating in class-action suits brought in court as well as class claims brought in arbitration.

In February 2004, Muhammad filed a putative class-action suit in New Jersey Superior Court against County Bank, Easy Cash, Telecash, Main Street, John Doe, and John Roe. The complaint alleged that Easy Cash, Telecash, and Main Street violated the Consumer Fraud Act (CFA), *N.J.S.A.* 56:8–2, the civil usury statute, *N.J.S.A.* 31:1–1, and the New Jersey RICO statute, *N.J.S.A.* 2C:41–1, by charging, and conspiring to charge, illegal rates of interest. The complaint further alleged that County Bank aided and abetted the unlawful conduct of the other defendants by renting out its name and status without actually funding or meaningfully participating in the loans. Muhammad requested injunctive relief, restitution, damages, penalties, and costs.

Defendants removed the action to federal district court, but because Muhammad's claims were determined by that court not to be preempted by the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 *U.S.C.* § 1831d, the case was remanded to state court. Defendants thereupon filed a motion to compel arbitration and to stay the action pending arbitration. They also filed a motion requesting a protective order in respect of discovery. Muhammad opposed defendants' motions and filed a cross-motion concerning discovery. Muhammad argued that the arbitration agreement was unconscionable based on the class-action waiver, discovery limitations in NAF's rules, the costs of the arbitration, and the bias inherent in NAF as an arbitration forum.[1] In

1. If the parties fail to agree on discovery matters, *NAF Rule* 29C allows mandatory dis-

response, defendants offered to arbitrate Muhammad's claims in the American Arbitration Association rather than the NAF—an offer that Muhammad rejected.

[11]The trial court granted defendants' motion to compel arbitration pursuant to the Federal Arbitration Act (FAA), 9 *U.S.C.* § 4, and stayed the case pending arbitration. Muhammad filed a motion for leave to appeal, which was granted. In a published decision, the Appellate Division affirmed the trial court. *Muhammad v. County Bank of Rehoboth Beach*, 379 *N.J.Super.* 222, 877 *A.*2d 340 (App.Div. 2005). Applying *Rudbart, supra*, 127 *N.J.* at 353, 605 *A.*2d 681, the panel concluded that the arbitration agreement was not unconscionable. *Muhammad, supra*, 379 *N.J.Super.* at 237–48, 877 *A.*2d 340. In upholding the class-arbitration bar specifically, the Appellate Division relied on its earlier decision in *Gras v. Associates First Capital Corp.*, 346 *N.J.Super.* 42, 786 *A.*2d 886 (2001), *certif. denied*, 171 *N.J.* 445, 794 *A.*2d 184 (2002), which, the panel believed, "directly address[ed]" the class-action waiver issue. *Muhammad, supra*, 379 *N.J.Super.* at 244–48, 877 *A.*2d 340. Judge Kestin filed a separate concurring opinion. *Id.* at 249, 877 *A.*2d 340.

Plaintiff filed a motion for leave to appeal, which we granted. 185 *N.J.* 254, 883 *A.*2d 1054 (2005). Legal Services of New Jersey filed a brief as amicus curiae in support of Muhammad. AARP, the Consumers League of New Jersey, and the National Association of Consumer Advocates filed a joint brief in support of Muhammad. Also, the Attorney General on behalf of the New Jersey Division of Consumer Affairs filed a brief in Muhammad's support. The Chamber of Commerce of the United States of America and the New Jersey Business and Industry Association filed amicus briefs in support of defendants.

II.

A.

[1] Congress enacted the FAA, 9 *U.S.C.* §§ 1–16, "to abrogate the then-existing common law rule disfavoring arbitration agreements 'and to place arbitration agreements upon the same footing as other contracts.' " *Martindale v. Sandvik, Inc.*, 173 *N.J.* 76, 84, [12]800 *A.*2d 872 (2002) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 *U.S.* 20, 24, 111 *S.Ct.* 1647, 1651, 114 *L.Ed.*2d 26, 36 (1991)). Section 2 of the FAA provides that arbitration agreements covered by the Act "shall be valid, irrevocable, and enforceable save upon grounds as exist at law or in equity for the revocation of any contract." 9 *U.S.C.* § 2. "In enacting section 2 of the FAA, 'Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.' " *Martindale, supra*, 173 *N.J.* at 84, 800 *A.*2d 872 (quoting *Southland Corp. v. Keating*, 465 *U.S.* 1, 10, 104 *S.Ct.* 852, 858, 79 *L.Ed.*2d 1, 12 (1984)). The FAA, however, does not preclude an examination into whether the arbitration agreement at issue is unconscionable under state law. *Id.* at 85–86, 800 *A.*2d 872.

[2, 3] "[G]enerally applicable contract defenses, such as fraud, duress, or *unconscionability*, may be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Assocs., Inc. v. Casarotto*, 517 *U.S.* 681, 687, 116 *S.Ct.* 1652, 1656,

covery where the "cost [of discovery] is commensurate with the amount of the Claim." Muhammad contends that because her damages are only $180, limiting discovery to that amount, in the context of a complex claim, precludes her from obtaining relief.

134 *L.Ed.*2d 902, 909 (1996) (emphasis added); *see also Discover Bank v. Superior Court*, 36 *Cal.*4th 148, 30 *Cal.Rptr.*3d 76, 113 *P.*3d 1100, 1112–13 (2005) (stating that "the FAA does not federalize the law of unconscionability or related contract defenses except to the extent that it forbids the use of such defenses to discriminate against arbitration clauses."). Furthermore, "whether the parties have a valid arbitration agreement at all" is a "gateway" question that requires judicial resolution. *Green Tree Fin. Corp. v. Bazzle*, 539 *U.S.* 444, 452, 123 *S.Ct.* 2402, 2407, 156 *L.Ed.*2d 414, 422 (2003) (plurality opinion).

[4, 5] It is clear that under *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 *U.S.* 395, 403–04, 87 *S.Ct.* 1801, 1806, 18 *L.Ed.*2d 1270, 1277 (1967), "a court must decide whether [an] agreement to arbitrate is valid." *Barker v. Golf U.S.A., Inc.*, 154 *F.*3d 788, 791 (8th Cir. 1998), *cert. denied*, 525 *U.S.* 1068, 119 *S.Ct.* 796, 142 *L.Ed.*2d 659 (1999). That said, were this contract [13]silent or ambiguous about the availability of class-wide arbitration, an arbitrator would have to resolve the question of contract interpretation. *See Bazzle, supra*, 539 *U.S.* at 451, 123 *S.Ct.* at 2407, 156 *L.Ed.*2d at 422 (holding that when arbitration agreement is silent on subject, arbitrator is to decide "whether the agreement forbids class arbitration"). The instant agreement is not silent, however, or even ambiguous as to the availability of class arbitration. Not only does the LOAN NOTE AND DISCLOSURE FORM state that all disputes "shall be resolved by binding individual (and not joint) arbitration," but the April 28, 2003 LOAN APPLICATION also states all disputes "shall be resolved by binding individual (and not class) arbitration." Both documents also reference the NAF rules of procedure, which bar class-wide arbitrations unless all parties consent. *See NAF Rule* 19(a). Furthermore, in addition to the class-arbitration waivers found in the arbitration agreements themselves, the broad class-action waivers found elsewhere in the contracts also contain clear and unmistakable language prohibiting Muhammad's use of a class mechanism.

Other courts similarly have distinguished *Bazzle*. For example, in *Gipson v. Cross Country Bank*, 354 *F.Supp.*2d 1278, 1286 (M.D.Ala.2005), the court, in the course of upholding a particular class-arbitration waiver, stated that

> [t]he contract before this court now is distinguishable from the one in *Bazzle*, because here the clause prohibiting class arbitration is clear, that is, there is no issue of contract interpretation as there was in *Bazzle*. Put another way, the Court plurality in *Bazzle* felt that the answer as to whether the contracts allowed or prohibited class arbitration was "not completely obvious," hence contract interpretation, which is the realm of the arbitrator, would be necessary. Here, however, an arbitrator need not interpret the contract's class action waiver clause, because the contract expressly prohibits class arbitration, thereby concerning "the validity of the arbitration clause," which the *Bazzle* plurality indicated could fall under the narrow exception concerning matters "contracting parties would likely have expected a court" to decide. There is no need for anyone to decide "whether the contract[ ] forbid[s] class arbitration." It expressly and unequivocally does. The only issue is whether such a clear prohibition is valid and enforceable....
>
> [(Citations omitted).]

[14]**[6]** For completeness we note defendants' argument that Muhammad's claims must fail because her challenge to the class-action waiver should be viewed as a challenge to the contract as a whole, and

not as a specific challenge to the arbitration agreement. *Prima Paint, supra*, 388 *U.S.* 395, 87 *S.Ct.* 1801, 18 *L. Ed.*2d 1270, and *Buckeye Check Cashing, Inc. v. Cardegna*, — *U.S.* —, 126 *S.Ct.* 1204, 163 *L.Ed.*2d 1038 (2006), hold that because arbitration agreements are, as a matter of federal arbitration law, severable from the remainder of a contract, a challenge to a contract as a whole is for an arbitrator to decide. In this matter, however, there are two types of class-action waivers in the contracts Muhammad signed: the class-arbitration waivers and the broad class-action waivers. The broad class-action waivers could be considered distinct from the arbitration agreement in the contracts, and thus could be considered part of the "contract as a whole." In that circumstance, under *Prima Paint* and *Buckeye*, an arbitrator would address the unconscionability of the broad class-action waivers. That situation is not before us, however, because there are distinct class-arbitration waivers within the arbitration clauses of both the LOAN NOTE AND DISCLOSURE form and the APPLICATION. Those class-arbitration waivers, based on their location and subject matter, are part of the arbitration agreements, and not part of the contracts as a whole. As such, we are empowered to address this challenge.

Because federal arbitration law does not prevent us from examining the validity of the class-arbitration waiver, we turn then to our own state law requirements in respect of contract unconscionability.[2]

B.

[7] It is well settled that courts "may refuse to enforce contracts that are unconscionable." *Saxon Constr. & Management Corp. v. Masterclean of N.C., Inc.*, 273 *N.J.Super.* 231, 236, 641 *A.*2d 1056 (), *certif. denied*, 137 *N.J.* 314, 645 *A.*2d 142 (1994); *see also N.J.S.A.* 12A:2–302 (adopting Uniform Commercial Code provision recognizing unconscionability as basis for voiding contract or clause therein). The seminal case of *Rudbart, supra*, set out factors for courts to consider when determining whether a specific term in a contract of adhesion is unconscionable and unenforceable. 127 *N.J.* at 356, 605 *A.*2d 681. In *Rudbart, supra*, this Court recognized that adhesion agreements necessarily involve indicia of procedural unconscionability. *Ibid.; see generally Sitogum Holdings, Inc. v. Ropes*, 352 *N.J.Super.* 555, 564–66, 800 *A.*2d 915 (Ch.Div.2002) (observing that unconscionability traditionally entails discussion of two factors: procedural unconscionability, which "can include a variety of inadequacies, such as age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process," and substantive unconscionability, which generally involves harsh or unfair one-sided terms). *Rudbart, supra*, notes that "the essential nature of a contract of adhesion is that it is presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity for the 'adhering' party to negotiate except perhaps on a few particulars." 127 *N.J.* at 353, 605 *A.*2d 681.

[8, 9] The determination that a contract is one of adhesion, however, "is the

2. The Appellate Division concluded that defendants had waived any argument that Delaware law should be applied (based on a choice of law clause in the contract). The panel found the issue to have been waived because it was not raised before the trial court and was raised only in a footnote in defendants' Appellate Division brief. *Muhammad, supra*, 379 *N.J.Super.* at 234 n. 3, 877 *A.*2d 340. Defendants did not seek review of the Appellate Division's determination of that issue.

beginning, not the end, of the inquiry" into whether a contract, or any specific term therein, should be deemed unenforceable based on policy considerations. *Id.* at 354, 605 *A.*2d 681. A sharpened inquiry concerning unconscionability is necessary when a contract of adhesion is involved.

> [I]n determining whether to enforce the terms of a contract of adhesion, courts have looked not only to the take-it-or-leave-it nature or the standardized form of the document but also to [(1)] the subject matter of the contract, [(2)] the parties' [16]relative bargaining positions, [(3)] the degree of economic compulsion motivating the "adhering" party, and [(4)] the public interests affected by the contract.
>
> [*Id.* at 356, 605 *A.*2d 681.]

Because adhesion contracts invariably evidence some characteristics of procedural unconscionability, the Court required a careful fact-sensitive examination into substantive unconscionability.[3] *Ibid. Rudbart's* multi-factor analysis generally conforms to the case-by-case approach widely used for evaluating claims of unconscionability. *See Cheshire Mortg. Serv. v. Montes,* 223 *Conn.* 80, 612 *A.*2d 1130, 1135 (1992) (stating that, under the UCC, "[t]he determination of unconscionability is to be made on a case-by-case basis, taking into account all of the relevant facts and circumstances.").

C.

The unconscionability issue in this matter centers on access to a class-wide proceeding in the arbitral setting. Although class arbitration specifically has never before been examined by this Court, the merits of the class-action procedure have been acknowledged many times in the context of court litigation. "By permitting claimants to band together, class actions equalize adversaries and provide a procedure to remedy a wrong that might otherwise go unredressed." *In re Cadillac V8–6–4 Class Action,* 93 *N.J.* 412, 424, 461 *A.*2d 736 (1983). "If each victim were remitted to an individual suit, the remedy could be illusory, for the individual loss may be too small to warrant a suit.... Thus the wrongs would go without redress, and there would be no deterrence to further [17]aggressions." *Riley v. New Rapids Carpet Ctr.,* 61 *N.J.* 218, 225, 294 *A.*2d 7 (1972). Other courts have referred to such small damage cases as "negative value" suits recognizing that they "would be uneconomical to litigate individually." *In re Monumental Life Ins. Co.,* 365 *F.*3d 408, 411 n. 1 (5th Cir.2004).

The class-action vehicle remedies the incentive problem facing litigants who seek only a small recovery. "[A] class action can produce a substantial fund to compensate ... [the class members'] attorney for his services." *In re Cadillac, supra,* 93 *N.J.* at 424, 461 *A.*2d 736. A "substantial fund" not only covers the attorney's actual fees, but also provides incentive in the form of possible contingency fees for attorneys to risk the prospect of receiving no recovery for their efforts. *See Amchem Products, Inc. v. Windsor,* 521 *U.S.* 591, 617, 117 *S.Ct.* 2231, 2246, 138 *L.Ed.*2d 689,

3. This is not to say that when a contract of adhesion involves overwhelming procedural unconscionability, that those procedural factors are not included and weighed in the overall analysis for unconscionability. *See, e.g., Discover Bank, supra,* 36 *Cal.*4th 148, 30 *Cal.Rptr.*3d 76, 113 *P.*3d 1100 (finding gross unfairness in contract formation when bill stuffer contained adhesion contract's terms). In that circumstance a "sliding scale" analysis may be appropriate. *See Sitogum Holdings Inc., supra,* 352 *N.J.Super.* at 565–66, 800 *A.*2d 915 (noting that courts have employed a "sliding scale" analysis when considering, in tandem, the two factors of procedural and substantive unconscionability).

709 (1997) (stating that "[a] class action solves [the incentive problem created by small damages] by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."); *Eisen v. Carlisle & Jacquelin*, 417 *U.S.* 156, 161, 94 *S.Ct.* 2140, 2144, 40 *L.Ed.*2d 732, 739 (1974) (stating that "[n]o competent attorney would undertake this complex antitrust action to recover so inconsequential an amount [as $70]."). The class-action mechanism also overcomes the problem that small individual recoveries may fail to provide an adequate incentive for a litigant to investigate a claim or bring suit even if the litigant could secure representation. *See Varacallo v. Mass. Mutual Life Ins. Co.*, 226 *F.R.D.* 207, 234 (D.N.J.2005) (stating that "[a]bsent class certification, very few individuals would have the incentive ... to bring individual claims"). And, not least of all, there is the additional justification that a class-action proceeding "can aid the efficient administration of justice by avoiding the expense, in both time and money, of relitigating similar claims." *In re Cadillac, supra*, 93 *N.J.* at 435, 461 *A.*2d 736.

[10] In sum, the class-action mechanism is recognized to be valuable to litigants, to the courts, and to the public interest. Class actions fulfill the policies of this State even when only a [18]small amount of damages is at stake. Not surprisingly, in light of the importance of its role generally, and specifically in recognition of its usefulness in connection with small-damages actions such as are often the case in consumer suits, this Court has instructed that "the class action rule should be construed liberally in a case involving allegations of consumer fraud." [19]*Ibid.; see also Strawn v. Canuso*, 140 *N.J.* 43, 68, 657 *A.*2d 420 (1995) (stating that "a class action is the superior method for adjudication of consumer-fraud claims"); *Riley, supra*, 61 *N.J.* at 228, 294 *A.*2d 7 (stating that "a court should be slow to hold that a suit [under the CFA] may not proceed as a class action."). With those justifications for the class-action vehicle in mind we turn to consider the unconscionability of the contractual waiver of class-wide arbitration before us.

III.

A.

[11] The arbitration agreement signed by Muhammad is clearly a contract of adhesion. We, therefore, must apply *Rudbart's* four factors, as did the Appellate Division, in order to determine whether New Jersey contract law principles permit enforcement of the class-arbitration prohibitions found in the instant arbitration agreements.

[12] The first three factors of the *Rudbart* analysis require only brief attention. In respect of subject matter, the circumstantial backdrop to our *Rudbart* inquiry is the payday loan agreement executed between the parties. The focus of our analysis, however, is on the agreement's mandatory arbitration provision that contains limits on discovery and bars class-wide arbitration. In respect of *Rudbart's* second factor, the gross disparity in the relative bargaining positions of the parties is self-evident from the nature of the payday loan contract between a consumer and a [19]financial entity.[4] We add only that the

4. The third *Rudbart* factor addresses the degree of economic compulsion motivating the "adhering" party. In respect of that factor we note only that payday loans may be necessities for persons who need access to cash and who may have credit difficulty, compelling their acquiescence to loans bearing exorbitant interest rates. Muhammad seeks to represent a class of people who, like herself, are under

contract Muhammad entered into is, in its most general sense, a consumer contract. Although those facts, in addition to our finding that the contract is one of adhesion, indicate a degree of procedural unconscionability in Muhammad's contract, they are insufficient to render the contract unenforceable. That said, adhesive consumer contracts, which are ordinarily enforceable, nonetheless may rise to the level of unconscionability when substantive contractual terms and conditions impact "public interests" adversely.

Rudbart's fourth factor, the most important to the present analysis, considers "the public interests affected by the contract." That factor requires us to determine whether the effect of the class-arbitration bar is to prevent plaintiff from pursuing her statutory consumer protection rights and thus to shield defendants from compliance with the laws of this State. Those "public interest" considerations ultimately determine whether we can permit enforcement of the provision in plaintiff's contract that allegedly precludes any realistic challenge to the substance of her loan-contract's terms.

[13, 14] In New Jersey, exculpatory waivers that seek a release from a statutorily imposed duty are void as against public policy. *McCarthy v. NASCAR, Inc.*, 48 *N.J.* 539, 542, 226 *A.*2d 713 (1967). Muhammad's claims are statutory; however, the class-arbitration waiver at issue, and class-action waivers in general, are not, in the strictest sense of the term, exculpatory clauses. *See Discover Bank, supra*, 30 *Cal.Rptr.*3d 76, 113 *P.*3d at 1108. The class-arbitration waiver does not preclude Muhammad from filing an individual claim in arbitration. The difficulty lies in the [20] fact that her individual consumer-fraud case involves a small amount of damages, rendering individual enforcement of her rights, and the rights of her fellow consumers, difficult if not impossible. In such circumstances a class-action waiver can act effectively as an exculpatory clause.

> To permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit practice was to prevent.
>
> [*Delgozzo v. Kenny*, 266 *N.J.Super.* 169, 193, 628 *A.*2d 1080 (App.Div.1993) (quoting *Hohmann v. Packard Instrument Co.*, 399 *F.*2d 711, 715 (7th Cir.1968)).]

Such waivers are problematic "when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties *predictably* involve small amounts of damages," as the California Supreme Court also recognized. *Discover Bank, supra*, 30 *Cal. Rptr.*3d 76, 113 *P.*3d at 1110 (emphasis added).

In most cases that involve a small amount of damages, "rational" consumers may decline to pursue individual consumer-fraud lawsuits because it may not be worth the time spent prosecuting the suit, even if competent counsel was willing to take the case. *See Kinkel v. Cingular Wireless, L.L.C.*, 357 *Ill.App.*3d 556, 564, 293 *Ill.Dec.* 502, 510, 828 *N.E.*2d 812, 820 (2005) (observing that in context of individually pursued small damage claims, any potential recovery would be offset "by any costs incurred in presenting the claim and any lost wages for taking time from work to do so."), *appeal granted*, 216 *Ill.*2d 690, 298 *Ill.Dec.* 378, 839 *N.E.*2d 1025 (2005); *see also Carnegie v. Household Int'l, Inc.*, 376 *F.*3d 656, 661 (7th Cir.2004) (comment-

an allegedly high degree of economic compulsion to enter into such loan contracts.

ing that "only a lunatic or a fanatic sues for $ 30."). Moreover, without the availability of a class-action mechanism, many consumer-fraud victims may never realize that they may have been wronged. As commentators have noted,

> often consumers do not know that a potential defendant's conduct is illegal. When they are being charged an excessive interest rate or a penalty for check bouncing, for example, few know or even sense that their rights are being violated. Nor, [21] given the relatively small amounts at stake, would most consumers find it worthwhile to seek legal advice to determine whether this is the case.
>
> [Jean R. Sternlight and Elizabeth J. Jensen, *Mandatory Arbitration: Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse*, 67 *Law & Contemp. Prob.* 75, 88 (2004).]

[15] In addition to their impact on individual litigants, class-action waivers can functionally exculpate wrongful conduct by reducing the possibility of attracting competent counsel to advance the cause of action. Class-action waivers prevent an aggregate recovery that can serve as a source of contingency fees for potential attorneys. Although defendants have no obligation to provide counsel to plaintiff, they cannot take action that impedes ordinary citizens' access to representation to vindicate their rights. Defendants emphasize the availability of attorney's fees under the CFA; however, that fact is not dispositive in the instant case because the damages sought by Muhammad and those she seeks to represent are small. The availability of attorney's fees is illusory if it is unlikely that counsel would be willing to undertake the representation. The finance charge for the loan in this matter was $60. The class of people whom plaintiff seeks to represent may have similar claims about that size. In fact, plaintiff had to roll-over her loan two times, bringing her compensatory claims to $180 that, with the possibility of treble damages available under CFA, may add up to a maximum of less than $600. One may be hard-pressed to find an attorney willing to work on a consumer-fraud complaint involving complex arrangements between financial institutions of other jurisdictions when the recovery is so small.[5] [22] It cannot be that class-action waivers are less objectionable when a plaintiff is suing under a statute that *fails* to provide for attorney's fees (and damages multipliers). Such a perverse result would encourage underenforcement of the very statutes that the Legislature has signaled as warranting strenuous enforcement.

We hold, therefore, that the presence of the class-arbitration waiver in Muhammad's consumer arbitration agreement renders that agreement unconscionable. As a matter of generally applicable state

5. In many respects, this is a fact-sensitive analysis and close cases may require the development of some proofs by a putative class plaintiff and fact-finding on the court's part. *See* Sternlight and Jensen, *supra*, 67 *Law & Contemp. Prob.* at 87 (stating that "[t]estimony from parties, local attorneys, or experts can establish which claims plaintiffs and their attorneys deem worth bringing. Such testimony needs to be specific as to what kinds of damages and attorney's fees would be available for individual claims [and] why these are insufficient"). At some point, an amount of damages will be high enough to attract counsel if attorney's fees are available, even though no counsel would take the same case if no attorney's fees were available. When "substantial damages" are at stake, the court should consider whether the availability of attorney's fees (including possible fee enhancement, *Rendine v. Pantzer*, 141 *N.J.* 292, 661 *A.*2d 1202 (1995)) in conjunction with a substantial potential damages award (including potential statutory multipliers) would allow a "substantial number" of consumers to obtain counsel and seek relief.

contract law, it was unconscionable for defendants to deprive Muhammad of the mechanism of a class-wide action, whether in arbitration or in court litigation. The public interest at stake in her ability and the ability of her fellow consumers effectively to pursue their statutory rights under this State's consumer protection laws overrides the defendants' right to seek enforcement of the class-arbitration bar in their agreement.

We do not view our holding today to be at odds with the decision in *Gras v. Associates First Capital Co.*, 346 *N.J.Super.* 42, 786 *A.*2d 886 (2001), *certif. denied*, 171 *N.J.* 445, 794 *A.*2d 184 (2002), in which the Appellate Division considered the issue before it to be whether class-action waivers were per se unenforceable. The court in *Gras, supra*, found that there was no "inherent conflict ... between arbitration and the underlying purpose of [the CFA]," 346 *N.J.Super.* at 52, 786 *A.*2d 886, and we agree. *Gras*, however, did not present the precise issue before the Court in this matter: whether the small amount of damages being pursued in this action involving complicated financial arrangements and multiple out-of-state entities effectively prevents plaintiff from being able to vindicate the public interests protected by the CFA.

[23][16] In our view, New Jersey's public policy favoring arbitration is not determinative of whether a specific class-arbitration waiver is unenforceable. Nothing in the arbitration process requires that claims be brought only by individuals. Moreover, unlike the limited discovery often found in arbitration agreements, class-arbitration waivers do not make arbitration a more streamlined and efficient forum for adjudicating disputes. One could speculate that class-arbitration waivers are viewed as more efficient because of the likelihood that fewer individual consumers would seek redress than those who would be included as part of a class. *Cf. Ting v. AT & T*, 182 *F.Supp.*2d 902, 931 n. 16 (N.D.Cal.2002) (stating that "the notion that it is to the public's advantage that companies be relieved of legal liability for their wrongdoing so that they can lower their cost of doing business is contrary to a century of consumer protection laws."), *aff'd in part, rev'd in part on other grounds*, 319 *F.*3d 1126 (9th Cir.2003). The purpose of arbitration, however, is not to discourage consumers from seeking vindication of their rights.

To be sure, many commentators have criticized, for various reasons, the class-action mechanism as it is applied in courts. *See* Sternlight and Jensen, *supra*, 67 *Law & Contemp. Prob.* at 102 (noting that "[a]cademics as well as corporate interests have pointed to ethical and efficiency issues and have argued that class actions be limited or reformed, if not eliminated."). Commentators have also suggested that class arbitration may in fact be no different or no more efficient than class actions litigated in court. Jean R. Sternlight, *As Mandatory Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 *Wm. and Mary L.Rev.* 1, 44–53 (2000); Jack Wilson, *No–Class–Action Arbitration Clauses, State Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 *Quinnipiac L.Rev.* 737, 773–80 (2004). In respect of court actions, the United States Congress and/or our State Legislature may amend class-action procedures should they perceive deficiencies in the current process. And, in the context of class arbitration, contracting parties and the various arbitration forums can [24]fashion procedural rules specific to class arbitration. Class arbitration is in its infancy and may provide a fertile ground for establishing flexible class-action procedures. *See Discover Bank, supra*, 30

*Cal.Rptr.*3d 76, 113 *P.*3d at 1116 (discussing California's approach to class arbitration). The drafters of arbitration agreements and forum rules, as well as the arbitrators themselves, may allow for the development of innovative class-arbitration procedures that address some of the perceived inadequacies with the current system.[6] That said, in order for a specific procedure to be considered "class arbitration," we presume that the essential elements of modern class actions would be present.

B.

Our decision today is rooted in the fact-sensitive public interest assessment of the *Rudbart* analysis and is not based on a determination that the arbitral forum, per se, cannot accomplish vindication of a consumer-fraud litigant's rights. In *Gilmer, supra*, the United States Supreme Court stated that arbitration is allowed in actions authorized by federal statutes "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum." 500 *U.S.* at 28, 111 *S.Ct.* at 1653, 114 *L.Ed.*2d at 38 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 *U.S.* 614, 637, 105 *S.Ct.* 3346, 3359, 87 *L.Ed.*2d 444, 462 (1985)). That analysis was used again by the Court in *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 *U.S.* 79, 90, 121 *S.Ct.* 513, 521, 148 *L.Ed.*2d 373, 383 (2000). Defendants argue that those holdings prevent the conclusion that we reach today in respect of Muhammad's arbitration agreement. We reject that argument.

Our analysis does not focus solely on the ability of Muhammad to individually vindicate her statutory rights. Our consideration of "the public interests affected by the contract" under *Rudbart* compels a broader inquiry into how class-action waivers affect the various interests protected under the CFA. Moreover, the analysis undertaken in *Gilmer* and *Randolph* reconciled various remedial federal statutes with the FAA. In *Randolph, supra*, the Court noted as part of its inquiry that it must "ask whether Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." 531 *U.S.* at 90, 121 *S.Ct.* at 521, 148 *L.Ed.*2d at 383. That is a uniquely federal question, distinct from an analysis of *state* contract law under *Rudbart*. The California Supreme Court observed similarly in *Discover Bank, supra*, when examining federal cases that have applied *Gilmer* and *Randolph*. 30 *Cal. Rptr.*3d 76, 113 *P.*3d at 1114 n. 6. Noting

6. One objection lodged against class actions is that because the stakes are so high, defendants are pressured into settling arguably frivolous claims. The amicus Chamber of Commerce advances that concern, noting the "hydraulic pressure to settle that class certification creates." *See also In re Rhone–Poulenc Rorer Inc.*, 51 *F.*3d 1293, 1299–1300 (7th Cir.) (noting that class certification can force defendants to stake "their companies on the outcome of a single jury trial," whereas numerous individual trials would "reflect a consensus, or at least a pooling of judgment, of many different tribunals.") (Posner, J.), *cert. denied*, 516 *U.S.* 867, 116 *S.Ct.* 184, 133 *L.Ed.*2d 122 (1995); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near–Total Demise of the Modern Class Action*, 104 *Mich. L.Rev.* 373, 374 (2005) (noting criticism that class certification gives "outsized leverage" to "even the most baseless of class claims."); Wilson, *supra*, 23 *Quinnipiac L.Rev.* at 778 (stating in respect of class arbitration that "companies must fear that a 'renegade arbitrator' will enter an enormous judgment, which almost certainly would be subject to only the traditional, limited judicial review of arbitral awards."). Those concerns could be addressed through class-arbitration rules drafted to establish methods that spread the risks associated with a single decision-maker while still preserving many of the efficiencies of the modern class-action procedure.

the difference between the federal "vindication of statutory rights" test and an unconscionability analysis under state law, the California Supreme Court stated that the decisions following the former approach "address whether a federal statute impliedly limits arbitration, [and] are obviously not binding on this court when it decides whether class arbitration waivers are unconscionable under state law principles." *Ibid.*; *see also Kristian v. Comcast Corp.*, 446 *F.*3d 25, 60 n. 22 (1st Cir.2006) (concluding similarly that state unconscionability analysis, which is "based on the particulars of state contract law, may include considerations not present in the vindication of statutory rights analysis .... which is not [26]dependent on state law."); *In re Universal Fund Telephone Billing Practices Litigation*, 300 *F.Supp.*2d 1107, 1136–38 (D.Kan.2003) (treating procedural unconscionability and availability of "[an] effective forum to vindicate statutory rights" as distinct inquiries).

C.

[17–20] Finally, although we find that the class-arbitration waivers in Muhammad's arbitration agreements are unconscionable and unenforceable, we find that the waivers are severable. Once the waivers are removed, the remainder of the arbitration agreement is enforceable. As the Eleventh Circuit has explained,

> [i]f all the provisions of the arbitration clause are enforceable, then the court must compel arbitration according to the terms of the agreement. If, however, some or all of its provisions are not enforceable, then the court must determine whether the unenforceable provisions are severable. Severability is decided as a matter of state law. If the offensive terms are severable, then the court must compel arbitration according to the remaining, valid terms of the parties' agreement. The court should deny the motion to compel arbitration only where the invalid terms of the arbitration clause render the entire clause void as a matter of state law.
>
> [*Terminix Int'l Co. LP v. Palmer Ranch Ltd. P'ship*, 432 *F.*3d 1327, 1331 (11th Cir.2005) (citation omitted).]

Similarly, our courts have recognized that "[i]f a contract contains an illegal provision and such provision is severable, courts will enforce the remainder of the contract after excising the illegal portion, so long as the prohibited and valid provisions are severable." *Schuran, Inc. v. Walnut Hill Assocs.*, 256 *N.J.Super.* 228, 233, 606 *A.*2d 885 (Law Div.1991); *see also Naseef v. Cord, Inc.*, 90 *N.J.Super.* 135, 143, 216 *A.*2d 413 (App.Div.) (stating "[i]t is true that if a contract contains an illegal provision, if such provision is severable the courts will enforce the remainder of the contract after excising the illegal portion."), *aff'd*, 48 *N.J.* 317, 225 *A.*2d 343 (1966). The instant contracts embrace that proposition in that the broad class-action waivers in both contracts use the language "[t]o the extent permitted by law." Thus, the contracts reflect an intention that the arbitration agreement would be implemented whether and to whatever extent class-wide arbitration might be [27]barred. Because we hold that the class-arbitration bar is not enforceable, we need not address plaintiff's additional argument about the impact of the discovery limitations on an individual arbitration claim.

IV.

The judgment of the Appellate Division is reversed and the matter is remanded to the Law Division for further proceedings consistent with this opinion.

Justice RIVERA–SOTO, concurring in part and dissenting in part.

To the extent the majority holds that the arbitration agreements in this case are enforceable, *ante*, 189 *N.J.* at 26, 912 *A.*2d at 103 (2006), I concur. However, to the extent the majority holds that the class-arbitration waivers in plaintiff's arbitration agreements are unconscionable, *ante*, 189 *N.J.* at 22, 912 *A.*2d at 100 (2006), I respectfully dissent for the reasons thoughtfully and exhaustively set forth by both the Appellate Division, *Muhammad v. County Bank of Rehoboth Beach, Del.*, 379 *N.J.Super.* 222, 877 *A.*2d 340 (App.Div.2005), and the trial court.

For reversal and remandment—Chief Justice PORITZ and Justices LONG, LaVECCHIA, ZAZZALI and WALLACE—5.

For concurrence in part; dissent in part—Justice RIVERA–SOTO—1.

189 N.J. 28

DELTA FUNDING CORPORATION, Plaintiff–Respondent,

v.

Alberta HARRIS, Defendant–Appellant.

Supreme Court of New Jersey.

Argued Feb. 14, 2006.

Decided Aug. 9, 2006.

Background: Sub-prime mortgage lender brought action, in federal court, to compel arbitration of borrower's state court claims, which named lender as a third-party defendant in foreclosure proceedings alleging lender violated the New Jersey Consumer Fraud Act. Borrower moved for summary judgment. The United States District Court for the District of New Jersey, 396 F.Supp.2d 512, denied borrower's motion for summary judgment, and compelled arbitration. Borrower appealed. The United States Court of Appeals for the Third Circuit certified a question to the New Jersey Supreme Court.

Holdings: The Supreme Court, LaVecchia, J., held that:

(1) cost-shifting provision in arbitration clause could be unconscionable, depending on arbitrator's interpretation of the provision;

(2) attorney fee provision in arbitration clause could be unconscionable, depending on arbitrator's interpretation of the provision;

(3) class-arbitration waiver was not unconscionable;

(4) arbitration clause's exclusion of foreclosure actions from arbitration was not unconscionable, though borrower could be force to litigate similar claims in different forums.

Certified question answered.

Zazzali, J., filed an opinion concurring in part and dissenting in part.

Rivera–Soto, J., filed a dissenting opinion.

1. Federal Courts ⇐392

Purpose of the certification process, under which the New Jersey Supreme Court may answer a question of law certified by the United States Court of Appeals for the Third Circuit, is to answer the question of law submitted pursuant to the certification, not to resolve factual disputes between the parties. R. 2:12A–1.

2. Alternative Dispute Resolution ⇐200

Under federal arbitration law, it is ordinarily the role of an arbitrator and not the courts to interpret ambiguous provi-

BIOGRAPHY OF

JONATHAN M. HYMAN

Jonathan M. Hyman is Professor of Law and Alfred C. Clapp Public Service Scholar at Rutgers Law School – Newark. He specializes in litigation and alternative dispute resolution. As a member of the Rutgers Constitutional Litigation Clinic, he litigated class action employment discrimination matters.

A practicing arbitrator and mediator, he has served as a mediator at the Equal Employment Opportunity Commission and is a recipient of the James Boskey ADR Practitioner of the Year Award.

His writing in the ADR field includes *Four Ways of Looking at a Lawsuit: How Lawyers Can Use the Cognitive Frameworks of Mediation,* 32 WASH. U. J. OF LAW AND POLICY (forthcoming 2011), *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLIN. L. REV.157 (2002) (with Lela Love), and *Negotiation Methods and Litigation Settlement in New Jersey: "You Can't Always Get What You Want,"* 12 OHIO ST. J. ON DISP. RESOL. 253 (1997) (with Milton Heumann).

He has been of counsel at Lowenstein Sandler, and has also taught at UCLA, Northwestern and Washington University in St. Louis law schools, and at the University of Essex in Great Britain.

He is currently a member of the New Jersey Supreme Court Committee on Complementary Dispute Resolution and the Court's Advisory Committee on Mediator Standards.

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July 30, 2010

SENT VIA COURIER
The Hon. Robert G. Millenky, J.S.C.
Superior Court of New Jersey
Camden County Civil Hall of Justice
101 S. 5th St.
Camden, NJ 08103

RE: Paul Leodori v. CIGNA Corp., et al.
Docket No.: CAM-L-1147-00

Dear Judge Millenky:

This office represents Paul A. Leodori, Esq. ("Leodori"), Plaintiff in the above-referenced "whistleblower" case, in which Defendants, CIGNA Corporation, CIGNA Insurance Company, and Insurance Company of North America ("CIGNA" or "Defendants") are represented by the law firms of Riker Danzig and Montgomery McCracken. Please accept this letter memorandum in lieu of formal brief, filed in support of Plaintiff's motion to confirm three Partial Final Awards rendered by ArbitratorJacquelin Drucker. This letter memorandum is supported by a sworn Certification of Hanan M.

Isaacs, Esq., and the exhibits referenced therein and attached thereto. This should satisfy the Court's concerns, if any, about the alleged "inadequacy" of Leodori's papers.

INTRODUCTORY STATEMENT

This is but the latest round in Leodori's 12-year effort to attain economic justice from the Defendants. We ask Your Honor to uphold the rule of law and give Leodori the relief to which he is long overdue.

In their opposing papers, Defendants have made the most important concession in 10 years of litigation and arbitration, based on what they have **not** said. Specifically, they do not challenge the Arbitrator's findings on liability or damages. Thus, Leodori is entitled to entry of a judgment against CIGNA for liability and damages, as outlined below.

The single matter now separating the parties is whether or not – and Leodori emphatically says not – Defendants can demonstrate that Leodori entered into an enforceable oral agreement to waive his statutory rights. As Leodori will show, CIGNA cannot rely upon Judge Colalillo's rulings in 2004 to preempt Leodori's civil rights in this case. This Honorable Court should find CIGNA's contract defenses frivolous as a matter of law.

As the Arbitrator stated at length in her Partial Final Award dated January 5, 2009, Leodori was a "superb" and well-regarded in-house

Manager of Defendants' New Jersey Major Claims Litigation Office in Cherry Hill, New Jersey. Before CIGNA hired him, Leodori had served as an Assistant Prosecutor in Bergen County, a Deputy Attorney General hired by Deborah Poritz, a Mudge Rose insurance coverage lawyer hired by former Attorney General Carey Edwards, and an O'Melveny and Myers insurance coverage lawyer. In the last two positions, Leodori worked exclusively for CIGNA, and CIGNA then asked him to manage its in-house litigation firm.

While at CIGNA, Leodori received consistently excellent performance reviews, cash awards, stock options, and pay increases from 1995 to 1999. Leodori's immediate boss, David Gold, considered Leodori a potential successor. However, Leodori's career arc abruptly ended in the fall of 1998, from which he never recovered. For the reasons that follow, and in violation of his CEPA rights, Defendants wrongfully discharged Leodori in the spring of 1999.

The following is based upon record evidence introduced in the arbitration proceedings. In 1998, Leodori learned of $25 million of suspected fraud by CIGNA's upper management, including allegations of internal bribery and unlawful insurance rebates, the latter arising from the Persian Gulf War of 1990. The suspected culprit in these dealings was

none other than CIGNA's largest insurance client, Texaco Corporation. When Leodori's fraud allegations came to light, CIGNA at first appeared willing to take Texaco to task, and Leodori was a member of the management team seeking relief from Texaco's overreaching.

However, in the fall of 1998, unbeknownst to Leodori, CIGNA's Property and Casualty Division, for which he worked, went on the sale block for $3.4 **billion**. All of the key players on the CIGNA "Need to Know" Team (its actual name) had a strong interest in pushing the Texaco fraud allegations under the rug. They also had a strong interest in isolating and getting rid of the only CIGNA player who was still talking about allegations of corporate fraud: Leodori. There was no evidence that the eventual purchaser, ACE Insurance Company, knew of the fraud allegations involving CIGNA, Texaco, and their respective Boards of Directors.

In late October, 1998, Leodori put his concerns into writing. He laid out for his boss, in writing, the suspected wrongdoing, together with possible criminal code and insurance law violations. Within days, CIGNA unlawfully barred Leodori from his office and put him out on paid leave. In so doing, CIGNA failed to follow 5 volumes of its published Human Resources and other authorities on "whistleblower" protection and repeatedly violated its employee disciplinary procedures. John Murphy

("Murphy"), a high ranking CIGNA lawyer, accompanied by Riker Danzig's Michael K. Furey, Esq., told Leodori's 12 staff attorneys at a hastily arranged meeting that they could not speak with Leodori and he could not speak with them. The meeting was described as extremely hostile and intimidating. CIGNA thus signaled that Leodori was a pariah, and that any contact with him could be a career-ending move.

CIGNA hired a law firm to conduct a one-day investigation, whitewashing its own misconduct. They then brought in a retired federal judge, Arlen Adams, to conduct a so-called "independent" investigation. However, before Judge Adams even got started, Murphy and other high ranking CIGNA employees revealed to the subjects and potential targets of the investigation all of the details in Leodori's confidential letter. They combed Leodori's confidential Human Resources file looking for "dirt" and deliberately poisoned Leodori's reputation throughout his work unit and in the company generally.

As Leodori's forensic investigations expert, Darryl S. Neier, testified, CIGNA's misconduct clouded the validity of Judge Adams's later investigation. Judge Adams, by his own admission at arbitration, did not even know that CIGNA had shown confidential information to key witnesses, nor whether those witnesses changed their testimony based

upon CIGNA's misconduct. Mr. Neier found that Judge Adams had compromised the investigative process in numerous ways, thereby invalidating his conclusions.

While Judge Adams eventually determined that he could not sustain Leodori's allegations factually or legally, he never determined that Leodori had proceeded in other than good faith, and he so testified.

In her Partial Final Award of January 5, 2009, the Arbitrator found that Leodori had "an objectively reasonable belief" that (1) CIGNA had violated state and federal laws and (2) CIGNA's upper management had committed substantial acts of fraud. The Arbitrator further found that Defendants committed retaliatory acts against Leodori, and that their stated reasons for firing him were clearly pretextual: "[T]he Arbitrator cannot conclude that, absent the retaliatory motivation, [Leodori] still would have been terminated."

In her Partial Final Award: Damages, dated December 9, 2009, the Arbitrator determined that Leodori was entitled to pain and suffering damages of $10,000, economic damages and losses of $731,489 for 4.5 years of back pay, prejudgment interest on his award, and is "entitled to reasonable costs and attorney's fees".

In her Partial Final Award: Forum Issue, dated May 7, 2010, the Arbitrator ruled she had no lawful authority to determine the validity of a set of alleged and unsigned oral Agreements to Proceed to Arbitration, and she returned those issues to the trial court for a variety of reasons stated. Defendants asked that this matter be returned to the trial court, Leodori opposed it, and the Arbitrator sided with the defense.

Leodori no longer challenges the Arbitrator's determination that statutory counsel fees and costs and any alleged cap on damages should be determined by Your Honor. Three years of arbitration proceedings, after six years of procedural complexity engendered by Defendants, are more than enough.

DEFENDANTS ARE HELD TO THE TERMS OF THE ARBITRATOR'S THREE PARTIAL FINAL AWARDS, RENDERED PER THE AAA RULES, AND IN ACCORANCE WITH NEW JERSEY'S ARBITRATION STATUTE.

As the Arbitrator stated in Partial Final Award dated January 5, 2009, at page 1,

> [B]y agreement of the parties, the matter has proceeded in accordance with [AAA's] National Rules for the Resolution of Employment Disputes, Amended and Effective January 1, 2004 . . . . [O]n June 25, 2004, [Judge Colalillo] ordered the parties to arbitrate pursuant to an agreement into which the parties had entered. [Leodori] disputes this characterization of the court's order and has asserted a continuing objection to the arbitrability of this matter. . . . [T]he parties agreed that the hearing would proceed on the sole [issue of CEPA liability] [and] agreed that the determination of

damages would be addressed separately, after the resolution of . . . liability.

The Arbitrator has now found in Leodori's favor on the critical issues of CEPA liability and damages, reserving on counsel fees and costs. Leodori is entitled to entry of a judgment against the Defendants. He has been deprived of the use of his money for close to 12 years, and his damages, with interest, approach one million dollars.

CIGNA and its legal counsel have sought to deprive Leodori of his money damages and counsel fees and costs. Defendants now complain that Leodori has "prematurely" filed his confirmation motion. In the context of a 12-year delay of justice, it is hard to imagine that Leodori has been premature about anything.

The Arbitrator understood Leodori's argument that arbitration fees and costs are subsumed by CEPA's fee- and cost-shifting, which should be resolved by Your Honor. In early May of 2010, we asked the Arbitrator to make her final ruling, if any, on this relatively minor issue, and to refer the matter to Your Honor as part and parcel of your work on this case. For unknown reasons, the Arbitrator has failed to act or explain why not. The defense would hold Leodori hostage to the Arbitrator's inaction. Leodori respectfully submits that is neither fair nor right. We ask Your Honor to

resolve the remaining issues timely, rather than dismiss them pending the Arbitrator's ruling.

Moreover, the "missing" decision involves calculation of prejudgment interest, to which the parties, through a date certain, have already stipulated. If updated calculations are needed per the Rules of Court, Rule 4:42-11(a)(ii), there are ministerial acts, not requiring arbitral decision-making.

Leodori seeks the enforcement of all three of the Arbitrator's Partial Final Awards. If the Arbitrator acts timely, additional requests for enforcement could be forthcoming. If she never acts, then Leodori should not be deprived of the justice to which she found him entitled in the first place.

Each of the Partial Final Awards is presumed valid. Del Piano v. Merrill Lynch, 372 N.J. Super. 503, 510 (App. Div. 2004), certif. granted, 183 N.J. 218, certif. dismissed as improvidently granted, 195 N.J. 512 (2005). The scope of review of an arbitration award is narrow. Otherwise, its purposes would be "severely undermined." Fawzy v. Fawzy, 199 N.J. 456, 470 (2009), citing Barcon Assocs., Inc. v. Tri-County Asphalt Corp., 86 N.J. 179, 187 (1981).

The parties have stipulated that their arbitration is governed solely by the New Jersey (Revised) Arbitration Act, N.J.S.A. 2A:23B-1, et seq., which amended and superseded the former arbitration statute, N.J.S.A. 2A:24-1, et seq. A referral to arbitration made on or after January 1, 2003, is governed by the Arbitration Act. N.J.S.A. 2A:23B-3(a). In this case, the referral of June 25, 2004, clearly invokes the new statutory scheme.

N.J.S.A. 2A:23B-23(a) lists six factors permitting a court to vacate an arbitration award upon filing of a confirmation motion or other summary action:

1. The award was procured by corruption, fraud, or other undue means.

2. The Arbitrator's evident partiality.

3. The Arbitrator refused to postpone the hearing despite good cause shown, refused to consider material evidence, or otherwise conducted the hearing in a way that substantially prejudices the rights of a party.

4. The Arbitrator exceeded her powers.

5. There was no agreement to arbitrate and the objecting party properly preserved his objection.

6. The arbitration was conducted without proper notice.

On the record before Your Honor, there is no evidence of Arbitrator misconduct. To the contrary, the parties appear satisfied with the contents of the three Partial Final Awards. The only conceivable issue rests in item

5, regarding no agreement to the statutory waivers offered by the defense and rejected by Leodori. However, the Arbitrator has now referred those issues to Your Honor for resolution.

DEFENDANTS WILL PRESENT NO EVIDENCE THAT LEODORI AGREED TO THEIR ORAL OR WRITTEN OFFERS TO WAIVE HIS STATUTORY RIGHTS IN ARBITRATION

As outlined procedurally and at length in Leodori v. CIGNA, et al., 175 N.J. 293 (2003), cert. den. 540 U.S. 938, 124 S.Ct. 74, 157 L.Ed.2d 250 (2003) ("Leodori I"), Defendants fought for 3 years to force Leodori into handbook arbitration, despite the fact that he had conscientiously refused, while employed, to sign a trial by jury waiver-of-rights provision. "Significantly," said the Court, "[Leodori] did not sign the Agreement. **The signature line in [Leodori's] copy was left blank**." (Emphasis added). Id. at 298.

In Leodori I, Justice Verniero, writing for a unanimous Court, stated as follows:

> [T]o be enforceable . . . in New Jersey, a waiver-of-rights provision must reflect that an employee has agreed clearly and unambiguously to arbitrate the disputed claim. Generally, we determine a written agreement's validity by considering the intentions of the parties as reflected in the four corners of the written instrument.

Id. at 302.

The Court further held:

In our view, a valid waiver [of statutory rights] results only from an explicit, affirmative agreement that unmistakably reflects the employee's assent. . . .'The Court will not assume that employees intend to waive [their] rights' [and] 'one party to a contract may not unilaterally impose an obligation to arbitrate upon another party to the contract.'

Id. at 303 (citations omitted).

Most importantly, on the crucial fact of non-signature in the waiver-of-rights context, the Leodori I Court stated:

When one party . . . presents a contract for signature to another party, the omission of that other party's signature is a significant factor in determining whether the two parties mutually have reached an agreement . . . . **Without [Leodori's] signature on the Agreement . . . , we cannot enforce the arbitration provision** unless we find some other explicit indication that [Leodori] intended to abide by [the waiver of rights] provision. No such indication appears in the record.

. . . .

We are constrained to conclude that the record as a whole does not demonstrate that [Leodori] had surrendered his statutory rights knowingly and voluntarily, which remains the critical inquiry.

. . . .

The Court is free to consider whether a purported arbitration agreement contains those . . . elements that are required to uphold any other contract. Included in those requirements is the assent of the party against whom enforcement is sought, as **customarily indicated by the party's signature.**

Defendants' own documents contemplated [Leodori's] signature as a concrete manifestation of his assent . . . . **Our contract law does not permit Defendants to contemplate or require [Leodori's]**

signature on an agreement and then successfully to assert that he omission of that signature is irrelevant to the agreement's validity.

Id. at 305-306 (emphases added).

Leodori I is more than important and precedential case law; it is also the law of the case. The parties' conduct, both their actions and inactions, must be filtered through the lens of Leodori I. For example, and perhaps uniquely in New Jersey legal history, Leodori knew what it meant to sign a waiver-of-rights document proffered by his former employers. His refusal to sign must be seen as a rejection. Clearly, Defendants and their legal counsel knew that as well.

When Michael Furey wrote to Leodori on April 19, 2004, Exhibit A, attached hereto, he expressly invited Leodori's "proposed changes" as well as Leodori's signature. "Once revisions are made, if any, we will circulate the final agreement for execution." If Mr. Furey contemplated a further document, which he called a "final agreement for execution" , then the document he furnished clearly was something less than "final".

When Leodori filed a 27-paragraph certification to the trial court, Exhibit B attached hereto, stating all material facts in dispute and denying repeatedly that an arbitration settlement had been reached, how could Defendants reasonably conclude that waiver of important statutory rights

and his constitutional right to a trial by jury had been clearly and expressly made?

What record proofs do Defendants propose to show that Leodori clearly, expressly, and unambiguously agreed to waive his statutory rights to (1) counsel fees and costs awarded against Defendants, per CEPA, and (2) the full measure of his damages award, without the arbitrary cap sought by the defense? In a phrase, they have none.

Why did Defendants create two alleged Agreements to Arbitrate, strike by their own hands certain key provisions in the second draft that were contained in the first, and then present the second version with handwritten changes to the Appellate Division's Judge Landau on October 8, 2004, at Exhibit C, attached?

What is Your Honor to make of Mr. Furey's full-throated admission to Judge Colalillo, Transcript of June 11, 2004, at page 25, that Defendants and their legal counsel unilaterally **added** Federal Arbitration Act jurisdiction to the purported agreement, which the parties had never discussed? Here is the text at issue:

> LEODORI: [T]hey talk about the Federal Arbitration Act. We never even discussed the Federal Arbitration Act.
>
> THE COURT: Did you or didn't you [Mr. Furey]?
>
> MR. FUREY: No, we did not, and we'll withdraw that. . . .

Similarly, the trial court and both parties went from pages 50 to 73 of the June 11 argument regarding confidentiality, which the defense conceded was a material term. In the Transcript of June 25, 2004, at page 3, Mr. Furey states that "confidentiality, **that's the only major disagreement**." (Emphasis added). The Defendants had made a written proposal including confidentiality, and Leodori clearly rejected it. In court on June 25, 2004, Mr. Furey sought to bargain his way to consent, with the Court's assistance: "[W]e have a proposal to make." Does that not indicate to the world that no final agreement had been reached on a material issue?

The issue of an arbitrator's appointment shoots through the entirety of the transcripts from June 11 and 25, 2004. Leodori is clear as a bell on that point. Party selection was a material issue and Defendants and he never consented to arbitrate under mutually agreed terms and conditions.

Leodori I fairly shouts an answer: there was never a meeting of the minds, and the alleged oral Agreements to Proceed to Arbitration were void and unenforceable.

Judge Colalillo spoke repeatedly in dicta about "fair terms", "complete terms", and similar expressions of approval. However, her actual rulings were remarkably consistent, and at variance from Defendants' claims

before Your Honor. In the proceedings of January 25, 2004, here is what she said she was actually enforcing:

> Agreeing to go to arbitration was the essential tern of this contract. [Page 23, line 14]
>
> Counsel, once again, the essential element was to proceed to arbitration. [Page 29, line25, to page 30, line 1]

Then, a remarkable thing happened, as follows:

> THE COURT: But you may have a confidentiality provision that's enforced under the arbitration. But that's not – You can take that up with the Arbitrator.
>
> LEODORI: Well, Judge, I guess that's a good point. Part of the – **we've never really reached an agreement on what the actual [contract to arbitrate] provisions are. I think Your Honor has just basically ordered us to arbitra[tion]. I don't think we have a per se agreement** because we went over [all of] that last week . . . .
>
> MR. FUREY: Well, we – perhaps so that the record is complete, we should have marked the agreement . . . .
>
> THE COURT: Put it as a joint exhibit. **That doesn't mean you agree to it. It just means that each of you will have a copy . How's that? All right? . . . .**
>
> MR. FUREY: . . . The record should reflect that I gave Mr. Leodori a Xerox of the agreement that we worked out last week.

Pages 32-33, Transcript of June 25, 2004 (emphases added).

Contrary to Defendants' legal brief, this was not the statement of a trial judge who sloppily or inadvertently referred to the contents of a purported agreement as subject to varying interpretations. Judge Colalillo's

comments followed hours of in-court discussions for 110 transcript pages spread over two court days. Judge Colalillo knew the parties had serious disputes over contract terms. But the one issue, the key provision, about which she felt enforcement was required, involved referral to arbitration. That was the key for her, and she said so repeatedly.

This interpretation is fully borne out by Judge Colalillo's clear and unambiguous refusal, despite Defendants' repeated requests, to attach to her Order a copy of one of the versions of the alleged Agreement to Proceed to Arbitration. Judge Colalillo struck that language from the draft Order in her own hand, along with Defendants' requests for (1) a Stipulation of Dismissal and (2) a sealed record. Judge Colalillo knew exactly what she was doing, and she acted for a reason: she knew that Defendants had overreached and that Leodori had clearly and obviously not agreed to material parts of Defendants' requested statutory waivers. Defendants' contentions to the contrary are both wrong and insulting to the trial court.

Judge Colalillo also clearly expected that the parties would seek out advice and direction from the selected Arbitrator, who would, as it were, "fill in the blanks". Defense counsel clearly sought that result, and Leodori

eventually "saw the light" in going forward with AAA administered arbitration.

When Leodori filed his appeal, he wanted the Appellate Division to reverse Judge Colalillo's Order to arbitration, based on a legal argument that there had been no meeting of the minds as to Arbitrator selection and a host of other issues. The Appellate Division refused to treat his appeal as final and of right. Rather, they declared the appeal "interlocutory" and invited him to refile his appeal after arbitration. **See** Exhibit D, attached. Leodori thus preserved his right to challenge arbitrability, in full, post arbitration.

Since denial of Leodori's interlocutory appeal in 2006, the Supreme Court has determined that litigants directed to arbitration have an appeal as of right to challenge arbitrability. Wein v. Morris, 194 N.J. 364 (2008). If the Appellate Division had taken Leodori's appeal as of right, without question, it would have required a plenary hearing on contested issues of material fact. **See** Amatuzzo v. Kozmiuk, 305 N.J. Super. 469, 474-75 (App. Div. 1997).

While New Jersey public policy encourages the settlement of litigation, Impink ex rel. Baldi v. Reynes, 396 N.J. Super. 553, 563 (App. Div. 2007), that policy "does not mean that courts will rewrite or unduly

expand settlement agreements . . . to deem settled or waived things not legitimately encompassed." Isetts v. Borough of Roseland, 364 N.J. Super. 247, 254 (App. Div. 2003). Nor will a court enforce an agreement that the parties have not reached. Mosley v. Femina Fashions, Inc., 356 N.J. Super. 118, 126 (App. Div. 2002), certif. denied, 176 N.J. 279 (2003) ("Before a settlement agreement may be enforced, . . . there must be an agreement to the essential terms of the agreement.").

A trial court presented with a disputed motion to enforce a settlement agreement should hold a hearing to resolve the disputed questions of fact. Amatuzzo, 305 N.J. Super. at 474-75. Of critical importance here, at such a hearing, the party urging the existence of an enforceable settlement has the burden of proof. Id.

Throughout arbitration proceedings, from 2006 until 2008, Leodori preserved his arbitrability challenge, in writing, to the Arbitrator and his adversaries, who acknowledged his challenge periodically. In 2008, to avoid yet more protracted proceedings followed by multiple layers of appeals and possible remands, Leodori voluntarily and in writing to the Arbitrator dropped a portion of that challenge, namely the referral to arbitration itself. Leodori agreed to proceed with arbitration under the relevant AAA Rules. However, he simultaneously advised the Arbitrator

and the Defendants that he preserved his objections to the terms of the alleged Agreements to Proceed to Arbitration on all issues except the simple referral to arbitration. Defendants were on full notice of Leodori's continued challenge to the validity and enforceability of their proffered Agreements.

Defendants having lost on liability and damages, it is now for this Honorable Court to determine the existence, validity, and enforceability of the disputed Agreements, or the lack thereof.

IT IS NO DEFENSE TO LEODORI'S POSITION THAT LEODORI DID NOT ASK FOR A PLENARY HEARING BEFORE JUDGE COLALILLO

Defendants assert that Leodori waived his right to seek a plenary hearing because he failed to raise the issue with Judge Colalillo and further failed to raise the issue on appeal. For the reasons that follow, Defendants' position is frivolous.

Leodori certified to the trial court that there were material contested factual issues. He did was he was supposed to do. Judge Colalillo decided the matter without sworn testimony in open court. Leodori was not required to ask for a hearing. The trial court, by law, could not determine the issues in the case without one. Moreover, Defendants also failed to seek a testimonial hearing.

The Appellate Division denied Leodori's appeal as interlocutory, but without prejudice to his re-application post-arbitration. That is precisely where we are today. Leodori is asking Your Honor to do that which the Arbitrator requested and the Appellate Division has required as a matter of law. Judge Colalillo could not determine who was telling the truth just by looking at the papers. She did not say a word about who had the burden of proof or the legal implications of Leodori's refusal, in light of Leodori I, to sign the Defendants' proffered Agreements in any form.

If Judge Colalillo's order of referral to arbitration is void for lack of a testimonial foundation, then its validity is not enhanced by Leodori's supposed failure to request a plenary hearing. Void is void.

Defendants are asking Your Honor to make the same procedural mistakes and to decide this matter based upon Judge Colalillo's rulings, which were ambiguous at best. Most respectfully, Your Honor should resist their invitation.

DEFENDANTS CANNOT "CHERRYPICK" CONTRACT TERMS OR SPLICE TOGETHER BITS OF AN AGREEMENT TO PRODUCE AN ALLEGED "LESSER INCLUDED AGREEMENT"

Since 2004, Defendants have taken the outrageous position, legally and factually, that they are entitled to enforcement of an oral set of Agreements whose terms are mutually contradictory. They further have

argued, and continue to do so here, that they are allowed to pick and choose provisions, and add and subtract them at will. What clearly and provably started out as an **offer to settle** a procedural set of issues has "morphed" in their minds into an enforceable contract. This is contrary to any fair interpretation of New Jersey contract law.

In Lehr v. Afflitto, 382 N.J. Super. 376 (App. Div. 2006), Judge Robert Fall, writing for the Appellate panel, put to rest any argument that a party is entitled to seek enforcement of a subset of contractual terms. Although arising in the matrimonial setting, the principles enunciated in Lehr apply forcefully to the facts of our case. In Lehr, as in Leodori, the party seeking enforcement relied upon terms of agreement allegedly reached in mediation. The mediator testified about the contents of mediated negotiations, which the Court found violative of the public policy contained in the Uniform Mediation Act, N.J.S.A. 2A:23C-1, **et seq**., even though the statute became law only after the events giving rise to the appeal. If Your Honor determines that a plenary hearing is required, as Leodori asks, then the mediator should not be permitted to testify for any purposes.

Regarding the contents of the alleged agreement sought to be enforced, the trial court found, after a plenary hearing, that the parties had agreed to13 out of 16 contract terms, that those 13 terms were

enforceable, and that the remaining 3 would be subject to trial. The Appellate Division reversed, stating as follows, 382 N.J. Super. at 396:

> [I]t was clear and undisputed that an agreement had not been reached as to all issues. In fact, both parties have freely acknowledged that even if there had been an agreement reached on the 13 issues, three . . . issues had not yet been resolved. . . . [E]ven if the findings of the [trial] judge were to be accepted, by the admission of both parties . . . there was no final, binding settlement as to all outstanding issues . . . .

The Court pointed out that disputed negotiations often involve "a mosaic" of issues, where it becomes impossible to separate out one issue from the rest: "There were no extraordinary circumstances here that warranted entry of a judgment . . . that incorporated a purported settlement of thirteen issues, while bifurcating the three other unresolved . . . issues for future resolution or adjudication." Id. at 397.

In Leodori, likewise, there were no extraordinary circumstances warranting a referral to arbitration, when the parties continued to disputed the underlying terms of agreement. Judge Colalillo focused on the "key term", namely the agreement to arbitrate, and glossed over all of the contested material terms, believing the parties were "better off" in arbitration and that the Arbitrator would help them resolve any continuing disputes.

The Defendants are not entitled to enforcement of an alleged contract that may best be described as Frankensteinian, a contract that is far less than the sum of its cobbled together parts.

Leodori does not contest the referral to arbitration. He noticed the Arbitrator and his adversaries of his change of mind, with a reservation of rights concerning his continued challenge to the alleged oral statutory waivers. The validity or invalidity of those contested items must still be determined at a plenary hearing. Justice and fairness require no less. This Honorable Court should so rule.

DEFENDANTS HAVE NO STANDING TO ASSERT AN ATTORNEY LIEN ON BEHALF OF NON-PARTIES TO THIS ACTION, AND ANY SUCH CLAIMS ARE BARRED BY THE 6-YEAR STATUTE OF LIMITATIONS.

Defendants assert, bizarrely, that this Court must enter a final judgment containing a non-existent attorney fee lien sought in 2004 by a law firm that previously represented Leodori. When Leodori's litigation matter was terminated in 2004, any attorney lien that may have existed was extinguished. Moreover, no such attorney ever came forward to assert an amount allegedly due, no fee arbitration notice was sent to Leodori under Rule 1:20A-6, no litigation was commenced against Leodori, and more than 6 years have passed since the time the attorney lien was sought to be entered.

Defendants are much more concerned about the rights of a non-party than they are about Leodori's right to be paid. If it will help Defendants, Leodori will be happy to indemnify them and hold them harmless if any lawyers show up looking for Leodori's money.

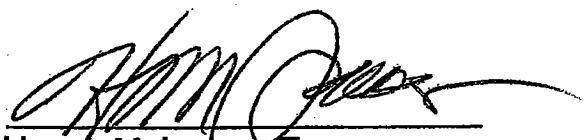
CONCLUSION

For the foregoing reasons, in the interests of substantial justice, and for good cause shown, Plaintiff Paul A. Leodori, Esq., respectfully urges this Honorable Court to do the following:

1. Confirm and enter Arbitrator Drucker's three Partial Final Awards in the form of a Final Judgment, in accordance with law.
2. Enter an Order setting forth prejudgment interest due and owing from Defendants to Leodori, not only to the date of stipulation, but form that date to the date of entry of the confirmed Awards.
3. Set a plenary hearing date to determine the validity and enforceability, if any, of Defendants' proffered oral statutory waivers.
4. Permit both parties limited discovery rights to prepare for said plenary hearing.
5. Determine the amount of statutory counsel fees and costs due and owing from Defendants to Plaintiff, per CEPA.

6. For such other and further relief as this Honorable Court may deem proper and just.

Respectfully submitted,
HANAN M. ISAACS, P.C.
Attorneys for Plaintiff

BY: 
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Leodori v. CIGNA

Statement of Arbitrability Issues

12/6/10

May It Please the Court

On 11/9/10, Your Honor made no independent findings of fact or conclusions of law on the non-existence / non-enforceability of an alleged oral Agreement to Proceed to Arbitration.

You also made no credibility determinations about any of the parties to this case, or their legal counsel.

If you are not Judge Colalillo's Appellate Division to correct her errors, then you are also not her Appellate Division to confirm the propriety of her decisions. On November 9, 2010, you interpreted the rulings of Judge Colalillo from 2004. You did not foreclose Plaintiff's appeal of Judge Colalillo's rulings, but simply determined they were what they were.

On November 9th, you also found that the parties reached a new Agreement in 2007 to proceed to arbitration before Arbitrator Drucker, an agreement that included Plaintiff's right to challenge arbitrability, that challenge to be heard and decided by her. You also determined that Plaintiff detrimentally relied upon Defendant's agreement to proceed to an arbitrability hearing, because he changed his legal position by dropping his claims against 40 defendants, his request for a jury trial, and limiting his challenge to a "whistleblower" claim and the non-existence and non-enforceability of an alleged cap on damages, an alleged cap on counsel fees (or no counsel fees), and confidentiality.

You also found that Arbitrator Drucker later determined, on Defendant's motion, that she lacked authority to determine arbitrability, and that the issue is now before you; noting that Plaintiff initially disagreed with the Arbitrator's position, but is not seeking its reversal here.

Today's hearing is about Plaintiff's arbitrability challenge, the one that would have occurred before Arbitrator Drucker, but for Defendant's motion to disqualify her and the Arbitrator's decision to disqualify herself.

We must determine the scope of today's hearing. Plaintiff is certain that the scope should be plenary. Your Honor questioned last time if that was the parties' intent in 2007. We are here to show you, with proofs, that the intent of both sides was to conduct a plenary hearing, where Plaintiff could seek to prove that there was no agreement to proceed to arbitration on toxic terms and Defendants could seek to prove the opposite.

If Your Honor determines a limited scope of hearings, then Plaintiff will note his objections and will participate subject to his right to an appeal from this Court. Plaintiff, in that event, also will preserve his argument that he is entitled fully to the benefits of his bargain with the Defendants. He will preserve his right to argue against the onerous terms

offered by Defendants, but not accepted in 2004 and the non-enforceability of said terms, based not on Judge Colalillo's rulings at all, but rather on the 2007 new contract to arbitrate, preserved and memorialized in multiple Arbitrator Drucker rulings and Partial Final Awards.

Defendants have wrongly cited the NJ-URAA for the proposition that parties cannot delegate arbitrability determinations to the Arbitrator. If they are correct, and they are not, then this Court, standing in the Arbitrator's shoes also cannot entertain a plenary challenge to the Arbitrator. Under the FAA and URAA, however, Defendants are patently incorrect. The URAA provides in N.J.S.A. 2A:23B-6(c) that "an arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable."

Defendants have two contract versions; one "clean" and the other marked up by them, not signed by anyone. They

have contended at different times that the different versions are "correct". Your Honor did not explicitly rule on this. Which of the two alleged agreements did you find to be controlling? Defendants represented to Judge Landau that the marked up letter is the correct version in their letter dated October 8, 2004. During the second oral argument before you, on November 3, 2010, Mr. Furey stated at pg. 62, line 5-12:

> Mr. Furey: We came back to [Judge Colalillo], and that's when we went back on the record and she said, well if you haven't reached an agreement, then we're going to go back to the original agreement, that you provided to use when you filed this motion.
> The Court: That's the 11th?
> Mr. Furey: That's the 11th. And that's the way we proceeded the next day.

Defendants currently rely upon the "cleaned up" version; even though Mr. Furey admitted before Judge Colalillo that the FAA reference was his own invention and should be "removed". See Transcript dated 6/11/04 at page 25, line 3 to 4.

> Mr. Furey: No, we did not [discuss the Federal Arbitration Act] and we'll withdraw that [from the Agreement to Proceed to Arbitration].

But it's still in the "cleaned up" version. So let's use that one for purposes of argument. Look at the FAA jurisdiction language of the "cleaned up" version on page 2 paragraph 2. Now consider Rent-A-Center, West, Inc. v. Jackson, 130 U.S. 2772, 2777 (2010), decided on June 21, 2010. Majority opinion says that an agreement to arbitrate that delegates an arbitrability determination to the arbitrator is BINDING and the courts lack jurisdiction to hear those challenges. If we are in an FAA governed case, Rent-A-Center controls, and an arbitrability challenge is 100% before the arbitrator—in this case, you. There are no limits.

Case law does not forbid arbitrators from ruling on arbitrability. The law only forbids arbitrators from ruling on arbitrability absent an agreement for the arbitrator to rule on arbitrability!! What makes this case confusing is the case within a case. After all, according to Your Honor, if the

Arbitrator is only ruling upon whether the parties initially agreed to arbitrate, then shouldn't that have been the exclusive jurisdiction of Judge Colalillo, who ruled that the parties did agree to arbitrate? The answer is **NO,** because the parties clearly and unambiguously made a post-Judge Colalillo agreement that the Arbitrator would consider testimony and make a *de novo* ruling on whether the parties initially agreed to arbitrate.

Case law is clear that parties can agree to have an arbitrator decide the issue of arbitrability. Just recently, our Appellate Division adopted the U.S. Supreme Court holding that the issue of arbitrability cannot be decided by an arbitrator unless the parties expressly agree that the arbitrator will decide the initial issue of arbitrability:

> That is because under state and federal law, arbitration is a matter of contract, and "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." AT & Techs. v. Commc'ns Workers of Am., 475 U.S. 643, 648-49, 106 S. Ct. 1415, 1418, 89 L. Ed.2d 648, 655 (1986). The general rule is that the

> threshold question of arbitrability is for a court. "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is a 'clea[r] and unmistakabl[e]' evidence that they did so." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S.Ct. 1920, 1924, 131 L.Ed.2d 985, 994 (1995) (quoting AT & T Techs., supra, 475 U.S. at 649, 106 S. Ct. at 1418, 89 L. Ed.2d at 656).
> Madison House Group v. Pinnacle Entertainment, Inc., 2010 WL 909663 N.J. Super. A.D., March 15, 2010.

In Highgate v. Kirsh, 224 N.J. Super. 328, 332, (1988), all facts are taken into consideration to determine waiver. The Highgate test provides the procedural mechanisms for us to show the Court that there was in fact a separate subsequent agreement, and not a modification of the original agreement. There is only one Highgate test and that is totality of the circumstances. According to Wein v. Morris, 194 N.J. 364, 384 (2008):

> We conclude that the Highgate analysis presents a better approach to the waiver issue. That is, the court should consider the totality of circumstances to evaluate whether a party has waived the right to object to arbitration after the matter has been ordered to arbitration and arbitration is held. Some of the factors to be considered in determining the waiver issue are whether the party sought to enjoin arbitration or sought

interlocutory review, whether the party challenged the jurisdiction of the arbitrator in the arbitration proceeding, and whether the party included a claim or cross-claim in the arbitration that was fully adjudicated.

We are here to show that Mr. Leodori preserved his arbitrability objection modified by one degree. He agreed to arbitrate, but not under the toxic terms. As we will outline here, the Wein and Highgate factors are based on a totality of the circumstances. Plaintiff's testimony and the documents we are seeking admission of will demonstrate that the Plaintiff meet the totality of the circumstances test. He challenged arbitrability from day 1 to today. The only change was that with the consent of the Defendants, he dropped his objection from going to arbitration, but not his objection to the terms of no counsel fees, a cap on damages and confidentiality.

The totality of the circumstances in this case demonstrate that the parties entered into a subsequent agreement to avoid appeal on the arbitrability issue by

agreeing that the arbitrator would hear and finally rule on the arbitrability issue *de novo* rather than forcing the parties to appeal.

There has been no decided New Jersey case on agreements to arbitrability under the NJ-URAA, but the authors of the UAA and NJ-URAA, respectively, Dean Tom Stipanowich of Pepperdine University's Straus Institute of Dispute Resolution and Ronald Sturtz, are on our legal team. We are confident that parties are fully permitted by law to bind themselves to an arbitral determination of arbitrability. In this case, since you substitute for the Arbitrator, you have plenary authority to consider the existence and enforceability of the 2004 alleged oral agreement, parties' 2007 new agreement, unbound by Judge Colalillo's 2004 rulings. In fact, you are obligated to do so.

Both parties entered into the 2007 Agreement for the same reason: to avoid post-arbitration appeals. Listen to Ed

Ellis at the 2nd oral argument appearance on 11/3/10, at page 50, line 15 to page 51 line 2:

> You asked Mr. Furey why would we agree to [an arbitrability challenge before the Arbitrator]. And, you know, in retrospect...it's a little bit difficult to look back through the fog of time. But what we would have gotten out of that is the finality of the phase three award. In other words, Mr. Isaacs couldn't have come to Court and challenged the phase three award on arbitrability in the same way he's trying to do now. He would have been restricted, and he would have been limited to the restricted ability – the restricted appellate rights under the New Jersey Arbitration Act, which, as you just observed, were pretty limited.

All Defendants have here is an argument, but it has not been subject to a proof hearing under oath. Mr. Ellis was especially eloquent there. He made the very same comments when we discussed the matter with Arbitrator Drucker in 2007. Plaintiff wanted and expected the same benefits of the 2007 accord, and the modified agreement in which Plaintiff conceded arbitrability, but continued to challenge the toxic elements of the 2004 alleged oral

agreement. Those challenges are now before you, in plenary fashion.

If you agree with our analysis, after considering our proofs on scope, then we ask you to take sworn testimony as to the non-existence of the 2004 alleged oral contract and non-enforceability of the cap on damages, the cap or elimination of counsel fees/costs under CEPA (depending upon which version of the oral contract is considered) and blanket confidentiality of proceedings. Also, a cap on counsel fees in 2004 looks unconscionable 6 years later...when one side gets fully compensated and the other is down $2 million. Simply a "risk" of litigation/arbitration? We don't think so. We think that disparity shocks the court's conscience or should.

Here are our proofs of the parties' intent to allow broad scope of this issue:

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Maureen S. Binetti is a partner with the 155-attorney Woodbridge, New Jersey law firm of Wilentz, Goldman & Spitzer, P.A., one of the largest firm in New Jersey, and the only large firm in New Jersey which regularly handles employment matters on behalf of employees. Ms. Binetti chairs the firm's Employment Law Department.

Certified by the New Jersey Supreme Court as a Civil Trial Attorney, Ms. Binetti has extensive experience in all aspects of employment law, particularly the litigation of sexual harassment, sex, age, race, and disability discrimination, wrongful discharge, whistleblower, and restrictive covenant claims, in both the state and federal courts, as well as wage and hour and other class actions. In addition to her extensive litigation practice, Ms. Binetti often serves as an independent investigator of internal employee complaints, and as a state-approved mediator of employment claims.

Ms. Binetti is a Fellow of the College of Labor And Employment Lawyers, has been recognized as one of the leaders among women and minorities in the legal profession by the New Jersey Law Journal, and by her peers as one of the Top 100 Attorneys and Top 50 Women Lawyers in New Jersey and in Best Lawyers in America. She is a recurring speaker for the ABA, PLI, AAJ, NELA, and the New Jersey Institute for Continuing Legal Education, among others, and is co-author of numerous articles and other publications on employment law developments which impact the workplace, as well as a contributing author to the New Jersey Employment Law book by Lexis/Nexis and the NJBA Labor and Employment Section. She also serves as a Bencher and team leader for the Sidney Reitman Employment Law Inn of Court and on the District VIII Ethics Committee.

Ms. Binetti is perhaps best known for her successful representation of the plaintiff before the New Jersey Supreme Court in the seminal case of Fuchilla v. Layman and the University of Medicine and Dentistry of N.J., a sexual harassment and civil rights action, and for her recent $1 million verdict for plaintiff in a retaliation case, Battaglia v. UPS.

Ms. Binetti is a 1982 graduate of Rutgers Law School – Newark, and graduated with high honors from Douglass College of Rutgers University in 1977. She was admitted to the Bar of the State of New Jersey in 1982, and has been with the firm since that time. She is a long-time member of NELA and NELA-NJ and of numerous bar associations, including the ABA and NJSBA Labor and Employment Sections, and is past Co-Chair of the Employment Rights and Responsibilities Committee of the ABA Section and Vice-Chair of the Section's Mock Trial Competition Committee.

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Hanan M. Isaacs is a mediator, arbitrator, and trial lawyer with offices in Princeton, New Jersey. An experienced commercial and personal injury arbitrator, formerly for the American Arbitration Association's New Jersey Regional Office, Mr. Isaacs is also an Accredited Professional Mediator (APM) in general civil and divorce matters by the New Jersey Association of Professional Mediators (NJAPM). He served as NJAPM's President for the 1999 to 2001 term.

His law practice emphasizes employment litigation, business litigation, personal injury law, family law, and alternative dispute resolution in those fields.

Mr. Isaacs is a Past Chair of the Dispute Resolution Section of the New Jersey State Bar Association, serving from 1996 to 1998. He received that Section's ADR Practitioner of the Year Award in 1999. He served from 1995 until 2005 as an approved mediator under the Supreme Court's statewide mediation program (General Civil, Chancery) and pilot programs on presumptive civil and economic divorce mediation, and as a member of the Supreme Court's Complementary Dispute Resolution Committee from 1996 until 2000.

Mr. Isaacs taught at Rider University's Law and Justice Program in the fall of 2002 and at Seton Hall University Law School in 1998. He has been a guest lecturer at the New Jersey Judicial College. He serves as a Civil and Divorce Mediation Training Programs trainer for the

New Jersey Institute for Continuing Legal Education, and as a Divorce Mediation Training Programs trainer for NJAPM.

Mr. Isaacs is a Master of the Marie L. Garibaldi American ADR Inn of Court, the nation's only Inn of Court dedicated to Alternative Dispute Resolution, and also is a Master of the Mercer County American Inn of Court. Mr. Isaacs also is a Supreme Court Certified Matrimonial Practitioner.

Mr. Isaacs received his J.D. from the University of North Carolina School of Law, with honors, in 1979; an M.A. in American Legal History from Rutgers University, also in 1979; and a B.A. from Rutgers College, with honors, in 1975.

A professional mediator and arbitrator for 30 years, Mr. Isaacs also serves as a consultant to the CPA and general business community-- including the Princeton Regional Chamber of Commerce. He has trained hundreds of CPA's, human resources professionals, lawyers, and other business community members in the art and craft of negotiation, mediation, arbitration, conflict resolution, dispute systems design, ethics, and practice building.

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Section 3

1 of 4 DOCUMENTS

HOWARD WEIN, PATRICK DELANEY and JEFFERY REALTY, INC., Plaintiffs-Appellants, v. JACK MORRIS, JSM AT INMAN, L.L.C., JSM AT TALMADGE, L.L.C., CHARLESTOWN CROSSING, INC., JSM AT NEW DOVER, L.L.C. and JSM AT MATAWAN, L.L.C., Defendants-Respondents, and ABC, CORPS. 1-10, XYZ, L.L.C.'S 2-10 and JOHN AND JANES DOES 1-15, Defendants.

A-104 September Term 2006

SUPREME COURT OF NEW JERSEY

2008 N.J. LEXIS 315

October 22, 2007, Argued
April 14, 2008, Decided

PRIOR HISTORY: [*1]

On certification to the Superior Court, Appellate Division, whose opinion is reported at *388 N.J Super. 640, 909 A.2d 1186 (2006).*

Wein v. Morris, 388 N.J. Super. 640, 909 A.2d 1186, 2006 N.J. Super. LEXIS 314 (App.Div., 2006)

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff real estate brokers sued defendants, property owners and their agent, alleging they were owed commissions; defendants filed counterclaims. The trial court sue sponte ordered the matter to arbitration. The brokers moved to enforce an award entered in their favor; the trial court confirmed the award. Defendants appealed; the New Jersey Superior Court, Appellate Division, reversed the award. The brokers appealed.

OVERVIEW: Fours years after the suit was filed, defendants moved to compel arbitration, but withdrew the motion before it was ruled on. About a year later, the trial court ordered arbitration over the parties' objection. The arbitrator entered an award in favor of the brokers and granted their motion to amend the award to include future damages. The intermediate appellate court held that the trial court erred in ordering the parties to arbitrate because the parties waived arbitration, and that defendants did not forfeit their right to appellate review by not immediately seeking leave to appeal the order compelling arbitration. The high court, applying the former New Jersey Arbitration Act, *N.J.S.A. §§ 2A:24-1* to -11, held that the trial court erred in ordering the parties to arbitrate. However, the order compelling arbitration was a final order appealable as of right, and even if the order were not final, under the circumstances presented, defendants waived their right to contest the arbitrator's jurisdiction by not challenging it until they filed their appeal. Finally, the arbitrator lacked the authority to modify the arbitration award to include future damages.

OUTCOME: The intermediate appellate court's holdings that the trial court lacked authority to order arbitration and that the arbitrator lacked authority to amend the award were affirmed. Its holding that defendants had not waived their right to contest the arbitrator's jurisdiction was reversed. The case was remanded to the trial court for further proceedings.

LexisNexis(R) Headnotes

Civil Procedure > Alternative Dispute Resolution > Validity of ADR Methods

[HN1] The former New Jersey Arbitration Act, *N.J.S.A. §§ 2A:24-1* to -11, authorized courts to recognize and enforce arbitration agreements. Former *N.J.S.A. § 2A:24-1*. New Jersey public policy encourages the use of arbitration proceedings as an alternative forum.

Civil Procedure > Alternative Dispute Resolution > Arbitrations > General Overview
Contracts Law > Contract Conditions & Provisions > Arbitration Clauses
Contracts Law > Contract Interpretation > General Overview

[HN2] An arbitration agreement is a contract and is subject, in general, to the legal rules governing the construction of contracts. In accordance with the law of contracts, an arbitration clause may be modified or superseded.

Contracts Law > Contract Interpretation > Severability
Contracts Law > Defenses > Illegal Bargains
[HN3] If a contract contains an illegal provision and such provision is severable, courts will enforce the remainder of the contract after excising the illegal portion, so long as the prohibited and valid provisions are severable.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule
[HN4] A party has the right to appeal to the New Jersey Superior Court, Appellate Division, from a final judgment. *R. 2:2-3(a)(1)*. A judgment is final for purposes of appeal if it disposes of all issues as to all parties.

Civil Procedure > Alternative Dispute Resolution > Validity of ADR Methods
Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule
[HN5] The New Jersey Supreme Court deems an order compelling arbitration a final judgment appealable as of right. That is, whether the court in compelling arbitration dismisses the action as part of a final order or stays the matter, the order will be deemed final and appealable as of right.

Civil Procedure > Alternative Dispute Resolution > Validity of ADR Methods
Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule
[HN6] The New Jersey Supreme Court exercises its rulemaking authority and amends *R. 2:2-3(a)* to add an order of the court compelling arbitration to the list of orders that shall be deemed final judgments for appeal purposes. Because this is a new rule, the supreme court finds it appropriate to apply it purely prospectively.

Governments > Courts > Judicial Precedents
[HN7] Prospective application of a judicial decision is appropriate when that decision establishes a new rule of law, by either overruling past precedent or deciding an issue of first impression.

Civil Procedure > Alternative Dispute Resolution > Validity of ADR Methods
[HN8] Whether there has been a waiver of the right to litigate an issue in court rather than to proceed to arbitration is dependent upon the course elected by the party objecting to arbitration and the facts relating to the nature and degree of its participation in the arbitration proceeding. Although it is preferable for a party claiming that an issue is beyond an arbitrator's jurisdiction to seek an injunction of the arbitration, failure to do so will not alone justify a finding of waiver. The principle of waiver is invoked to assure that a party may not get two bites of the apple: if he chooses to submit to the authority and jurisdiction of an arbitrator, he may not disavow that forum upon the return of an unfavorable award. Reservation of an objection to the arbitration surely is a relevant fact in determining waiver. But that fact alone cannot be dispositive. "Waiver" really means that the objecting party has made an election which is binding not because he wants it to be, but because the law makes it so.

Civil Procedure > Alternative Dispute Resolution > Validity of ADR Methods
[HN9] The court should consider the totality of circumstances to evaluate whether a party has waived the right to object to arbitration after the matter has been ordered to arbitration and arbitration is held. Some of the factors to be considered in determining the waiver issue are whether the party sought to enjoin arbitration or sought interlocutory review, whether the party challenged the jurisdiction of the arbitrator in the arbitration proceeding, and whether the party included a claim or cross-claim in the arbitration proceeding that was fully adjudicated.

SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

Howard Wein, et. al vs. Jack Morris, et al **(A-104-06)**

Argued October 22, 2007 -- Decided April 14, 2008

WALLACE, J., writing for a unanimous Court.

This appeal requires the Court to determine the validity of an arbitration award.

In March 1997, plaintiffs Howard Wein, Patrick Delaney, and Jeffery Realty, Inc., entered into two lease commission agreements with defendant Jack Morris on behalf of defendant entities. Through those agreements,

plaintiffs became the exclusive agents to procure tenants and buyers for defendants' properties. Both agreements contained an arbitration clause that required any controversy, dispute or claim between the parties to be "resolved by binding arbitration in accordance with the rules of the American Arbitration Association."

Plaintiffs claimed they [*2] were due commissions, but defendants disagreed. In November 1998, plaintiffs filed suit in the Superior Court, alleging breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, and various other improprieties. Defendants filed an answer raising several affirmative defenses and counterclaims, and demanding a jury trial. The parties did not seek arbitration.

In May 2002, defendants moved to stay the lawsuit and to compel arbitration, but withdrew that motion before it was heard. In June 2003, after almost five years of extensive court-supervised discovery, both sides moved for summary judgment. Over the objection of the parties, all in agreement that the arbitration clause had been waived, the trial court *sua sponte* ordered the matter to arbitration and dismissed the action. No party sought to appeal that order and the matter proceeded to arbitration without further objection. The arbitrator entered an award in favor of plaintiffs that did not include future damages in the form of renewal commissions and counsel fees. Plaintiffs asked the arbitrator to reconsider the failure to include both of those items. The arbitrator subsequently awarded future [*3] damages, but denied the request for counsel fees.

Plaintiffs moved to enforce the award, and defendants moved to vacate it. The trial court confirmed the award and dismissed defendants' motion. In a published opinion, the Appellate Division reversed, finding that the trial court erred in compelling arbitration, that the trial court's order was not final and appealable as of right, and that defendants did not waive their right to contest the arbitration issue. The Appellate Division also concluded that the arbitrator exceeded his authority when he amended the award to include renewal commissions.

The Supreme Court granted plaintiffs' petition for certification and permitted the National Employment Lawyers Association of New Jersey (NELA) to file a brief as *amicus curiae*.

HELD: The trial court erred in ordering the parties to arbitrate; the order compelling arbitration was a final order appealable as of right, and even if the order were not final, under the circumstances presented defendants waived their right to contest the arbitrator's jurisdiction; and, the arbitrator lacked the authority to modify the arbitration award to include future damages.

1. The New Jersey Arbitration Act (the [*4] Arbitration Act), *N.J.S.A. 2A:24-1 to -11*, authorizes courts to recognize and enforce arbitration agreements. New Jersey courts have long noted the public policy encouraging arbitration. Applying fundamental contract principles, the Court is in accord with the Appellate Division's conclusion that arbitration was mutually waived. The parties engaged in almost five years of court-monitored discovery and clearly expressed their desire to waive arbitration. Faced with that unequivocal waiver, it was error for the trial court to order the matter to arbitration. (Pp. 10-12)

2. New Jersey court rules provide that a party has the right to appeal to the Appellate Division from a final judgment. *R. 2:2-3(a)(1)*. Here, the trial court ordered the parties to arbitration and dismissed the action. That would appear to be a final judgment appealable as of right because the order disposed of all the issues as to those parties before the Superior Court. The Court recognizes, however, that if the trial court had followed the procedure provided under the then-applicable Arbitration Act, upon determining that the matter should be referred to arbitration, the court should have stayed the action. In that [*5] event, the order compelling arbitration would not have been final because it merely suspended the litigation until after the arbitration proceedings were complete, at which time the dispute would be subject to final resolution by the court confirming, vacating, or modifying the award. When the parties are ordered to arbitration, the right to appeal should not turn on whether a trial court decides to stay the action or decides to dismiss the action. Rather, the same result should apply in either case. To avoid further uncertainty in this area, and to provide a uniform procedure, the Court finds it appropriate to deem an order compelling arbitration a final judgment appealable as of right. That will provide uniformity, promote judicial economy, and assist the speedy resolution of disputes. The Court exercises its rulemaking authority and amends *Rule 2:2-3(a)* to add an order of the court compelling arbitration to the list of orders that shall be deemed final judgments for appeal purposes. Because this is a new rule, the Court finds it appropriate to apply it purely prospectively and not to the parties of this appeal. The matter is referred to the Supreme Court's Civil Practice Committee [*6] for its recommendations. (Pp. 13-18)

3. The Appellate Division has held, and this Court agrees, that parties may waive their right to have a court determine the issue by their conduct or by their agreement to proceed in arbitration. The court should consider the totality of circumstances to evaluate whether a party has waived the right to object to arbitration after the matter has been ordered to arbitration and arbitration is held. Some of the factors to be considered in determining

the waiver issue are whether the party sought to enjoin arbitration or sought interlocutory review, whether the party challenged the jurisdiction of the arbitrator in the arbitration proceeding, and whether the party included a claim or cross-claim in the arbitration proceeding that was fully adjudicated. In this case, defendants expressed disagreement with the trial court, agreed to an arbitrator, filed their counterclaim, and fully participated in the arbitration proceeding. It would be a great waste of judicial resources to permit defendants to essentially have a second run of the case before a trial court. Under the totality of the circumstances, defendants waived their right to appeal the order compelling [*7] arbitration. (Pp. 18-24)

4. The Court is in substantial agreement with the reasoning of the Appellate Division on the issue of the arbitrator's authority to issue a corrected and clarified award. The arbitrator was without authority to amend the award to include renewal commissions. (Pp. 24-25)

The judgment of the Appellate Division is **AFFIRMED in part** and **REVERSED in part**. The matter is **REMANDED** to the trial court for further proceedings consistent with this opinion.

COUNSEL: *Brian F. Curley* argued the cause for appellants (*Mr. Curley*, attorney; *Mr. Curley* and *Ronald M. Sturtz*, on the briefs).

Michael J. Canning argued the cause for respondents (*Giordano, Halleran & Ciesla*, attorneys; *Mr. Canning* and *Kelly D. Gunther*, on the brief).

Andrew Dwyer submitted a brief on behalf of amicus curiae National Employment Lawyers Association of New Jersey (*The Dwyer Law Firm*, attorneys).

JUDGES: JUSTICE WALLACE, JR., delivered the opinion of the Court. CHIEF JUSTICE RABNER and JUSTICES LONG, LaVECCHIA, RIVERA-SOTO, and HOENS join in JUSTICE WALLACE's opinion. JUSTICE ALBIN did not participate.

OPINION BY: WALLACE, JR.

OPINION

JUSTICE WALLACE, JR., delivered the opinion of the Court.

This appeal requires us to determine the validity of an [*8] arbitration award. Plaintiffs' underlying claims are based on defendants' alleged breach of two written contracts, each of which contained an arbitration clause. Plaintiffs filed a complaint in Superior Court and did not seek arbitration. Defendants answered and filed a counterclaim. After almost five years of court-supervised discovery, both sides moved for summary judgment. Over the objection of the parties, the trial court ordered the matter to arbitration and dismissed the action. No party sought to appeal that order and the matter proceeded to arbitration without further objection. The arbitrator entered an award in favor of plaintiffs that did not include future damages and counsel fees. Plaintiffs asked the arbitrator to reconsider the failure to include both of those items. The arbitrator subsequently awarded future damages, but denied the request for counsel fees.

Plaintiffs moved to enforce the award, and defendants moved to vacate it. The trial court confirmed the award and dismissed defendants' motion. The Appellate Division reversed, finding that the trial court erred in compelling arbitration, that the trial court's order was not final and appealable as of right, and that [*9] defendants did not waive their right to contest the arbitration issue. We granted plaintiffs' petition for certification.

We hold that the trial court erred in ordering the parties to arbitrate, that the order compelling arbitration was a final order, and that even if the order were not final, under the circumstances presented defendants waived their right to contest the arbitrator's jurisdiction. We also hold that the arbitrator lacked the authority to modify the arbitration award to include future damages.

I.

The facts underlying this matter are largely uncontested. In March 1997, plaintiffs Howard Wein, Patrick Delaney, and Jeffery Realty, Inc., entered into two lease commission agreements with defendant Jack Morris on behalf of defendant business entities. Through those agreements, plaintiffs became the exclusive agents to procure tenants and buyers for defendants' properties. Both agreements also contained an arbitration clause that required any controversy, dispute or claim between the parties to be "resolved by binding arbitration in accordance with the rules of the American Arbitration Association."

Plaintiffs claimed they were due commissions, but defendants disagreed. In November [*10] 1998, plaintiffs filed suit in the Superior Court, alleging breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, and various other improprieties. Defendants filed an answer raising several affirmative defenses and several counterclaims, including fraud, misrepresentation, negligence, breach of fiduciary duties, and breach of the duty of good faith and fair dealing. Defendants demanded a jury trial.

The parties engaged in extensive discovery that lasted until 2003. The trial court closely monitored discovery, issuing six case management orders and deciding several motions to compel discovery. At one point de-

fendants filed a motion for leave to appeal, but the Appellate Division denied that motion.

In May 2002, defendants moved to stay the lawsuit and to compel arbitration, but withdrew that motion before it was heard. Defendants also filed a motion for summary judgment that same month but subsequently withdrew that motion as well. A year later in June 2003, defendants again moved for summary judgment, and plaintiffs cross-moved for summary judgment.

On the return date for the summary judgment motions, the trial court surprised the parties by sua [*11] sponte ordering the parties to binding arbitration in accordance with the agreements. Defense counsel objected, arguing that plaintiffs had waived the arbitration clause. Plaintiffs' counsel agreed that the arbitration clause had been waived and reminded the court that defendants had filed a motion to compel arbitration, but withdrew the motion.

Following the hearing, plaintiffs' counsel wrote the trial court stating that the parties were in agreement that arbitration was waived and the litigation should proceed in court. Nevertheless, the trial court entered an order dated August 28, 2003, denying the parties' motions for summary judgment as moot, directing the parties to resolve their dispute through arbitration, and dismissing the complaint and all counterclaims and cross-claims. Neither plaintiffs nor defendants filed an appeal from that order.

On September 23, 2003, plaintiffs initiated arbitration with the American Arbitration Association (AAA). The parties agreed that a retired jurist would be the arbitrator. Defendants filed an answer and counterclaim against plaintiffs. Defendants did not raise any objection with the arbitrator regarding the arbitrator's authority to resolve [*12] the dispute.

The arbitration hearing was held over sixteen days. The parties presented multiple witnesses and significant documentary evidence. In December 2004, the arbitrator awarded plaintiffs $ 1,076,769, plus pre-judgment interest. The arbitrator expressly made no award of counsel fees and did not award any commissions to plaintiffs based on potential lease renewals or extensions. The award provided that it was "in full settlement of all claims and counterclaims" and that "[a]ll claims not expressly granted herein are hereby denied."

On December 9, 2004, plaintiffs wrote the arbitrator requesting clarification on two points in the arbitration award. Plaintiffs suggested that they were entitled to commissions for lease renewals and attorneys' fees. In a separate letter to the arbitrator, defendants challenged the dates used to calculate prejudgment interest and objected to reconsideration of the attorneys' fees and lease renewal awards, citing *AAA Rule* 48, [*13] which prohibits reconsideration of the merits of any claim. However, defendants conceded that the AAA rules permit the arbitrator to fix computational errors and requested correction of alleged miscalculations in the original award.

The arbitrator amended the award, noting that the making of such amendments was within his authority in order to correct technical errors and address inadvertent omissions. The modified award granted plaintiffs commissions for any future lease renewals or extensions but did not award attorneys' fees. The arbitrator also adjusted the original calculation of commissions for one lease in favor of plaintiffs, increasing it from $ 339,456.48 to $ 370,568.25, but decreased the award relating to a different lease, lowering it from $ 379,606.50 to $ 361,530.00. Excluding the award of commissions on lease renewals, the difference between the original award and the amended award was $ 13,035.27.

Plaintiffs, using the docket number from their original complaint, filed a motion in Superior Court to confirm the arbitration award, and defendants cross-moved to vacate the award. Defendants did not raise the propriety of the dismissal order of August 28, 2003. The trial [*14] court confirmed the award in all respects and denied defendants' cross-motion.

Defendants appealed. In a published opinion, the Appellate Division held that the trial court's order directing the parties to arbitration was improper because the parties waived arbitration. *Wein v. Morris, 388 N.J. Super. 640, 649, 909 A.2d 1186 (2006)*. The panel further concluded that defendants did not forfeit their right to appellate review by not seeking "leave to appeal immediately after entry of the August 28, 2003 order, or by vigorously pursuing [their] rights in the arbitration proceedings." *Ibid.* The panel viewed the order dismissing all claims and referring the parties to arbitration as interlocutory and thus not subject to the time bar for filing an appeal. *Id. at 652-53, 909 A.2d 1186*. The panel also held that defendants' failure to file a timely motion for leave to appeal did not estop them from appealing the order after the arbitration award was entered. *Id. at 655-56, 909 A.2d 1186*. Finally, the panel concluded that the arbitrator exceeded his authority when he amended the award to include renewal commissions. *Id. at 659-60, 909 A.2d 1186*.

We granted plaintiffs' petition for certification. *190 N.J. 254, 919 A.2d 848 (2007)*. We also permitted the National Employment [*15] Lawyers Association of New Jersey (NELA) to file a brief as amicus curiae.

II.

Plaintiffs argue that the Appellate Division's ruling is in direct conflict with *Highgate Development Corp. v.*

Kirsh, 224 N.J. Super. 328, 333, 540 A.2d 861 (App. Div. 1988), which held that waiver of the right to object to arbitration "is dependent upon all of the facts relating to the nature and degree of the objecting party's participation in the arbitration proceeding." Plaintiffs contend that defendants' extensive and vigorous participation in the arbitration proceedings is indicative of their intent to forfeit any objections to arbitration. Plaintiffs further assert that sound policy counsels against affording defendants "two bites at the apple" by participating in arbitration and then contesting the arbitrator's jurisdiction after an unfavorable award. Specifically, plaintiffs point to an e-mail sent from defendants' attorney to plaintiffs' attorney after the court-ordered arbitration that stated, "[d]epending on the selection [of the arbitrator], which is essential, my client would agree to arb[itration]."

Plaintiffs further assert that the order compelling arbitration was a final order, relying on *Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)*, [*16] in which the Supreme Court held that an order compelling arbitration was a final order for purposes of appeal under the Federal Arbitration Act. Plaintiffs add that a contrary view would undermine the finality of arbitration awards and erode the strong public policy in favor of arbitration. Plaintiffs also note that defendants did not raise any objection to the arbitrator's jurisdiction during the arbitration hearings. Finally, plaintiffs assert that the arbitrator's modification of the arbitration award was appropriate.

In contrast, defendants contend that they did not waive their right to appeal the trial court's order directing the parties to arbitration. They argue that *Highgate* is not applicable in this case because in *Highgate*, the defendant waived his right to contest the arbitrator's jurisdiction by not seeking "to abort the arbitration by obtaining a judicial determination that the matter was not arbitrable." Defendants contend that they preserved their right to contest the propriety of arbitration because they lodged an objection in the Law Division. Defendants further argue that the trial court's order directing the parties to arbitrate was an interlocutory order, not subject [*17] to the forty-five-day time limit of a final order. Additionally, defendants claim that their failure to seek leave to appeal was justified because leave to appeal is "highly discretionary" and "exercised only sparingly," and that judicial economy counsels against a rule mandating the filing of a motion for leave to appeal. Finally, defendants argue that their participation in the arbitration proceedings was involuntary and therefore, they did not waive their right to appeal the order compelling arbitration.

Amicus National Employment Lawyers Association of New Jersey argues that federal precedent interpreting the Federal Arbitration Act is persuasive and that this Court should hold that "dismissal of all claims in favor of arbitration is final and subject to immediate appeal." Amicus also points to several New Jersey opinions holding that dismissal of a claim in deference to another forum is a final order subject to immediate appeal.

III.

Preliminarily, we note that at the time the complaint was filed herein, the New Jersey Arbitration Act (the Arbitration Act), *N.J.S.A. 2A:24-1 to -11*, was applicable. However, in 2003 during the course of this litigation, the Arbitration Act was partially [*18] repealed when the Legislature adopted a modified version of the Uniform Arbitration Act of 2000 (the Uniform Arbitration Act), *N.J.S.A. 2A:23B-1 to -32. L.* 2003, *c.* 95. The Uniform Arbitration Act applied to arbitration agreements made "on or after January 1, 2003," *N.J.S.A. 2A:23B-3(a)*, but "[o]n or after January 1, 2005," it "govern[ed] an agreement to arbitrate whenever made." *N.J.S.A. 2A:23B-3(c)*. However, the Uniform Arbitration Act expressly exempts collective bargaining agreements from its terms and provides that collective bargaining agreements are subject to the Arbitration Act. Consequently, the Arbitration Act continues to apply in the context of collective bargaining agreements.

Because the underlying agreements in this matter were executed in 1997, the initial complaint was filed in November 1998, and the trial court ordered the matter to arbitration in 2003, the Appellate Division concluded that the Arbitration Act applied to the present matter. *Wein, supra, 388 N.J. Super. at 654 n.6, 909 A.2d 1186.* We agree. Consequently, we view this matter under the Arbitration Act.

IV.

We first address the Appellate Division's conclusion that the trial court erred in ordering the matter to arbitration. [*19]

[HN1] The Arbitration Act authorizes courts to recognize and enforce arbitration agreements. *N.J.S.A. 2A:24-1*. Our courts have long noted our public policy that encourages the "use of arbitration proceedings as an alternative forum." *Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 489, 610 A.2d 364 (1992)*; *see also Delta Funding Corp. v. Harris, 189 N.J. 28, 39, 912 A.2d 104 (2006)*. [HN2] "An arbitration agreement is a contract and is subject, in general, to the legal rules governing the construction of contracts." *McKeeby v. Arthur, 7 N.J. 174, 181, 81 A.2d 1 (1951)* (citations omitted); *see also Hojnowski v. Vans Skate Park, 187 N.J. 323, 343, 901 A.2d 381 (2006)*. In accordance with the law of contracts, an arbitration clause may be modified or superseded. *McKeeby, supra, 7 N.J. at 181-82, 81*

A.2d 1; *see also N.J.S.A. 2A:24-1*. Further, "our courts have recognized that [i]f [HN3] a contract contains an illegal provision and such provision is severable, courts will enforce the remainder of the contract after excising the illegal portion, so long as the prohibited and valid provisions are severable." *Muhammad v. County Bank of Rehoboth Beach, 189 N.J. 1, 26, 912 A.2d 88 (2006)* (citations and quotations omitted).

Applying fundamental contract principles to the present [*20] case, we are in accord with the Appellate Division's conclusion that "the circumstances at hand abundantly militate in favor of the finding of a mutual waiver of the contractual right to arbitrate." *Wein, supra, 388 N.J. Super. at 651, 909 A.2d 1186*. Plaintiffs filed their complaint in Superior Court without reference to arbitration, demonstrating their intent to resolve the dispute in court. Defendants likewise filed an answer and asserted several counterclaims without seeking enforcement of the arbitration clauses. Thereafter, the parties engaged in almost five years of court-monitored discovery. Even after defendants filed a motion to compel arbitration, and then withdrew it, the court permitted discovery to continue. If that were not enough, the parties clearly expressed their desire to waive arbitration when they objected to the trial court's order compelling them to submit to arbitration and asserted at the hearing that they wished to waive arbitration and proceed in court. Faced with that unequivocal waiver, it was error for the trial court to order the matter to arbitration.

V.

Although the trial court erred when it ordered that the matter be arbitrated, plaintiffs argue that the order compelling [*21] arbitration was a "final judgment," and that defendants were required to file an appeal within the prescribed forty-five-day time limit or accept the judgment as binding. Alternatively, plaintiffs assert that defendants' participation in the arbitration proceedings without seeking an interlocutory appeal or raising an objection with the arbitrator precludes them from challenging the arbitrator's jurisdiction.

A.

Our court rules provide that [HN4] a party has the right to appeal to the Appellate Division from a final judgment. *R. 2:2-3(a)(1)*; *Moon v. Warren Haven Nursing Home, 182 N.J. 507, 511, 867 A.2d 1174 (2005)*. A judgment is final for purposes of appeal if it "dispos[es] of all issues as to all parties." *Hudson v. Hudson, 36 N.J. 549, 552-53, 178 A.2d 202 (1962)*. Although that principle is easily stated, it is not always easily applied.

In the present case, the trial court ordered the parties to arbitration and dismissed the action. That would appear to be a final judgment appealable as of right because the order disposed of all the issues as to those parties before the Superior Court. We recognize, however, that if the trial court had followed the procedure provided under the then-applicable Arbitration Act, upon [*22] determining that the matter should be referred to arbitration, the court should have stayed the action "until an arbitration has been had in accordance with the terms of the agreement." *N.J.S.A. 2A:24-4*. In that event, the order compelling arbitration would not have been final because it merely suspended the litigation until after the arbitration proceedings were complete, at which time the dispute would be subject to final resolution by the court confirming, vacating, or modifying the award. *N.J.S.A. 2A:24-4*.

Other jurisdictions that have considered whether an order compelling arbitration is a final order are divided. *See* David B. Harrison, Annotation, *Appealability of State Court's Order or Decree Compelling or Refusing to Compel Arbitration*, 6 A.L.R. 4th 652, § 3(a)-(b) (Supp. 2007) (collecting cases). *Compare Muao v. Grosvenor Props., Ltd., 99 Cal. App. 4th 1085, 122 Cal. Rptr. 2d 131 (Cal. Ct. App. 2002)* (holding order compelling arbitration is interlocutory), *with Cabrini Med. Ctr. v. Desina, 64 N.Y.2d 1059, 479 N.E.2d 217, 489 N.Y.S.2d 872 (N.Y. 1985)* (holding order compelling arbitration is final and immediately appealable).

The United States Supreme Court considered this issue under the Federal Arbitration Act (FAA) and concluded [*23] that such an order was a final order. *Green Tree, supra, 531 U.S. at 79, 121 S. Ct. at 513, 148 L. Ed. 2d at 373*. In *Green Tree*, the parties' loan agreement contained an arbitration clause. *Id. at 82-83, 121 S. Ct. at 517-18, 148 L. Ed. 2d at 378-79*. After the plaintiff sued the defendant in Federal Court, the defendant moved to compel arbitration under the FAA, and the motion was granted. *Id. at 83, 121 S. Ct. at 518, 148 L. Ed. 2d at 379*. On appeal, the Eleventh Circuit determined that the order was final and affirmed the judgment. *Ibid.* In deciding the issue, the Supreme Court reviewed *9 U.S.C.A. § 16*, which allows for appeal under certain conditions and provides in part that an appeal may be taken from "a final decision with respect to an arbitration that is subject to this title." *Id. at 84-85, 121 S. Ct. at 518-19, 148 L. Ed. 2d at 379-80*. The Court noted that *Section 16(a)(3)* "preserves immediate appeal of any final decision with respect to an arbitration, regardless of whether the decision is favorable or hostile to arbitration," and that a "final decision" is a "decision that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment." [*24] *Id. at 86, 121 S. Ct. at 519, 148 L. Ed. 2d at 380* (citations and internal quotations omitted). After noting the lack of a uniform approach with respect to orders directing arbitration, the Court concluded that when the trial court orders "the parties to

proceed to arbitration" and dismisses "all the claims before it, that decision is 'final' within the meaning of *§ 16(a)(3)*, and therefore appealable." *Id. at 88-89, 121 S. Ct. at 520-21, 148 L. Ed. 2d 381-82.*

We agree with the reasoning of *Green Tree*. Beyond that, in the present case, once the trial court ordered the parties to proceed in arbitration and dismissed the complaint, that decision ended the litigation in the Superior Court. There was nothing left for the trial court to decide between the parties. We conclude, therefore, that the order of the trial court was a final judgment subject to an immediate appeal.

As noted above, if the court had stayed the action, the judgment would not have been final because the parties had to return to the trial court before all of the issues could be finalized. In our view, there should be a uniform approach with respect to the right to appeal an order for arbitration. When the parties are ordered [*25] to arbitration, the right to appeal should not turn on whether a trial court decides to stay the action or decides to dismiss the action. Rather, the same result should apply in either case. In that way the parties will know with relative certainty that the order is appealable as of right.

The Uniform Arbitration Act is more explicit in determining when an appeal may be taken. That Act, which became applicable January 1, 2005 for all agreements with arbitration clauses regardless of when the agreement was entered, expressly provides when an appeal may be taken. *N.J.S.A. 2A:23B-3(c), -28.* Pursuant to the Uniform Arbitration Act, if the court finds "an enforceable agreement to arbitrate, it shall order the parties to arbitrate," *N.J.S.A. 2A:23B-7(b)*, and shall stay the proceeding on just terms, *N.J.S.A. 2A:23B-7(f),(g)*. The Uniform Arbitration Act expressly authorizes an appeal from

> (1) an order denying a summary action to compel arbitration;
>
> (2) an order granting a summary action to stay arbitration;
>
> (3) an order confirming or denying confirmation of an award;
>
> (4) an order modifying or correcting an award;
>
> (5) an order vacating an award without directing a rehearing; or
>
> (6) a final judgment [*26] entered pursuant to this act.
>
> [*N.J.S.A. 2A:23B-28.*]

We note, however, there is no express provision for an appeal from an order compelling arbitration and staying the judicial proceeding. We do not know if that was an oversight in the statute or an intended consequence.

To avoid further uncertainty in this area, and to provide a uniform procedure, we find it appropriate [HN5] to deem an order compelling arbitration a final judgment appealable as of right. That is, whether the court in compelling arbitration dismisses the action as part of a final order or stays the matter, the order will be deemed final and appealable as of right. In our view, that will provide uniformity, promote judicial economy, and assist the speedy resolution of disputes.

Rule 2:2-3(a) governs interlocutory and final appeals. That rule also delineates various orders that are deemed final. [HN6] We exercise our rulemaking authority and amend *Rule 2:2-3(a)* to add an order of the court compelling arbitration to the list of orders that shall be deemed final judgments for appeal purposes. We refer the matter to our Civil Practice Committee for its recommendations. *Moon, supra, 182 N.J. at 517-18, 867 A.2d 1174.* Previously there was no uniform approach [*27] to the treatment of such orders. Because this is a new rule, we find it appropriate to apply it purely prospectively and not to the parties of this appeal. *See Velez v. City of Jersey City, 180 N.J. 284, 297, 850 A.2d 1238 (2004)* (holding that [HN7] prospective application of a judicial decision is appropriate when that decision "establishes a new rule of law, by either overruling past precedent or deciding an issue of first impression") (citing *Alderiso v. The Medical Center of Ocean City, Inc., 167 N.J. 191, 203, 770 A.2d 275 (2001)*).

B.

Plaintiffs also argue that defendants waived their right to appeal the order compelling arbitration because they participated in arbitration without objection. Plaintiffs urge that, based on the totality of circumstances test set forth in *Highgate*, defendants forfeited their right to object to arbitration in this appeal.

Our Appellate Division has held, and we agree, that parties may waive their right to have a court determine the issue by their conduct or by their agreement to proceed in arbitration. *N.J. Mfrs. Ins. Co. v. Franklin, 160 N.J. Super. 292, 300, 389 A.2d 980 (App. Div. 1978)*; *see also* D.J. Penofsky, Annotation, *Participation in Arbitration Proceedings as Waiver of Objections to Arbitrability*, 33 A.L.R.3d 1242, 1245-50 (1970).

In [*28] *Highgate*, our Appellate Division addressed whether the parties waived the right to proceed in court by participating in the arbitration proceeding. There, the plaintiffs filed a demand for arbitration with the AAA. *Highgate, supra, 224 N.J. Super. at 330, 540*

A.2d 861. The defendants objected on the grounds that the agreement did not require arbitration. *Ibid.* Nevertheless, the defendants filed a response with the arbitrator, objecting to the arbitration but also asserting twelve substantive defenses. *Id. at 331, 540 A.2d 861*. The matter proceeded to arbitration without further objection and "occupied five full days, during which both parties presented extensive proofs." *Ibid.* The arbitrator issued an award in favor of the plaintiffs, but when plaintiffs sought confirmation of the award, the defendants argued that the award was invalid because the arbitrator lacked jurisdiction. *Id. at 331-32, 540 A.2d 861*.

The Appellate Division noted that "[w]hether [HN8] there has been a waiver is dependent upon the course elected by the objecting party and the facts relating to the nature and degree of its participation in the arbitration proceeding." *Id. at 332, 540 A.2d 861* (quotation and alterations omitted). The panel further stated that although "it is [*29] preferable for a party claiming that an issue is beyond an arbitrator's jurisdiction to seek an injunction of the arbitration, failure to do so will not alone justify a finding of waiver." *Id. at 332-33, 540 A.2d 861*. In declaring that waiver is evaluated by examining all relevant circumstances, the panel explained that

> [t]he principle of waiver is invoked to assure that a party may not get two bites of the apple: if he chooses to submit to the authority and jurisdiction of an arbitrator, he may not disavow that forum upon the return of an unfavorable award. That important policy would be subverted if a party could enter a nominal objection to the arbitrator's jurisdiction, submit himself fully to the arbitration and still retain the option to demand a new hearing if he does not like the outcome of the arbitration. Reservation of an objection to the arbitration surely is a relevant fact in determining waiver. But that fact alone cannot be dispositive.
>
> [*Id. at 333, 540 A.2d 861*.]

The panel also referred to *Merchants Indemnity Corp. v. Eggleston, 37 N.J. 114, 130, 179 A.2d 505 (1962)*, in which Chief Justice Weintraub explained in an analogous setting that "'waiver' is a term 'used loosely to embrace a number of concepts. . . [*30] . [I]t would be a mistake to apply a definition, useful for one purpose, to a situation for which it was not intended.'" *Ibid.* The panel reasoned that "'waiver' really means that the objecting party has made an election which is binding 'not because he wants it to be, but because the law makes it so.'" *Id. at 334, 540 A.2d 861* (quoting *Merchants, supra, 37 N.J. at 131, 179 A.2d 505*). The panel concluded that the defendants waived their right to object to arbitration when they filed a full response on the merits, filed their own counterdemand for AAA arbitration that subsequently was withdrawn, proceeded from discovery through a full litigation of all of the issues over a two-year period, and never sought to abort the arbitration by obtaining a judicial determination that the matter was not arbitrable under the contract. *Ibid.*

Other jurisdictions also look to the conduct of the parties in determining the waiver issue. For example, in *First Options of Chicago v. Kaplan, 514 U.S. 938, 946, 115 S. Ct. 1920, 1925, 131 L. Ed. 2d 985, 994-95 (1995)*, the Supreme Court evaluated whether the party had waived the right to challenge arbitration under the Federal Arbitration Act. In that case, the contesting party "forcefully" [*31] and repeatedly objected to the arbitrator's jurisdiction. The Court concluded that the contesting party's objections demonstrated that he did not want the arbitrator to have binding authority over him, and therefore did not waive the right to object. *Ibid.*

The Second Circuit interpreted *First Options* to require a party participating in arbitration proceedings to make a "timely objection to the submission of the dispute to arbitration [or else] that party may be found to have waived its right to object to the arbitration." *Opals on Ice Lingerie, Designs by Bernadette, Inc. v. Bodylines Inc., 320 F.3d 362, 368-69 (2d Cir. 2003)* (citing *First Options, supra, 514 U.S. at 946, 115 S. Ct. at 1925, 131 L. Ed. 2d at 994*). Thus, under the Federal Arbitration Act a party must file a timely objection with the arbitrator or else waiver will be applied.

Here, the Appellate Division neither considered *Highgate* nor addressed the federal case law; rather, it referenced an earlier line of cases that employed a different analysis to arrive at a contrary result. *See Wein, supra, 388 N.J. Super. at 656-59, 909 A.2d 1186*. Specifically, the panel cited *Collingswood Hosiery Mills v. American Federal Hosiery Workers, 28 N.J. Super. 605, 611, 101 A.2d 372 (Ch. Div. 1953)*, [*32] *rev'd on other grounds, 31 N.J. Super. 466, 107 A.2d 43 (App. Div. 1954)*, which found waiver because the party had "voluntarily submitted to arbitration and participated in the hearings." *Wein, supra, 388 N.J. Super. at 656-57, 909 A.2d 1186*. The panel concluded that in the present case the trial court's sua sponte order compelling arbitration left defendants with "no alternative but to actively pursue and protect [their] interests in arbitration," and therefore defendants did not voluntarily waive their right to contest the arbitrator's jurisdiction. *Id.*

We conclude that the *Highgate* analysis presents a better approach to the waiver issue. That is, [HN9] the

court should consider the totality of circumstances to evaluate whether a party has waived the right to object to arbitration after the matter has been ordered to arbitration and arbitration is held. Some of the factors to be considered in determining the waiver issue are whether the party sought to enjoin arbitration or sought interlocutory review, whether the party challenged the jurisdiction of the arbitrator in the arbitration proceeding, and whether the party included a claim or cross-claim in the arbitration proceeding that was fully adjudicated.

Once the [*33] trial court below ordered both parties to arbitration, defendants raised an objection with the trial court, but failed either to object before the arbitrator or to seek direct appeal or interlocutory review. The Appellate Division recognized that defendants "could have presented a compelling case for the grant of interlocutory review of the August 28, 2003 order," but did not give that much weight. *Wein, supra, 388 N.J. Super. at 656, 909 A.2d 1186.*

A motion for leave to appeal, whether granted or not, would have been favorable evidence for defendants in deciding the waiver issue. More importantly, once the parties agreed on an arbitrator, defendants did not file an objection to the arbitrator's jurisdiction. Rather, defendants expressed disagreement with the trial court, agreed to an arbitrator, filed their counterclaim, and fully participated in the arbitration proceeding. If defendants intended to preserve the right to appeal the order requiring arbitration, at a minimum, they should have raised an objection before the arbitrator. *See N.J. Mfrs., supra, 160 N.J. Super. at 300, 389 A.2d 980* (holding that company's objection to arbitration in memoranda submitted to arbitrator represented adequate reservation of [*34] issue for judicial determination). Additionally, defendants did not even argue the propriety of the August 28, 2003 order before the Law Division when they opposed plaintiffs' motion to confirm the award and cross-moved to dismiss the arbitration award. Instead, defendants waited until their appeal to the Appellate Division to raise that issue. *See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234, 300 A.2d 142 (1973).*

Finally, it would be a great waste of judicial resources to permit defendants, after fully participating in the arbitration proceeding, to essentially have a second run of the case before a trial court. That would be contrary to a primary objective of arbitration to achieve "final disposition, in a speedy, inexpensive, expeditious and perhaps less formal manner." *Barcon Assocs. v. Tri-County Asphalt Corp., 86 N.J. 179, 187, 430 A.2d 214 (1981)* (citation omitted). Accordingly, we conclude that under the totality of the circumstances presented, defendants waived their right to appeal the order compelling arbitration.

VI.

Lastly, plaintiffs contend that the arbitrator was within the scope of his authority to issue a corrected and clarified award under the Rules of the AAA. The Appellate Division disagreed, [*35] and so do we. The panel concluded that

> No one disputes that the award contained computational errors that warranted correction, but the arbitrator exceeded his authority when he granted relief for renewal commissions not permitted by his original award. Because the original award expressly denied all claims for relief not otherwise mentioned, the arbitrator's later grant of additional relief constituted a modification of that which was already denied and was inconsistent with Rule 46's declaration that "[t]he arbitrator is not empowered to redetermine the merits of any claim already decided."
>
> [*Wein, supra, 388 N.J. Super. at 659-60, 909 A.2d 1186.*]

We are in substantial accord with the reasoning of the Appellate Division and affirm that issue essentially for the reasons expressed by the panel. We conclude that the arbitrator was without authority to amend the award to include renewal commissions.

VII.

We affirm in part and reverse in part the judgment of the Appellate Division. We remand to the trial court for further proceedings consistent with the views expressed herein.

CHIEF JUSTICE RABNER and JUSTICES LONG, LaVECCHIA, RIVERA-SOTO, and HOENS join in JUSTICE WALLACE's opinion. JUSTICE ALBIN did not [*36] participate.

BIOGRAPHY OF

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Brian F. Curley is a Certified Civil Trial Attorney. He specializes in business litigation in Morristown, New Jersey. He received his J.D. from Widener University School of Law in 1994 and received his L.L.M. in Trial Advocacy in May 2000 from Temple University School of Law.

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