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HAVE YOU VOLUNTEERED TO ARBITRATE TODAY?

Lynne Canning*

INTRODUCTION

On its face, *Strausberg v. Laurel Healthcare Providers, LLC*¹ addresses which party has the burden to prove that a contract is unconscionable, and therefore unenforceable, in the context of a mandatory predispute arbitration agreement in a nursing home admissions process, and whether a state court ruling specifically targeting arbitration agreements was preempted by federal law. At the heart of the case is the growing conflict between the traditionally voluntary use of arbitration and the increasing use of mandatory predispute arbitration agreements in the consumer context. *Strausberg* also raises issues about states' increasing use of the equitable doctrine of unconscionability and the contract formation element of mutual assent to balance policies favoring arbitration with policies protecting vulnerable consumer populations.

The first section of this article lays out the pertinent facts of *Strausberg* and its procedural history. The second section discusses the history of arbitration in the United States, the Supreme Court's expanding interpretation of the scope of the Federal Arbitration Act ("FAA"), the increasing use of mandatory predispute arbitration agreements in nursing home admissions processes and New Mexico state law and jurisprudence concerning arbitration and unconscionability. The third section analyzes the rationale of the New Mexico Supreme Court in reversing the New Mexico Court of Appeals' decision in *Strausberg*. Finally, the article addresses the implications of *Strausberg* for the use of mandatory predispute arbitration provisions in contracts between parties with unequal bargaining power, as New Mexico and other state courts strive to balance

* Class of 2015, University of New Mexico School of Law. Thanks to my Mom and Dad, Angie and Jim Canning, with whom I wish I'd been able to share my law school adventures, and to Danielle Gothie and Nova Cooper, who have loved and supported me every step of the way. Thanks also to the amazing faculty and staff at UNM School of Law who continue to remind me why I chose to go to law school, to *NMLR* Editor-in-Chief Matthew Zidovsky for his indispensable help, to Emily, for sharing the experience and the commute, and to my family, friends and colleagues for their ongoing encouragement.

1. *Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, 304 P.3d 409.

policies protecting vulnerable consumers with policies favoring mandatory predispute arbitration.

STATEMENT OF THE CASE

A. *Facts*

Plaintiff–Respondent Nina Strausberg (“Strausberg”) underwent spinal fusion surgery on April 5, 2007, at the age of forty-eight. She required rehabilitation following surgery, and on April 11, 2007, was admitted to the Arbor Brook nursing home in Albuquerque, New Mexico, where she resided until April 23, 2007.² Although Strausberg had originally chosen a small facility near her home for her post-surgery requirements, she was told an hour before she left the hospital that she would be going to Arbor Brook, because no one else would take her.³ Strausberg was required to sign a predispute arbitration agreement as a mandatory condition for admission into the nursing home. At the time she signed the agreement, Strausberg was recovering from surgery, in pain, and suffering cognitive limitations from pain medication.⁴ The nurse liaison from Arbor Brook, whose job it was to ensure that prospective residents signed the arbitration agreement, was neither trained in the substance of the agreement nor prepared to answer questions.⁵ The agreement provided in part, that:

[b]y signing this Arbitration Agreement, the Facility and the Resident relinquish their right to have any and all disputes associated with . . .the provision of services under the [Arbitration] Agreement (including, without limitation, class action or similar proceedings; claim for negligent care or any other claims of inadequate care provide [sic] by the Facility . . .), resolved through a lawsuit, namely by a judge, jury or appellate court, except to the extent that New Mexico law provides for judicial action in arbitration proceedings. This Arbitration Agreement shall not apply to either the Facility or Resident in any disputes pertaining to collections or discharge of residents.

BY SIGNING THIS AGREEMENT, THE FACILITY AND THE RESIDENT UNDERSTAND THAT THEY ARE GIVING UP THEIR CONSTITUTIONAL RIGHT TO A TRIAL IN

2. *Id.* ¶ 4.

3. Brief for Appellant at 2, *Strausberg v. Laurel Healthcare Providers, LLC*, 2012-NMCA-006, 269 P.3d 914 (No. 29,238).

4. *Id.* at 1.

5. *Id.* at 5.

COURT BY A JUDGE OR JURY, AND THE RIGHT TO APPEAL CONCERNING ANY DISPUTES.⁶

B. Procedural History

In June 2008, Strausberg filed a complaint for damages in the District Court of Bernalillo County against the operator of Arbor Brook, Arbor Brook LLC, d/b/a Arbor Brook Healthcare, and Laurel Healthcare Providers, LLC as its owner, operator, or manager (“Defendants”).⁷ Strausberg alleged *inter alia* that negligent care resulted in painful, preventable decubitus ulcers at the site of her surgical wound, a staph infection, hospitalization, and other medical complications.⁸

Defendants moved the district court to compel arbitration and dismiss Strausberg’s case, arguing that all of her claims were covered by the predispute arbitration agreement she signed.⁹ In response, Strausberg argued that the arbitration agreement was invalid, being both procedurally and substantively unconscionable.¹⁰ Strausberg argued the agreement was substantively unconscionable because it was one-sided and covered only claims that would be brought by the resident, but excluded claims that would be brought by the nursing home.¹¹ Strausberg also argued that she was, at the time of signing, “unsophisticated, mentally compromised, in a greatly diminished bargaining position, and did not feel free to accept or decline the terms demanded by the Defendants” and thus, it would be “fundamentally unfair to bind [her] to the purported arbitration contract, given the gross procedural unconscionability existing at the time she signed it.”¹²

The district court first ruled that the agreement was not substantively unconscionable, and subsequently held an evidentiary hearing to determine if it was procedurally unconscionable.¹³ While specifically noting that Strausberg’s testimony demonstrated that she was confused about signing the arbitration agreement, the district court ruled that the “factors considered to determine the validity of the arbitration agreement ‘generally [were] evenly balanced[.]’”¹⁴ The district court also noted that

6. *Strausberg*, 2013-NMSC-032, ¶ 5.

7. *Id.* ¶ 6.

8. *Id.*

9. *Id.* ¶ 7.

10. *Strausberg v. Laurel Healthcare Providers, LLC*, 2012-NMCA-006, ¶ 3, 269 P.3d 914.

11. *Strausberg*, 2013-NMSC-032, ¶ 7.

12. Brief for Appellant at 9, *Strausberg v. Laurel Healthcare Providers, LLC*, 2012-NMCA-006, 269 P.3d 914 (No. 29,238).

13. *Strausberg*, 2012-NMCA-006, ¶ 3.

14. *Id.* ¶ 4.

“Plaintiff believed that her only option was to be discharged from the hospital to Defendant[s]’ care, but did not testify whether she looked into other placement options, *and it was her burden to prove the contract at issue [was] unenforceable*”¹⁵ Ultimately, the district court ruled that Strausberg had failed to meet the burden of proof required of her as the party seeking to set aside the arbitration agreement, and held that the arbitration agreement was not procedurally unconscionable.¹⁶ The court granted the Defendants’ motion to compel arbitration.¹⁷

On appeal, the New Mexico Court of Appeals cited the recent New Mexico Supreme Court decisions in *Rivera* and *Cordova*, which were issued during the briefing period. The court of appeals noted that “unconscionability is an equitable doctrine rooted in public policy under which an arbitration agreement may be deemed unenforceable,” and that New Mexico recognizes both procedural and substantive unconscionability under the doctrine of contractual unconscionability.¹⁸ A contract provision is substantively unconscionable when it “unreasonably benefits one party over another,”¹⁹ and “procedurally unconscionable where there is such gross inequality in bargaining power between the parties that one party’s choice is effectively non-existent.”²⁰ Defining unconscionability as under *Guthmann v. La Vida Llena* and *Cordova*, the court of appeals noted that adhesion contracts may result in procedural unconscionability and that:

To determine whether an adhesion contract exists, the court inquires into three factors: “(1) whether it was prepared entirely by one party for the acceptance of the other; (2) whether the party proffering the contract enjoyed superior bargaining power because the weaker party could not avoid doing business under the particular terms; and [(3)] whether the contract was offered to the weaker party without an opportunity for bargaining on a take-it-or-leave-it basis.”²¹

15. *Id.* (emphasis added).

16. *Id.*

17. *Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, ¶ 15, 304 P.3d 409.

18. *Strausberg*, 2012-NMCA-006, ¶ 8 (citing *Rivera v. Am. Gen. Fin. Services, Inc.* 2011-NMSC-033, ¶ 43, 150 N.M. 398, *and Cordova v. World Fin. Corp. of N.M.* 2009-NMDC-021, ¶ 21, 146 N.M. 256).

19. *Strausberg*, 2012-NMCA-006, ¶ 11.

20. *Id.* ¶ 12.

21. *Id.* ¶ 13 (citing *Guthmann v. La Vida Llena*, 1985-NMSC-106, ¶ 11, 103 N.M. 506. *See also Cordova v. World Fin. Corp. of N.M.* 2009-NMDC-021, ¶ 21, 146 N.M. 256.

The court of appeals cited the West Virginia Supreme Court's reasoning for treating nursing home contracts with mandatory predispute arbitration agreements differently from "mere commercial contracts" in *Brown v. Genesis Healthcare Corp.*²² The court of appeals then noted that the *Strausberg* facts made clear that this was "not a mere commercial transaction," and that the nursing home admission process often takes place in a context where people are "at their most vulnerable, emotionally or physically, or both."²³

The court of appeals reversed, holding that the district court erred by putting the burden on the Plaintiff to prove unconscionability, because the "party who seeks to compel arbitration has the burden to prove the existence of a valid agreement to arbitrate."²⁴ It held that "when a nursing home relies upon an arbitration agreement signed by a patient as a condition for admission to the nursing home, and the patient contends that the arbitration agreement is unconscionable, the nursing home has the burden of proving that the arbitration agreement is not unconscionable."²⁵ In its ruling, the court of appeals acknowledged that "most courts that have considered the question, place the burden on the party seeking to set aside an arbitration agreement on unconscionability grounds," but distinguished *Strausberg* from other cases involving commercial transactions.²⁶ It concluded that while "parties are generally bound to resolve disputes by arbitration when they have contractually agreed to do so . . . a party seeking specific performance has the burden of providing grounds for such relief. In this case, it is the existence of a legally valid and enforceable contract to arbitrate."²⁷ In his dissent, Judge Wechsler argued that the court misread the holding in *Brown*, noting that the equitable doctrine of unconscionability is a defense or exception to enforcing an otherwise valid contract, and most courts addressing the issue of unconscionability place the burden on the party seeking to set aside an arbitration agreement.²⁸

Following the New Mexico Court of Appeals' ruling, Defendants petitioned for a writ of certiorari, and the New Mexico Supreme Court granted review to address which party has the burden of proof on the

22. *Strausberg*, 2012-NMCA-006, ¶ 19, 269 P.3d 914 (citing *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250 (W.Va. 2011)).

23. *Strausberg*, 2012-NMCA-006, ¶ 18.

24. *Id.* ¶ 1.

25. *Id.* ¶ 20.

26. *Id.* ¶ 17.

27. *Id.* ¶ 16.

28. *Id.* ¶¶ 28–29 (Wechsler J., dissenting).

issue of unconscionability.²⁹ The New Mexico Supreme Court reversed and held that Strausberg bore the burden of proving the arbitration agreement was unconscionable, and that the court of appeals' rule was preempted by the FAA.³⁰

BACKGROUND

A. Arbitration and the FAA

Arbitration is defined as “[a] method of dispute resolution involving one or more neutral third parties who are usu[ally] agreed to by the disputing parties and whose decision is binding.”³¹ In practice, arbitration refers to any process in which a private third-party neutral, much like a judge, renders a judgment or “award” after hearing evidence and argument in a dispute.³² Arbitration procedures are characterized as “adversary *adjudicative* procedures analogous to court trial,” resulting in “a judgment that is *binding*.”³³ Lawyers involved in arbitration act as advocates for parties in much the same way they do in court trials, presenting oral arguments, documentary and testimonial evidence, and preparing briefs for the arbitrators, who act as neutral decision makers and determine awards.³⁴ Arbitration awards are mutually binding, enforceable in a court of law, and are generally more difficult to overturn than court judgments.³⁵ Courts have increasingly favored binding arbitration as an effective dispute resolution option, and over time, arbitration procedures have become progressively more similar to litigation, resulting in what has been called an “all-purpose surrogate” for trial.³⁶

Historically, arbitration and mediation were the preferred methods of dispute resolution for communities united by religion, philosophy, ethnicity, immigration status, or commerce, which shared a coherent community vision, a suspicion of law and lawyers, and common goals of social harmony beyond individual conflict.³⁷ Native Americans have also long

29. *Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, ¶ 1, 304 P.3d 409.

30. *Id.* ¶ 3.

31. BLACK'S LAW DICTIONARY 119 (9th ed. 2010).

32. JAY FOLBERG ET AL., *RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW* 537 (2d ed. 2010).

33. *Id.* (emphasis in original).

34. *Id.*

35. *Id.*

36. *Id.* at 539.

37. JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS* 4 (1983). See DAVID J. LANGUM, *LAW AND COMMUNITY ON THE MEXICAN CALIFORNIA FRONTIER: ANGLO-AMERICAN EXPATRIATES AND THE CLASH OF*

used arbitration as a means of resolving disputes within and between tribes, and today continue to use traditional methods of dispute resolution as an alternative to the Anglo-European adversarial or “vertical justice” system.³⁸ The practice of arbitration has been commonplace as a method of alternative dispute resolution in the United States for centuries, and was used extensively by early colonists throughout the period of English rule.³⁹ In fact, “the American pattern of dispute settlement is, and always has been, more varied and complex than our currently constricted legal perspective would suggest.”⁴⁰

Voluntary binding arbitration also has a long history in the commercial sphere. Arbitration was common in commercial transactions in medieval Europe, utilizing the commercial customary law developed by merchants’ guilds and corporations,⁴¹ and similar arbitration practices were also favored by merchants in the American colonies as being more efficient and effective than the courts.⁴² The *statute mercatorum* or “law merchant” eventually became codified as an alternative to the courts, which were viewed as “unsuitable” for business transactions, being a “cumbersome, expensive and irritatingly slow procedure” that failed to recognize the mercantile concept of negotiability.⁴³ In medieval times, merchant courts dispensed speedy justice for traders at commercial fairs, and by the middle of the twentieth century, industry and trade associations in this country were sponsoring private arbitration programs for business-to-business disputes.⁴⁴ These commercial arbitration agreements, however, have traditionally been voluntarily entered into and “negotiated by sophisticated parties of approximately equivalent bargaining power who under[stand] the benefits and costs of their bargains.”⁴⁵

Businesses and corporations prefer arbitration over litigation for many reasons: “to achieve a speedy resolution; to avoid the costs and

LEGAL TRADITIONS, 1821-1846 97 (1987) (explaining that the primary function of the early 19th century system of conciliation used by the Mexican California courts was to prevent litigation and settle disputes without the necessity of formal adjudication).

38. See The Honorable Robert Yazzie, “*Life Comes From It*”: Navajo Justice Concepts, 24 N.M. L. REV. 175 (1994).

39. William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L. Q. 193, 198 (1956).

40. AUERBACH, *supra* note 37, at 4.

41. RUDOLPH B. SCHLESINGER, *COMPARATIVE LAW* 296 (4th ed., 1980).

42. FOLBERG, *supra* note 32, at 538.

43. SCHLESINGER, *supra* note 41, at 296.

44. FOLBERG, *supra* note 32, at 539.

45. Linda J. Demaine and Deborah R. Hensler, “Volunteering” to Arbitrate through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROBS. 55, 55–56 (2004).

delays of litigation; to forego extensive discovery; to escape the glare of a public proceeding; to avoid the publication of a legal precedent; to choose a decision maker with pertinent business or legal expertise; or, to achieve a more satisfactory or more durable resolution.”⁴⁶ Arbitration today, however, can end up being as lengthy or costly as litigation, with some business attorneys and commercial arbitrators increasingly complaining that arbitration has become “too much like litigation.”⁴⁷ For individuals, arbitration can be cost-prohibitive, although “one of the major improvements over the past decade in mandatory arbitration of consumer claims is that more arbitration clauses provide that the corporation should pay most of the fees for arbitration.”⁴⁸

Despite its long history of use in the commercial sphere, arbitration is often referred to as “an extraordinary substitute” for the adjudication of disputes in courts of law.⁴⁹ In fact, the common law tradition “rejected arbitration as a deprivation of the jurisdiction of the courts and therefore contrary to public policy.”⁵⁰ In response, Congress passed the Federal Arbitration Act (“FAA”) in 1925, the purpose of which was to require U.S. courts to grant motions to compel arbitration, to “reverse the longstanding judicial hostility to arbitration agreements . . . and to place them on the same footing as other contracts.”⁵¹ A 1926 Virginia Law Review article celebrating the passage of the FAA stated, “[b]y this act there is reversed the hoary doctrine that agreements for arbitration are revocable at will and are unenforceable, and in the language of the statute itself, they are made ‘valid, enforceable and irrevocable’ within the limits of Federal

46. FOLBERG, *supra* note 32, at 540.

47. *Id.* at 541.

48. Public Justice Comments to Bureau of Consumer Financial Protection In Response to Request for Information for Study of Pre-Dispute Arbitration Agreements, Docket No. CFPB-2012-0017, 9 (June 23, 2012), http://publicjustice.net/sites/default/files/downloads/PublicJusticeCommentsToCFPB_ReMandatoryArbitration_Jun2012.pdf.

49. Jones, *supra* note 39, at 193.

50. Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 185 (2004).

51. Ann E. Krasuski, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts With Residents*, 8 DEPAUL J. HEALTH CARE L. 263, 271 (2004-2005). See generally Federal Arbitration Act, 9 U.S.C. §§ 1-37 (2000). The Act was passed as the United States Arbitration Act and provides, “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.” *Id.* at § 2.

jurisdiction.”⁵² Today, the FAA is consistently interpreted by the Supreme Court to preempt all state laws perceived as undermining arbitration, and thirty-five states have enacted the 1955 Uniform Arbitration Act, with fourteen others adopting similar legislation.⁵³

In 1925 when the FAA was passed, the use of arbitration was primarily limited to business-to-business transactions and management/union contexts,⁵⁴ which were “negotiated by sophisticated parties of approximately equivalent bargaining power who understood the benefits and costs of their bargains.”⁵⁵ When the Chairman presiding over the joint subcommittee hearings on the FAA before the 68th Congress expressed concern that the FAA would enable businesses to offer arbitration contracts on a take-it-or-leave-it basis to captive customers or employees, the bill’s supporters reassured him that this could not happen as people were “protected today as never before” by the Federal government.⁵⁶ As that prescient Senator feared, consumers today increasingly find themselves unwittingly having “volunteered” to arbitrate disputes that may arise down the road with service or product providers, often without a clear understanding of the terms of the arbitration provisions they have “agreed” to, and on a “take-it-or-leave it” basis.⁵⁷

The phenomenon of mandatory arbitration in the consumer context is a relatively recent occurrence, having emerged over the past several decades, largely in response to the Supreme Court’s expanding pro-arbitration interpretations of the applicability of the FAA.⁵⁸ Businesses in the past did not routinely use mandatory predispute arbitration agreements “to require consumers, employees, franchisees, or other weaker parties to resolve disputes by private arbitration rather than in court.”⁵⁹ Consumers today, however, are often deemed to have “assented” to mandatory arbi-

52. Julius Henry Cohen & Kenneth Dayton, *Federal Arbitration Law*, 12 V.A. L. REV. 265, 265 (1926). *See also id.* at 270 (“While our American courts have usually declared a friendly attitude toward arbitration, they have felt themselves bound by the long standing decisions holding that arbitration agreements were revocable at will and would not be enforced by the courts.”).

53. Jay E. Grenig, 26 West’s Legal Forms, Alt. Disp. Res. Appendix 1A. Revised Uniform Arbitration Act (3d ed.).

54. *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1636 (2005).

55. Demaine, *supra* note 45, at 55–56.

56. *Arbitration of Interstate Commercial Disputes: J. Hearings on SB1005 and HR 646 Before the Subcomm[s]. of the Comm[s]. on the Judiciary*, 68th Cong. 15 (1924) (statements of Sen. Thomas Sterling, Presiding and Julius Henry Cohen, General Counsel for NY State Chamber of Commerce).

57. Demaine, *supra* note 45, at 55–56.

58. Sternlight, *supra* note 54, at 1636.

59. *Id.* at 1635.

tration through form agreements routinely used by the purveyors of consumer products or services. The use of mandatory predispute arbitration agreements in these contexts raises the question of whether they can truly have been voluntarily entered into and “negotiated by sophisticated parties of approximately equivalent bargaining power who under[stand] the benefits and costs of their bargains.”⁶⁰

The academic community, state legislatures, consumer advocates and the courts are engaged in ongoing debate about the use of mandatory predispute arbitration agreements, concerned about the growing number of consumers bound by proliferating form arbitration clauses “voluntarily entered into” through the simple act of purchasing goods or services.⁶¹ The most pointed criticisms of mandatory predispute arbitration provisions arise from the perceived lack of fairness in consumer, employment, and other potentially “adhesive contracts.”⁶² One of the primary features of mandatory predispute arbitration agreements is that the “stronger” party writes the rules and chooses the company who hires the arbitrator, often one who is handpicked by the industry.⁶³ “When one party ‘sets the stage’ for binding arbitration by putting arbitration provisions in its contracts with consumers or employees, some of the attributes of arbitration that would be perceived as favorable in a commercial contract may appear to be one-sided advantages.”⁶⁴ An individual who perceives him or herself as being “forced to submit” to mandatory arbitration is likely to be unfamiliar with the process, while the party who drafted the arbitration clause is likely to be a “repeat player” who is familiar with the process and the arbitrators involved.⁶⁵ While in business-to-business arbitrations, it makes perfect sense to look for an arbitrator with commercial or technical expertise, consumers may reasonably be “wary of the perceived bias borne of experience as an ‘insider.’”⁶⁶

As an example, a 2009 Minnesota case concerning the National Arbitration Forum (“NAF”) raised long expressed concerns “that consumers and employees cannot find equitable treatment in justice systems set up by companies who are ‘repeat players’ in the system.”⁶⁷ The “NAF saga” is characterized as “one of the more colorful (and troubling) epi-

60. Demaine, *supra* note 45, at 55–56.

61. FOLBERG, *supra* note 32, at 701.

62. *Id.* at 707.

63. Telephone Interview with Paul Bland, Senior Attorney, Public Justice (Nov. 12, 2013).

64. FOLBERG, *supra* note 32, at 707.

65. *Id.*

66. *Id.*

67. *Id.* at 704.

sodes in the recent history of consumer arbitration.”⁶⁸ The NAF was sued by the Minnesota Attorney General over its management of debt actions involving consumers and credit card companies, and was accused of violating state consumer fraud, deceptive trade practices, and false advertising laws by hiding financial connections to collection agencies and credit card companies.⁶⁹ As part of a settlement, the NAF ceased its consumer arbitration program in the summer of 2009, and provides a cautionary tale of “a[n] [arbitration] provider with an apparent deep-seated conflict of interest.”⁷⁰ According to the public interest law firm Public Justice:

[I]f the Minnesota Attorney General had not happened to discover that the NAF had crossed the most blatant line of inappropriate conduct – taking tens of millions of dollars for shares of a wholly owned corporation from entities who were currently litigating tens of thousands of cases in front of the NAF – the NAF might well still be cheating consumers and operating as a semi-secret arm of the bank-defense community.⁷¹

Public Justice argues that “there is no reason whatsoever that such an entity could not arise again, cloak itself in respectability . . . and operate in a similarly unfair situation for an indefinite period.”⁷²

Other criticisms of mandatory predispute arbitration stem from the fact that there is no meaningful judicial review of arbitrators’ decisions, “so that an arbitrator can make a ‘glaring error of law,’ and issue a ‘whacky’ legal decision or engage in ‘silly fact-finding,’ without it being grounds for overturning a decision.”⁷³ The system is largely impenetrable, being closed to the public and the press, and since most arbitrators do not issue written opinions, it is very difficult for consumers or employees to find how arbitrators have ruled in past cases.⁷⁴ Arbitration is, in fact, far less transparent than the public court system, and generally does not permit the law to develop in a public way.⁷⁵

Perhaps the most troubling result of the increasing use of mandatory predispute arbitration agreements is the suppression of claims, ensuring that “the vast majority of consumers who suffer legal wrongs will never

68. *Id.* at 703.

69. *Id.*

70. *Id.* at 704.

71. Public Justice, *supra* note 48, at 5.

72. *Id.*

73. Telephone Interview with Paul Bland, Senior Attorney, Public Justice (Nov. 12, 2013).

74. *Id.*

75. *Id.*

even try to pursue their rights under federal and state consumer protection laws.”⁷⁶

While the civil justice system brings injunctive relief (such as the end of deceptive and misleading practices, the elimination of improperly claimed debts, and the cleaning of credit reports, among other things) and monetary compensation to hundreds of thousands or millions of borrowers each year, only about 1,000 consumer cases against corporations of any kind were arbitrated in 2009 and 2010.⁷⁷

Since the Supreme Court’s 2010 decision in *AT&T v. Concepcion*,⁷⁸ upholding the use of collective (class wide) arbitration waivers in consumer contracts, thousands of consumers’ legal claims have been tossed out by courts, and the vast majority of those claims have not been pursued individually,⁷⁹ with only 300 claims filed by consumers each year from 2010 through 2012.⁸⁰ “The claims simply disappeared, as opposed to being resolved in arbitration.”⁸¹ Public Justice argues that “the broad data, as well as a number of potent evidentiary records in particular cases, confirms the obvious – that if consumers must each individually pursue their claims in arbitration, lenders will be immunized from liability for all but a tiny proportion of the legal wrongs they may commit.”⁸² In fact, a 2008 “survey of contracts drafted by large telecom, consumer credit, and financial corporations suggests that avoiding class actions is the principal purpose of many arbitration clauses” and “as a whole, arbitration clauses were far more common in industries where class actions were a greater risk.”⁸³ Perhaps surprisingly, “[o]nly 6 percent of these companies’ substantial contracts with other businesses contained arbitration clauses,” suggesting that, perhaps, “these companies don’t really prefer arbitration to litigation,” or that “they prefer arbitration when the stakes are small and litigation when the stakes are large.”⁸⁴

76. Public Justice, *supra* note 48, at 4.

77. *Id.* at 3–4.

78. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

79. Public Justice, *supra* note 48, at 4.

80. Richard Alderman, Guest Lecturer, Presentation at the University of New Mexico School of Law (Oct. 15, 2014).

81. Public Justice, *supra* note 48, at 4.

82. Telephone Interview with Paul Bland, Senior Attorney, Public Justice (Nov. 12, 2013).

83. DOUGLAS LAYCOCK, ET AL., *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 933 (4th ed. 2010).

84. *Id.*

B. The Supreme Court's Expanding Interpretation of the Scope of the FAA

The purpose and scope of the FAA was thought to be limited when it was enacted in 1925, applying to business-to-business transactions voluntarily entered into and “negotiated by sophisticated parties of approximately equivalent bargaining power who understood the benefits and costs of their bargains.”⁸⁵ Over the past several decades, however, the United States Supreme Court has expanded its scope, with Justices increasingly finding themselves at odds in interpreting Congress’ intent in adopting the Act, and often at odds with state courts, as well.⁸⁶ Since the 1980s the Court has characterized the FAA as reflecting a “policy favoring arbitration,” affirming that “as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”⁸⁷ In the pivotal *Southland v. Keating*, the Court reinforced Congress’ intent and its own policy of placing arbitration agreements “upon the same footing as other contracts,”⁸⁸ saying “[c]ontracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts.”⁸⁹ However, while reinforcing that arbitration agreements are “valid, irrevocable and enforceable,”⁹⁰ the *Southland* court also highlighted the FAA’s Section 2 language which allows nullification of arbitration agreements on “such grounds as exist at law or in equity for the revocation of any contract.”⁹¹ Thus, the Court interpreted Section 2 to mean that state courts can invalidate arbitration agreements based on generally applicable state law contract defenses such as fraud, duress, and unconscionability.⁹²

Many, including the bill’s ABA drafters, have pointed out that Congress never intended the FAA to be a substantive law that would preempt state laws, but rather a procedural and remedial statute designed to apply

85. Demaine, *supra* note 45, at 55–56.

86. Krasuski, *supra* note 51, at 272.

87. *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24–25 (1983) (explaining “the courts of appeals have . . . consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”).

88. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

89. *Id.* at 7.

90. *Id.* at 10 (quoting 9 U.S.C. § 2 (1976)).

91. *Id.* at 11.

92. Randall, *supra* note 50, at 186.

only to Federal courts.⁹³ As early as *Southland*, Justices O'Connor and Rehnquist argued that the legislative history unambiguously and conclusively established that the 1925 Congress did not intend the FAA to apply to state courts.⁹⁴ For support, they referred to language in Section 3 of the FAA, which refers to suits or proceedings being "brought in any of the courts of the United States upon any issue referable to arbitration,"⁹⁵ and Section 4, which specifies that a party who wishes to compel arbitration "may petition any United States district court"⁹⁶

Eleven years after *Southland*, in *Allied-Bruce Terminix Companies, Inc. v. Dobson*,⁹⁷ the Supreme Court further expanded the scope of the FAA and its interpretation of Congress' intent by holding that the FAA applied to individual transactions between businesses and consumers. The Court held that the language of § 2 should be read "broadly, extending the Act's reach to the limits of Congress' Commerce Clause power."⁹⁸ Thus, even this dispute between a homeowner and an exterminator was subject to mandatory arbitration under the FAA, because it was a "transaction involving interstate commerce – a truly broad rubric."⁹⁹ Although Justice O'Connor concurred in the majority opinion as it applied to federal courts, she continued to express reservations about applying such a broad interpretation of the FAA to state courts warning, "[t]he reading of § 2 adopted today will displace many state statutes carefully calibrated to protect consumers."¹⁰⁰ As examples, she pointed to the Montana state code refusing to enforce arbitration clauses in consumer contracts where the consideration is \$5,000 or less,¹⁰¹ and state procedural requirements aimed at ensuring knowing and voluntary consent, such as the South Carolina code requiring that notice of arbitration provisions be prominently placed on the first page of contracts.¹⁰² Justice O'Connor wrote that "over the past decade, the Court has abandoned all pretense of ascertaining

93. Cohen, *supra* note 52, at 275–76 ("The statute as drawn establishes a procedure in the Federal courts for the enforcement of certain arbitration agreements. It is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws.").

94. *Southland*, 465 U.S. at 22.

95. 9 U.S.C. § 3 (1970).

96. 9 U.S.C. § 4 (1970).

97. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995).

98. *Id.* at 268.

99. FOLBERG, *supra* note 32 at 695–96.

100. *Allied-Bruce Terminix*, 513 U.S. at 282 (O'Connor J., concurring).

101. *Id.*

102. *Id.*

congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.”¹⁰³

The following term, in *Doctor's Associates, Inc. v. Casarotto*, the Court affirmed that while “[s]tates may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause ‘upon such grounds as exist at law or in equity for the revocation of contract,’” state courts may not “place arbitration clauses on unequal ‘footing,’” and “decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.”¹⁰⁴ The Montana law at issue declared “an arbitration clause unenforceable unless ‘[n]otice that [the] contract is subject to arbitration’[was] ‘typed in underlined capital letters on the first page of the contract.’”¹⁰⁵ Since Montana’s law covered “specifically and solely contracts ‘subject to arbitration,’” it was preempted by the FAA.¹⁰⁶ Justice Ginsberg highlighted the “pathmarking” *Southland* decision interpreting the FAA as establishing a “broad principle of enforceability,”¹⁰⁷ and went on to quote the majority’s 1987 decision in *Perry v. Thomas*:

In *Perry* we reiterated: “[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the text of § 2].”¹⁰⁸

Circuit City v. Adams followed five years later, and turned on whether mandatory arbitration could be enforced not only with regards to commercial contracts, but also in the context of individual employment con-

103. *Id.* at 283. Justice O’Connor argued that “Congress never intended the Federal Arbitration Act to apply in state courts [and] this Court has strayed far afield in giving the Act so broad a compass,” and reminded the Court of past holdings that required “congressional intent to supercede state laws must be ‘clear and manifest.’” *Id.* Justice O’Connor also reiterated Justice Stevens’ dissent in *Perry v. Thomas*, which stated “[i]t is only in the last few years that the Court has effectively rewritten the statute to give it a pre-emptive scope that Congress certainly did not intend,” and asserted, “I have no doubt that Congress could enact, in the first instance, a federal arbitration statute that displaces most state arbitration laws. But I also have no doubt that, in 1925, Congress enacted no such statute.” *Id.*

104. *Dr.’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 686 (1996).

105. *Id.* at 683 (quoting Mont. Code Ann. §27-5-114(4) (1995)).

106. *Id.*

107. *Id.* at 685.

108. *Id.* (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)).

tracts.¹⁰⁹ A Circuit City employee filed an employment discrimination action in state court, and the employer brought action under the FAA to compel arbitration.¹¹⁰ In a 5-4 decision, the Court held that most employment contracts were subject to the FAA.¹¹¹ Justice Stevens' dissenting opinion stated, "[t]he history of the Act, which is extensive and well documented, makes clear that the FAA was a response to the refusal of courts to enforce commercial arbitration agreements . . ."¹¹² Echoing Justice O'Connor's dicta in *Allied-Bruce Terminix*, he wrote, "[t]imes have changed. Judges in the 19th century disfavored private arbitration. The 1925 Act was intended to overcome that attitude, but a number of this Court's cases decided in the last several decades have pushed the pendulum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration."¹¹³

The Court's 2010 term brought further expansion of the scope of the FAA and further limitations on consumers with *AT&T v. Concepcion*, which featured a cellular telephone contract that "provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."¹¹⁴ Using California's Discover Bank Rule, the California Federal District Court denied AT&T's motion to compel arbitration under the *Concepcion*'s contract, finding "that the arbitration provision was unconscionable because AT & T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions."¹¹⁵ The California Supreme Court's *Discover Bank* rule states:

[W]hen 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, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money . . . such waivers are unconscionable."¹¹⁶

109. *See* *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

110. *Id.* at 110.

111. *Id.* at 109.

112. *Id.* at 125 (Stevens J., dissenting).

113. *Id.* at 131-32. Justice Stevens also stated, "[t]here is little doubt that the Court's interpretation of the [Federal Arbitration Act (FAA)] has given it a scope far beyond the expectations of the Congress that enacted it." *Id.*

114. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011).

115. *Id.* at 1745 (citing *Discover Bank v. Superior Court*, 113 P. 3d 1100 (2005)).

116. *Id.* at 1746 (quoting *Discover Bank*, 113 P. 3d at 1110).

On review, the Supreme Court ruled, in a 5-4 decision, that the FAA preempted California's *Discover Bank Rule*, which "[stood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹¹⁷ Justice Scalia wrote: "When state law prohibits outright the arbitration of a particular type of claim . . . [t]he conflicting rule is displaced by the FAA."¹¹⁸ Justice Breyer's dissent in *AT&T v. Conception* noted that Section 2 of the FAA reads that an arbitration agreement "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*," and that the California law addressed circumstances "in which 'class action waivers' in *any* contract are unenforceable."¹¹⁹ Thus, California's rule did not single out arbitration agreements, was not inconsistent "with the federal Act's language and primary objective," and "the Court [was] wrong to hold that the federal Act pre-empts the rule of state law."¹²⁰ Justice Breyer, who had expanded the scope of the FAA in *Allied-Bruce Terminix* sixteen years earlier, now invoked the origins of the FAA to argue for a more limited Congressional intent.¹²¹

As the Supreme Court has expanded the scope of the FAA over the past several decades, corporations have also expanded the use of mandatory predispute arbitration agreements in the consumer context, moving increasingly further away from the tradition of arbitration being voluntarily entered into and "negotiated by sophisticated parties of approximately equivalent bargaining power who under[stand] the benefits and costs of their bargains."¹²²

C. The Use of Pre-Dispute Mandatory Arbitration Agreements in Nursing Home Admissions Contracts

There is vigorous debate, even within the arbitration community, over the use of mandatory predispute arbitration agreements in the health care context. This is particularly true in the nursing home admissions process, where there is a question whether the essential contract formation element of mutual assent is present.¹²³ Supporters cite arbitra-

117. *Id.* at 1753.

118. *Id.* at 1747.

119. *Id.* at 1756 (Breyer J., dissenting) (emphasis in original).

120. *Id.*

121. *Id.* at 1759 (emphasis added) ("Insofar as Congress considered detailed forms of arbitration at all, it may well have thought that *arbitration would be used primarily where merchants sought to resolve disputes of fact, not law, under the customs of their industries, where the parties possessed roughly equivalent bargaining power*").

122. Demaine, *supra* note 45, at 55-56.

123. Katherine Palm, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 ELDER L.J. 453, 454 (2006).

tion's reputation for cost-savings and rapid resolution of disputes, and argue that the use of arbitration "free[s] funds to improve provision of services."¹²⁴ While it is unknown how widespread the use of mandatory arbitration agreements are in the nursing home industry, most of the nation's largest nursing home chains now include arbitration agreements in their admissions packets,¹²⁵ in order to lower damage awards and "insulate themselves from litigation and what defendants often characterize as the 'runaway jury.'"¹²⁶

Although some arbitration clauses subject all disputes arising under the agreement to arbitration, others are inherently one-sided, excluding disputes that a nursing home would likely bring, such as claims for payment and collection.¹²⁷ Some arbitration clauses cap damages and require the parties to pay their own attorney fees; some require that arbitration take place in distant states; and many specify the arbitration provider, often "repeat players" who typically represent health care providers and are more likely to rule in favor of the nursing homes.¹²⁸ To avoid liability for wrongful death claims by residents' families, the agreements also bind heirs and assigns of residents in addition to the residents themselves.¹²⁹ Nursing home arbitration agreements also typically cite the FAA, in order to avoid being bound by state arbitration laws that might impose additional requirements on the language or terms of the agreements.¹³⁰ Critics argue that "the typical [nursing home] admission experience is a perfect storm of elements" likely to put the admittee at a distinct bargaining disadvantage.¹³¹ The need for nursing care often arises unexpectedly, the admission process takes place during periods of extreme stress for admittees and their families, and involves a number of documents which must be signed on the spot and are likely to include a mandatory predispute arbitration clause.¹³² The focus for patients and families at these times is on obtaining needed care, not on the possibility that harm, abuse, or even death may result from the nursing home stay.¹³³ In this context, it is legitimate to ask whether admittees and their families, by signing a form arbitration agreement, can truly be said to be indicating their "clear

124. *Id.* at 455.

125. Krasuski, *supra* note 51, at 268.

126. *Id.* at 267.

127. *Id.* at 268–69.

128. *Id.* at 269.

129. *Id.*

130. *Id.* at 269–70.

131. Katherine Palm, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 ELDER L.J. 453, 454 (2006).

132. Krasuski, *supra* note 51, at 263–64.

133. *Id.* at 264–65.

and unmistakable intent” to resolve any future dispute through arbitration.¹³⁴ Does a signature on a predispute arbitration agreement signed by an admittee or family member as a precondition to admission to a nursing home demonstrate “mutual assent” by “sophisticated parties of approximately equivalent bargaining power who under[stand] the benefits and costs of their bargains?”¹³⁵

Various issues have been litigated arising from the use of mandatory predispute arbitration clauses in nursing home admissions processes.¹³⁶ The FAA has preempted in cases where state legislation singled out nursing home arbitration agreements for unfavorable treatment.¹³⁷ Thus, the FAA was held to preempt provisions of Illinois’ Nursing Home Care Act invalidating any waiver by a nursing home resident of the right to bring a lawsuit under the Act or the right to a jury trial, since they gave nursing home residents greater rights with respect to arbitration agreements than in other contracts.¹³⁸ Similarly, the FAA preempted an Oklahoma statute prohibiting arbitration agreements in nursing home admission contracts, with the court holding that in enacting the FAA, “Congress expressed a national policy favoring enforcement of arbitration agreements, and there is nothing to suggest that Congress ever intended to carve out an exception to that broad policy allowing the State of Oklahoma to disfavor arbitration agreements in nursing home admission agreements.”¹³⁹

Courts have, however, found mandatory preadmission nursing home arbitration agreements procedurally unconscionable when viewing the circumstances of individual cases, rather than the fact that an agreement to arbitrate was at issue.¹⁴⁰ In *Woebse v. Health Care and Retirement Corp. of America*, the court held that the circumstances under which a

134. *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 277 (2011).

135. Demaine, *supra* note 45, at 55–56.

136. Marjorie Shields, Annotation, *Validity, Construction and Application of Arbitration Agreements in Contracts for Admission to Nursing Homes*, 50 ALR 6th 187 (originally published in 2009).

137. *See, e.g.*, *Covenant Health & Rehab. of Picayune, LP v. Lumpkin ex rel. Lumpkin*, 2008 WL 306008 (Miss. Ct. App. Feb. 5, 2008); *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983 (Ala. 2004); *McGuffey Health and Rehab. Ctr. v. Gibson ex rel. Jackson*, 864 So. 2d 1061 (Ala. 2003); *Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds ex. Rel. Braddock* 14 So. 3d 695 (Miss. 2009); *Triad Health Mgmt. of GA, III, LLC v. Johnson*, 679 S.E.2d 785 (Ga. Ct. App. 2009).

138. *Fosler v. Midwest Care Ctr. II, Inc.*, 928 N.E.2d 1 (Ill. App. Ct. 2009), *as modified on denial of reh’g*, (Mar. 1, 2010).

139. *Rainbow Health Care Ctr. Inc. v. Crutcher*, 2008 WL 268321, at *8 (N.D. Okla. Jan. 29, 2008).

140. Marjorie Shields, Annotation, *Validity, Construction and Application of Arbitration Agreements in Contracts for Admission to Nursing Homes*, 50 ALR 6th 187 (originally published in 2009).

nursing home resident's daughter signed an arbitration agreement were procedurally unconscionable, since no one explained or pointed out the arbitration provision in the 37-page agreement given to her the day after her mother was admitted to the home, and she was neither given an opportunity to read the agreement nor given a copy of the agreement after she signed.¹⁴¹ Similarly, in *Prieto v. Healthcare and Retirement Corp. of America*, the court held that an arbitration agreement was procedurally unconscionable when the agreement was included in a package of documents given to the daughter while her father was en route to the nursing home, and she was required to sign it, without any explanation, in order to complete her father's admission process.¹⁴² In *Romano ex rel. Romano v. Manor Care, Inc.*, the court held an arbitration agreement procedurally unconscionable when the husband of an elderly patient did not understand the rights he was signing away, and was not told that failure to sign would not affect the patient's care or her ability to stay in the nursing home.¹⁴³ Finally, in *Manley v. Personacare*, the court held that an arbitration agreement contained in a nursing home admissions contract was procedurally unconscionable where the resident was 66 years old, and was entering a nursing home directly from the hospital without an attorney, friend, or family member to assist her in the process. In light of her numerous physical problems, mild cognitive impairment, bouts of confusion, and lack of expertise, the court concluded that the resident's "bargaining power was substantially outweighed by the relative bargaining power of [the facility]".¹⁴⁴

In each nursing home case where the court found procedural unconscionability, a key factor was its determination that the arbitration agreement at issue had not been voluntarily "negotiated by sophisticated parties of approximately equivalent bargaining power who understood the benefits and costs of their bargains."¹⁴⁵

D. The Supreme Court and Marmet Health Care v. Brown

In 2012 the United States Supreme Court addressed the use of mandatory predispute arbitration agreements in the context of nursing

141. *Woebse v. Health Care and Ret. Corp. of Am.*, 977 So. 2d 630, 633 (Fla. Dist. Ct. App. 2d Dist. 2008).

142. *Prieto v. Healthcare and Ret. Corp. of Am.*, 919 So. 2d 531, 533 (Fla. Dist. Ct. App. 3d Dist. 2005).

143. *Romano ex rel. Romano v. Manor Care, Inc.*, 861 So. 2d 59, 63 (Fla. Dist. Ct. App. 4th Dist. 2003).

144. In *Manley v. Personacare* 2007 WL 210583, at *5 (Ohio Ct. App. 11th Dist. Lake County Jan. 26, 2007).

145. Demaine, *supra* note 45, at 55–56.

home admissions processes in *Marmet Health Care v. Brown*.¹⁴⁶ In *Brown*, the West Virginia Supreme Court of Appeals had reviewed three cases in which the plaintiffs argued that arbitration clauses “buried” in nursing home admission agreements were prohibited by Section 15(c) of West Virginia’s Nursing Home Act (the “Act”).¹⁴⁷ The Act provided, “[a]ny waiver of a resident or his or her legal representative of the right to commence an action under this section, whether oral or in writing, is void as contrary to public policy.”¹⁴⁸ In each case, the plaintiff had alleged that a nursing home had negligently caused the death of a resident, and in each case a representative had signed a nursing home admissions agreement containing a clause stating that any disputes arising from negligent treatment by the nursing home would be submitted to arbitration.¹⁴⁹ The defendant nursing homes argued that Section 15(c) of West Virginia’s Nursing Home Act was preempted by Section 2 of the FAA.¹⁵⁰

The West Virginia court focused on the traditionally voluntary nature of arbitration and the importance of the assent of both parties to arbitrate, noting, “[t]here is no denying that many decisions proclaim that federal policy favors arbitration, but this differs from saying that courts read contracts to foist arbitration on parties who have not genuinely agreed to that device.”¹⁵¹ It went on to address the problem of determining whether both parties have actually assented to arbitrate, noting that people being admitted to long-term care facilities and their families often have to sign contracts under stress, making consumers “vulnerable and dependent on full disclosure by facilities.”¹⁵² In this situation, residents and their family members “rarely know that the admission contract contains provisions that go far beyond the medical care and other services the facility promises (or is expected) to provide but instead, have serious implications for their legal and constitutional rights.”¹⁵³ The court cited United States Supreme Court precedent that there must be “clear and unmistakable intent of the parties for an arbitrator, rather than a court, to resolve a dispute,” and that “even though arbitration is favored, there

146. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012).

147. *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 263 (2011).

148. W.Va. Code, 16-5C-15(c) (1997).

149. *Brown*, 724 S.E.2d at 263.

150. *Id.* In response the court noted that the “saving[s] clause” in Section 2, provides that “despite the mandatory sense of the first part of the statute, an arbitration agreement may still be declared invalid, revocable and unenforceable ‘upon such grounds as exist at law or in equity for the revocation of any contract.’” *Id.* at 272.

151. *Id.* at 276 (quoting *Stone v. Doerge*, 328 F.3d 343, 345 (7th Cir. 2003)).

152. *Brown*, 724 S.E.2d at 270.

153. *Id.*

must be an underlying agreement between the parties to arbitrate.”¹⁵⁴ Further, “[t]he mantra that arbitration is always to be favored must not be mindlessly muttered. In some areas, arbitration is not appropriate; the protection of nursing home residents is certainly one area.”¹⁵⁵

Ultimately, the West Virginia Supreme Court of Appeals held that Section 15 (c) of the Nursing Home Act was preempted by the FAA because it conflicted with the FAA’s intended purpose of putting arbitration clauses on an equal footing with other contractual clauses by singling out for nullification written arbitration agreements with nursing home residents that did not apply to any other type of contractual agreements.¹⁵⁶ At the same time, because the United States Supreme Court had never examined how the FAA applies to personal injury or wrongful death actions that arise after the execution of an arbitration agreement, the court reviewed the three nursing home contracts for procedural and substantive unconscionability in light of other cases where arbitration agreements had been found unenforceable on grounds of public policy if they protect[ed] a party with a duty of “public service.”¹⁵⁷ Determining that nursing homes provide a “public service” and that “agreements absolving public service entities from responsibility for their negligence will not be enforced by the courts,”¹⁵⁸ the court declared that “as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence.”¹⁵⁹ In so holding, the West Virginia Supreme Court of Appeals directly targeted the United States Supreme Court’s FAA jurisprudence, pointing out that the Supreme Court’s “expansive jurisprudence interpreting the FAA implies that arbitration contracts be interpreted to compel arbitration of allegations of negligent conduct only tangentially related to the contract, even if fundamental notions of fairness and state public policy were being abrogated.”¹⁶⁰ In considering whether the West Virginia state public policy was preempted by the FAA, the court “found unpersuasive [the United States Supreme] Court’s interpretation of the FAA, calling it “tenden-

154. *Id.* at 277.

155. *Id.* (quoting *Hayes v. Oakridge Home*, 908 N.E.2d 408, 417–18 (2009) (Pfeifer, J., dissenting)).

156. *Id.* at 282.

157. *Id.* at 290.

158. *Id.* at 291.

159. *Id.* at 292.

160. *Id.* at 289.

tious,” and “created from whole cloth.”¹⁶¹ It quoted two of the drafters of the FAA, who noted, “[n]ot all questions arising out of contracts ought to be arbitrated,”¹⁶² and concluded that “Congress did not intend for arbitration agreements, adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, and which require questions about the negligence to be submitted to arbitration, to be governed by the Federal Arbitration Act.”¹⁶³ Thus, the West Virginia Supreme Court of Appeals concluded that the FAA did not preempt the State of West Virginia’s public policy against predispute arbitration agreements that apply to claims of personal injury or wrongful death against nursing homes.¹⁶⁴

In a summary reversal, the United States Supreme Court held that “West Virginia’s prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA.”¹⁶⁵ In a terse but pointed opinion, the Court wrote, “State and federal courts must enforce the FAA, with respect to all arbitration agreements covered by that statute. Here, the Supreme Court of Appeals of West Virginia, by misreading and disregarding the precedents of this Court interpreting the FAA, did not follow controlling federal law implementing that basic principle.”¹⁶⁶ It went onto say, “[w]hen this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established.”¹⁶⁷

The United States Supreme Court remanded the case, determining that the West Virginia court “must consider whether . . . the arbitration clauses in [the cases] are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA.”¹⁶⁸ Although the Supreme Court rejected West Virginia’s arguments, the West Virginia court’s opinion is notable for its focus on the critical contract element of mutual assent, emphasizing the Supreme Court’s own precedents highlighting the need for “clear and unmistakable intent” and

161. *Id.* at 278–79.

162. *Id.* at 292 (quoting the drafters of the FAA noting also that the Act “must be read in light of the situation which it was intended to correct and of the history of arbitration . . .”).

163. *Id.* at 297.

164. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012).

165. *Id.* at 1204.

166. *Id.* at 1202.

167. *Id.*

168. *Id.* at 1204.

an “underlying agreement between the parties to arbitrate.”¹⁶⁹ The West Virginia court focused on the traditionally voluntary nature of arbitration “negotiated by sophisticated parties of approximately equivalent bargaining power who under[stand] the benefits and costs of their bargains” and determined that this was unlikely to be found in a mandatory predispute arbitration agreement in a nursing home admissions process.¹⁷⁰

E. New Mexico’s Interpretation of the FAA and the UAA

Similar to the (FAA), the New Mexico Uniform Arbitration Act (“UAA”) provides that “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.”¹⁷¹ Thus, New Mexico courts may invalidate arbitration agreements on the same grounds that exist at law or equity for the revocation of any other contract. While the UAA favors arbitration, it also specifically recognizes certain grounds for invalidating arbitration agreements. Section 5 provides, “[i]n the arbitration of a dispute between a consumer, borrower, tenant or employee and another party, a disabling civil dispute clause contained in a document relevant to the dispute is unenforceable against and voidable by the consumer, borrower, tenant or employee.”¹⁷² A “disabling dispute clause” is “a provision modifying or limiting procedural rights necessary or useful to a consumer, borrower, tenant or employee in the enforcement of substantive rights against a party drafting a standard form contract or lease”¹⁷³ The Act also provides that arbitration clauses may not: (1) waive certain rights expressed within the Act, (2) unreasonably restrict the right to receive notice of arbitration, (3) unreasonably restrict the right to disclosure of facts by a neutral arbitrator, or (4) waive the right to be represented by counsel in an arbitration.¹⁷⁴ Thus, the New Mexico Legislature, through the UAA, has expressed policy in favor of arbitration balanced against policy in favor of the protection of consumers’ abilities to enforce their substantive rights.¹⁷⁵

169. *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 277 (2011).

170. Demaine, *supra* note 45, at 55–56.

171. NMSA 1978, § 44-7A-7(a) (2001).

172. NMSA 1978, § 44-7A-5 (2001).

173. NMSA 1978, § 44-7A-1(b)(4) (2001).

174. *See* NMSA 1978, § 44-7A-4(b)–(c) (2001).

175. Strausberg Answer Brief at 8, *Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, 304 P.3d 409.

1. New Mexico Courts' Attempts to Balance Public Policy Favoring Mandatory Predispute Arbitration with Public Policy Protecting Consumers

In interpreting the FAA and the UAA, New Mexico courts have not shied away from attempting to strike a balance between legislative policy favoring mandatory predispute arbitration and legislative policy protecting the rights of consumers, even going so far as to uphold UAA provisions that might be preempted by the FAA.¹⁷⁶ New Mexico courts have emphasized the importance of the voluntary nature of arbitration agreements, writing “where freely chosen, by the parties, arbitration is a favored method of resolving disputes because it is a relatively inexpensive and speedy process.”¹⁷⁷ In *McMillan v. Allstate*, the supreme court concluded that “the UAA provides no basis for concluding that the Legislature intended to compel arbitration where there was no agreement to arbitrate.”¹⁷⁸

In *Fiser v. Dell*, two years before the United States Supreme Court’s ruling in *Concepcion*,

[T]he New Mexico Supreme Court addressed arbitration agreements that prohibited class actions, holding: “the New Mexico Uniform Arbitration Act declares that arbitration clauses that require consumers to decline participation in class actions are unenforceable and voidable. While this provision may be preempted by the FAA, it is clear evidence of the fundamental New Mexico policy of allowing consumers a means to redress their injuries via the class action device.”¹⁷⁹

The Defendant (Dell) filed a Motion to Stay and Compel Arbitration pursuant to the FAA after Plaintiff Robert Fiser, who purchased a computer via Dell’s website, filed a putative class action lawsuit claiming that Dell systematically misrepresented the memory size of its computers.¹⁸⁰ The court held that, “in the context of small consumer claims that would be prohibitively costly to bring on an individual basis, contractual prohibitions on class relief are contrary to New Mexico’s fundamental public policy of encouraging the resolution of small consumer claims and are therefore unenforceable in this state.”¹⁸¹ It is unlikely that the New Mexico Supreme Court could have made this ruling on behalf of New

176. See *Fiser v. Dell*, 2008-NMSC-046, ¶ 13, 144 N.M. 464.

177. *Jaycox v. Ekeson*, 1993-NMSC-036, ¶ 7, 115 N.M. 635.

178. *McMillan v. Allstate*, 2004-NMSC-002, ¶ 8, 135 N.M. 17.

179. *Fiser*, 2008-NMSC-046, ¶ 13 (internal citations omitted).

180. *Id.* ¶ 2.

181. *Id.* ¶ 1.

Mexico's consumers following the United States Supreme Courts' 2010 ruling in *AT&T v. Concepcion*.¹⁸²

2. The FAA and New Mexico's doctrine of unconscionability

Both federal and New Mexico law require courts to apply generally applicable principles of contract law, such as fraud, duress, or unconscionability, to arbitration agreements.¹⁸³ The New Mexico Legislature has addressed the doctrine of unconscionability in NMSA 1978, Section 55-2-302, which states:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.¹⁸⁴

In 1985, the New Mexico Supreme Court explained how to determine unconscionability in adhesion contracts in the context of a life-care retirement center's Residence Agreement in *Guthmann v. La Vida Llena*.¹⁸⁵ The court defined three required elements to find an adhesion contract: (1) the agreement must occur in the form of a standardized contract prepared or adopted by one party for the acceptance of another; (2) the party proffering the standardized contract must enjoy a superior bargaining position because the weaker party virtually cannot avoid doing business under the particular contract terms; and (3) the contract must be offered to the weaker party on a take-it-or-leave-it basis, without opportunity for bargaining.¹⁸⁶ For the second element to be applicable, "a party may be deemed unable to avoid doing business under the terms of a standardized form contract when the dominant contracting party has monopolized the relevant market or when all the competitors of the dominant party use essentially the same contract terms."¹⁸⁷ For the third element, "an absence of opportunity to bargain is relevant . . . where the weaker party to the contract objects or has reason to object to one or more of the contract terms."¹⁸⁸

182. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

183. *Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, ¶31, 304 P.3d 409.

184. NMSA 1978, § 55-2-302(1) (1961).

185. *Guthmann v. La Vida Llena*, 1985-NMSC-106, 103 N.M. 506.

186. *Id.* ¶ 11.

187. *Id.* ¶ 13.

188. *Id.* ¶ 15.

In addressing unconscionability, the court determined that a contract can be held to be unconscionable “if there has been an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”¹⁸⁹ Defining procedural unconscionability, the court wrote, “[l]ack of meaningful choice relates to a procedural analysis of unconscionability and is determined by examining the circumstances surrounding the contract formation, including the particular party’s ability to understand the terms of the contract and the relative bargaining power of the parties.”¹⁹⁰ In addressing substantive unconscionability, the court wrote, “[w]hen terms are unreasonably favorable to one party a contract may be held to be substantively unconscionable.”¹⁹¹ To determine reasonableness or fairness, “the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made.”¹⁹²

Following the district court’s dismissal of *Strausberg* in 2009, the New Mexico Supreme Court issued two opinions discussing unconscionability, *Cordova v. World Finance Corporation of New Mexico*,¹⁹³ and *Rivera v. American General Financial Services, Inc.*¹⁹⁴ In *Cordova*, the Court reviewed a payday lender’s form arbitration provision that limited a borrower to mandatory arbitration as a forum to settle all disputes the borrower might bring, while reserving for the lender the exclusive option of access to the courts for all remedies the lender would most likely pursue against a borrower.¹⁹⁵ The court held that “such an inherently one-sided agreement is against New Mexico public policy and is therefore unconscionable,” and that the district court was correct in denying the company’s motion to compel arbitration.¹⁹⁶

In *Rivera*, the New Mexico Supreme Court granted certiorari to review a court of appeals opinion upholding a district court’s order compel-

189. *Id.* ¶ 16.

190. *Id.*

191. *Id.* ¶ 23.

192. *Id.* Although *Guthmann* was overruled, in part, by *Cordova v. World Finance Corporation of New Mexico*, to the extent that *Guthmann* required the party asserting unconscionability to demonstrate that the contract is one “such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other[.]” its framework for determining unconscionability in adhesion contracts continues to be used by New Mexico courts. *Id.* See also *Cordova v. World Finance Corp. of N.M.*, 2009-NMSC-021, ¶ 31, 146 N.M. 256.

193. 2009-NMSC-021, 146 N.M. 256.

194. 2011-NMSC-033, 150 N.M. 398.

195. *Cordova*, 2009-NMSC-021, ¶ 1.

196. *Id.*

ling arbitration of a borrower's claims against a title loan lender.¹⁹⁷ The court reversed the decision, based on its holding that the arbitration provisions in the title loan contract could not be enforced because the involvement of the then-unavailable National Arbitration Forum ("NAF") to arbitrate contract disputes was an integral requirement of the parties' agreement.¹⁹⁸ In describing the background of the case, the court noted that the arbitration provisions required Rivera to arbitrate any claims she might have against American General, but had exempted from binding arbitration certain claims American General might have had against Rivera.¹⁹⁹ The court then went on to specifically correct the analysis in the court of appeals' opinion "that impose[d] an overly narrow construction on New Mexico's unconscionability jurisprudence and misapplied" the court's holding in *Cordova*.²⁰⁰ The court addressed its interpretation of *Cordova* "in the context of one-sided arbitration clauses," since they "represent the kinds of issues that are capable of repetition yet likely to evade . . . appellate review."²⁰¹

Quoting *Cordova*, the court held, "Procedural unconscionability . . . examines the particular factual circumstances surrounding the formation of the contract, including the relative bargaining strength, sophistication of the parties, and the extent to which either party felt free to accept or decline terms demanded by the other."²⁰² The court additionally stated "[w]hen assessing procedural unconscionability, courts should consider whether the contract is one of adhesion[.]"²⁰³ and "[a]n adhesion contract is a standardized contract offered by a transacting party with superior bargaining strength to a weaker party on a take-it-or-leave-it basis, without opportunity for bargaining."²⁰⁴ Adhesion contracts generally warrant heightened judicial scrutiny because the drafting party is in a superior bargaining position, and "[a]lthough not all adhesion contracts are unconscionable, an adhesion contract is procedurally unconscionable and unenforceable 'when the terms are patently unfair to the weaker party.'"²⁰⁵

The court, again quoting *Cordova*, wrote that "[s]ubstantive unconscionability concerns the legality and fairness of the contract terms them-

197. *Rivera*, 2011-NMSC-033, ¶ 1.

198. *Id.*

199. *Id.* ¶ 3.

200. *Id.* ¶ 1.

201. *Id.* ¶ 41.

202. *Id.* ¶ 44.

203. *Id.*

204. *Id.*

205. *Id.*

selves,” and the “analysis focuses on such issues as whether the contract terms are commercially reasonable and fair, the purpose and effect of the terms, the one-sidedness of the terms, and other similar public policy concerns.”²⁰⁶ A contract provision is substantively unconscionable if it “is grossly unreasonable and against our public policy under the circumstances.”²⁰⁷ “Contract provisions that unreasonably benefit one party over another are substantively unconscionable,” as in this case, when a lender imposes a contract on a borrower that requires the borrower to settle all claims it may have against the lender through arbitration, but reserves the right to pursue remedies for itself in court.²⁰⁸ The arbitration provisions in *Rivera* were substantively unconscionable because they were “unfairly one-sided” and thus, “void under New Mexico law.”²⁰⁹ Following its clarification of *Cordova*, the court held that the arbitration provisions must be struck from the *Rivera* contract in their entirety either because they referred to the now nonexistent NAF, “or because they are unfairly one-sided and substantively unconscionable.”²¹⁰

Following *Cordova* and *Rivera*, the New Mexico Court of Appeals upheld two district court decisions finding nursing home arbitration agreements unconscionable. In *Figueroa v. THI of New Mexico at Casa Arena Blanca, LLC*, a deceased resident’s son filed claims against a nursing home operator for wrongful death, personal injury, negligent training and supervision, and purported violation of the Unfair Practices Act.²¹¹ The operator moved to compel arbitration. The court held that the unconscionability analysis of an arbitration agreement is not preempted by the FAA, and that the arbitration agreement was unreasonably and unfairly one-sided in favor of the nursing home, and therefore unenforceable based on substantive unconscionability.²¹² Noting that “arbitration agreements must be placed on ‘equal footing’ with other contracts, and are revocable only by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability,’ but not by defenses that single out arbitration agreements” or “that derive their meaning from the fact than an agreement to arbitrate is at issue,” the court held that since state law governs issues related to the validity, revocability and enforceability of

206. *Id.* ¶ 45.

207. *Id.*

208. *Id.* ¶ 46.

209. *Id.* ¶ 54.

210. *Id.* ¶ 56.

211. *See Figueroa v. THI of New Mexico at Casa Arena Blanca, LLC*, 2013-NMCA-077, ¶ 3, 206 P.3d 480.

212. *Id.* ¶ 1.

contracts generally, the FAA did not preempt.²¹³ Highlighting the New Mexico Supreme Court's decision in *Fiser*, the court noted that the New Mexico statute providing that any waiver of a consumer's right to a class action in an arbitration was void and unenforceable "may have been preempted by the FAA because it specifically singled out arbitration agreements, but nevertheless, the court reasoned that the statute was evidence of New Mexico's strong public policy to provide a procedure for consumers to have a remedy for small claims."²¹⁴ The reasoning, as highlighted by both the court of appeals and the New Mexico Supreme Court, was that, "because unconscionability is a doctrine that applies to all contracts under New Mexico law, its holding was not preempted by the FAA."²¹⁵

Following *Figueroa*, in *Ruppelt v. Laurel Healthcare Providers, Inc.*, the New Mexico Court of Appeals upheld the district court's determination that an arbitration agreement was substantively unconscionable where the daughter of a deceased nursing home resident brought a wrongful death action against the operator of the nursing home, alleging claims related to her father's treatment and care.²¹⁶ The court of appeals denied the motion to compel arbitration because, like in *Cordova*, the agreement "required residents . . . to arbitrate their most common claims but allowed Defendants to litigate the claims it was most likely to bring – those relating to collections or discharge of residents."²¹⁷

In analyzing the enforceability of arbitration agreements, New Mexico courts have examined whether the agreement was voluntarily "negotiated by sophisticated parties of approximately equivalent bargaining power who understood the benefits and costs of their bargains."²¹⁸ "New Mexico's legal doctrine of contractual unconscionability . . . was not developed to target or invalidate" arbitration agreements, and is applied to arbitration clauses in the same way it is applied to any other contract.²¹⁹ Congress' intent in enacting the FAA was "to promote inexpensive, fair, and reasonable arbitration alternatives to litigation," not to provide "a license for businesses to take advantage of consumers by the imposition of one-sided, unfair and legally unconscionable arbitration schemes."²²⁰ In its unconscionability jurisprudence, New Mexico appellate courts have

213. *Id.* ¶ 8.

214. *Id.* ¶ 9.

215. *Id.*

216. *See Ruppelt v. Laurel Healthcare Providers, LLC*, 2013-NMCA-014, 293 P.3d 902.

217. *Id.* ¶ 5.

218. Demaine, *supra* note 45, at 55–56.

219. *Figueroa*, 2013-NMCA-077, ¶ 10.

220. *Id.*

made clear “[w]e will not allow our courts to be used to enforce unconscionable arbitration clauses any more than we will allow them to be used to enforce any other unconscionable contract in New Mexico.”²²¹

RATIONALE AND ANALYSIS

A. Reasoning of the New Mexico Supreme Court in *Strausberg*

In *Strausberg v. Laurel Healthcare*, the New Mexico Supreme Court reviewed the question of whether the district court correctly allocated the burden of proof, and interpreted the UAA and the FAA *de novo*.²²² The court first concluded that the FAA applied, since the arbitration agreement Strausberg signed as a mandatory precondition of nursing home admission indisputably involved commerce.²²³ The court then considered general principles of New Mexico contract law, the FAA, the UAA and United States Supreme Court precedent interpreting the FAA in determining which party had the burden to prove unconscionability.²²⁴

In reversing the court of appeals, the New Mexico Supreme Court held that unconscionability is an affirmative contract defense to contract enforcement, and Strausberg therefore bore the burden of proving that the arbitration agreement was unconscionable.²²⁵ The court also held that federal law preempted the court of appeals’ holding because it treated nursing home arbitration agreements differently than other contracts.²²⁶ The court declined to consider the merits of Strausberg’s unconscionability defense, and remanded for a determination whether the district court erred by granting Defendants’ motion to compel arbitration and dismissing Strausberg’s case.²²⁷

1. Unconscionability is an affirmative contract defense that must be proven by its proponent

The New Mexico Supreme Court concluded that the court of appeals’ opinion was contrary to established principles of New Mexico contract law and the FAA’s mandate that arbitration agreements be treated

221. *Id.* (quoting *Cordova v. World Finance Corporation of New Mexico*, 2009-NMSC-021, ¶ 38, 146 N.M. 256).

222. *Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, ¶ 25, 304 P.3d 409.

223. *Id.* ¶ 29.

224. *Id.* ¶ 30.

225. *Id.* ¶ 3.

226. *Id.*

227. *Id.* ¶ 59.

the same as other contracts.²²⁸ In reversing, the court held, “[t]he Plaintiff has the burden to prove that the arbitration agreement is unconscionable because unconscionability is an affirmative defense to contract enforcement, and under settled principles of New Mexico law, the party asserting an affirmative defense has the burden of proof.”²²⁹

The court first discussed New Mexico’s unconscionability doctrine, noting “both New Mexico law and federal law require courts to apply generally applicable principles of contract law to arbitration agreements.”²³⁰ The court next addressed three principles of New Mexico law that demonstrated that Strausberg, as the “party who must persuade the factfinder in order to prevail,”²³¹ had the burden to prove unconscionability. Citing several New Mexico cases, the court stated that, as a general rule, the party alleging an affirmative defense has the burden of proof.²³² Second, New Mexico courts apply this general rule to affirmative contract defenses.²³³ Third, because New Mexico contract law treats unconscionability as an affirmative contract defense, i.e., an equitable exception to the rule that a contract should be enforced according to its terms, the party alleging unconscionability bears the burden of proof.²³⁴ The court went on

228. *Id.* ¶ 3.

229. *Id.*

230. *Id.* ¶ 31 (citing *Dr.’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 686 (1996) (“States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause upon such grounds as exist at law or in equity for the revocation of any contract.”)).

231. *Id.* ¶ 24.

232. *Id.* ¶ 36. See *Ortiz v. Overland Express*, 2010-NMSC-021, ¶ 30, 148 N.M. 405; see also *Tafoya v. Seay Bros. Corp.*, 1995-NMSC-003, ¶ 8, 119 N.M. 350 (“The party alleging an affirmative defense has the burden of persuasion.”); *J.A. Silversmith Inc. v. Marchiondo*, 1965-NMSC-061, ¶ 10, 75 N.M. 290 (noting that “it is well settled that the party alleging the affirmative has the burden of proof.”).

233. *Strausberg*, 2013-NMSC-032, ¶ 37. See, e.g., *Pucci Distrib. Co. v. Nellos*, 1990-NMSC-074, ¶ 6, 110 N.M. 374 (1990) (explaining that the party seeking to preclude contract enforcement based on illegality, an affirmative defense, bore the burden of proving illegality at trial); *Hickey v. Griggs*, 1987-NMSC-050, ¶ 22, 106 N.M. 27 (1987) (“Mitigation of damages is an affirmative defense and its burden of proof is on the defaulting party.”); *Mason v. Salomon*, 1957-NMSC-043, ¶ 11, 62 N.M. 425 (1957) (“[T]he burden is upon the party alleging fraud to establish its existence.”).

234. *Strausberg*, 2013-NMSC-032, ¶ 39. See *Rivera v. American General Financial Services, Inc.*, 2011-NMSC-033, ¶ 17, 150 N.M. 398 (“Agreements to arbitrate may . . . be invalidated by generally applicable contract defenses, such as . . . unconscionability.”). See also *State ex rel. State Highway & Transp. Dep’t v. Garley*, 1991-NMSC-008, ¶27–37, 111 N.M. 383 (1991) (discussing unconscionability as one “exception” to the general principle that parties are bound by the terms of a written contract with plain, unequivocal terms); *Fid. Nat’l Bank v. Tommy L. Goff, Inc.*, 1978-NMSC-074, ¶ 2, 92 N.M. 106 (1978) (referring to the “affirmative defense”

to point out that not only is this true in New Mexico, but that “other jurisdictions likewise place the burden of proving affirmative defenses to contract enforcement, including unconscionability, on the party seeking to set aside a contract.”²³⁵

In *Strausberg*, the New Mexico Court of Appeal’s majority opinion created an exception for nursing home arbitration agreements that shifted the burden from the patient to the nursing home to prove that its arbitration agreement was not unconscionable.²³⁶ In so doing, the court of appeals essentially *flipped* the burden of proving unconscionability from the party seeking to set aside an arbitration agreement to the party seeking to enforce the arbitration agreement and created a new burden to prove an *absence* of unconscionability.²³⁷ The New Mexico Supreme Court agreed that the party seeking to compel arbitration bears the initial burden of proving that a valid contract exists. Once that has been proven, “the burden shifts to the party opposing arbitration to demonstrate that an affirmative defense, such as unconscionability, renders the contract unenforceable.”²³⁸

Because *Strausberg* “[did] not argue that any of the elements required for valid contract formation [were] lacking, but instead argued that the district court should not enforce the contract because it [was] unconscionable,” the Supreme Court accepted the conclusion that a valid contract to arbitrate existed between *Strausberg* and the nursing home.²³⁹ *Strausberg* argued that a valid contract did not exist “because unconscionability renders a contract void, and ‘a void contract is a nullity and has no effect.’”²⁴⁰ The court was not convinced by *Strausberg*’s arguments to “disregard these well-settled principles of contract law and put the cart before the horse.”²⁴¹ It found that “by holding that the party seeking to compel arbitration has the burden to prove the absence of unconscionability, the Court of Appeals’ majority conflated the elements required for the formation of a valid contract with the affirmative defense of uncon-

of unconscionability); *Montano v. N.M. Real Estate Appraiser’s Bd.*, 2009-NMCA-009, ¶ 12, 145 N.M. 494 (“We will allow equity to interfere with enforcing clear contractual obligations only when well-defined equitable exceptions, such as unconscionability, mistake, fraud, or illegality justify deviation from the parties’ contract.”).

235. *Strausberg*, 2013-NMSC-032, ¶ 40.

236. *Strausberg v. Laurel Healthcare Providers, LLC*, 2012-NMCA-006, ¶ 20, 269 P.3d 914.

237. *Id.* ¶ 21.

238. *Strausberg*, 2013-NMSC-032, ¶ 42–43.

239. *Id.* ¶ 43.

240. *Id.* ¶ 44.

241. *Id.*

scionability.”²⁴² Since New Mexico contract law treats unconscionability as an affirmative contract defense, and the party seeking to set aside a contract based on a defense or exception such as unconscionability generally has the burden of proof, Strausberg had the burden to prove unconscionability.²⁴³

Ultimately, the New Mexico Supreme Court had little choice but to reverse since the nursing home exception contradicted general principles of New Mexico contract law and was preempted by the FAA.²⁴⁴ The unconscionability analysis outlined by the New Mexico Supreme Court in *Cordova*, *Rivera* and *Strausberg* provides guidance for lower courts to analyze the enforceability of arbitration agreements using New Mexico’s rules of contract formation and contract interpretation.²⁴⁵ By emphasizing the generally applicable contract principles used to determine unconscionability in both *Cordova* and *Rivera*, the court continued to define the contours of arbitration in New Mexico, and reinforced in *Strausberg* that arbitration agreements in New Mexico will be analyzed like any other contract.²⁴⁶

2. The New Mexico Supreme Court’s Holding was Consistent with the FAA and the UAA

Next, the New Mexico Supreme Court addressed preemption, pointing out that under the FAA and the UAA, courts are required “to enforce a valid arbitration agreement unless the agreement is revocable under established principles of contract law.”²⁴⁷ Rather than analyzing the *Strausberg* arbitration agreement using the affirmative contract defense of unconscionability, the New Mexico Court of Appeals had specifically singled out nursing home arbitration agreements, in spite of the United States Supreme Court’s repeated admonitions that state laws that cover “specifically and solely contracts subject to arbitration” are preempted by federal law.²⁴⁸ By creating a rule with a blanket presumption of unconscionability that applied only to nursing home arbitration agreements, the New Mexico Court of Appeals rule was preempted by the FAA,²⁴⁹ and the court of appeals was “in clear violation of the FAA’s mandate that an

242. *Id.* ¶ 42.

243. *Id.* ¶ 39.

244. *Id.* ¶ 55.

245. Telephone Interview with Rita Siegel, Attorney/Arbitrator/Mediator, New Mexico Board of Specialization (Nov. 1, 2013).

246. *Id.*

247. *Strausberg*, 2013-NMSC-032, ¶ 49.

248. *Dr.’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 683 (1996).

249. *Strausberg*, 2013-NMSC-032, ¶ 51.

arbitration agreement must be treated the same way as any other contract.”²⁵⁰

The New Mexico Supreme Court noted, “Congress did not . . . intend the FAA to entirely displace state law governing contract formation and enforcement,” providing that state courts may invalidate arbitration agreements by applying generally applicable contract defenses, such as fraud, duress or unconscionability.²⁵¹ By singling out arbitration agreements for special treatment, however, and not “plac[ing] arbitration agreements on equal footing with other contracts,” the court of appeals’ rule was preempted by the FAA.²⁵²

The New Mexico Supreme Court also noted that its conclusion in *Strausberg* was reinforced by the United States Supreme Court’s recent opinion in *Marmet Health Care*, which reversed the West Virginia Supreme Court decision in *Brown* on which the New Mexico Court of Appeals had relied.²⁵³ The United States Supreme Court vacated *Brown* “because it had ‘created a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA.’”²⁵⁴

By affirming that New Mexico’s doctrine of unconscionability will be applied to arbitration agreements in the same way it is applied to clauses in any other contract, the New Mexico Supreme Court signaled that New Mexico courts will continue to apply generally applicable contract principles in a way that does not target arbitration agreements for special negative treatment.²⁵⁵ At the same time, New Mexico courts have asserted that arbitration agreements will not be enforced when they are found to be unconscionable.²⁵⁶ In *Figueroa*, the court stated:

New Mexico’s legal doctrine of contractual unconscionability, like that of other jurisdictions, was not developed to target or invalidate this or any other arbitration agreement. Our unconscionability analysis, which is applied in the same manner to arbitration clauses as to any other clauses of a contract, is therefore not inconsistent with the dictates of the FAA. The FAA is intended to promote inexpensive, fair, and reasonable arbitration alternatives to litigation. It is not a license for businesses to take advantage of

250. *Id.*

251. *Id.* ¶ 52.

252. *Id.* ¶ 53.

253. *Id.* ¶ 54.

254. *Id.*

255. *Figueroa v. THI of New Mexico at Casa Arena Blanca, LLC*, 2013-NMCA-077, ¶ 10, 306 P.3d 480.

256. *Id.*

consumers by the imposition of one-sided, unfair and legally unconscionable arbitration schemes. We will not allow our courts to be used to enforce unconscionable arbitration clauses any more than we will allow them to be used to enforce any other unconscionable contract in New Mexico.²⁵⁷

B. The role of state courts in arbitration and the expanding use of unconscionability to invalidate arbitration agreements

As noted above, the FAA preserves a role for state law in arbitration through Section 2, which provides that a written agreement to arbitrate in a contract involving interstate commerce “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”²⁵⁸ The Supreme Court has interpreted Section 2 to mean that state law “concerning the validity, revocability and enforceability of contracts generally” is applicable to arbitration agreements as long as that state law does not take “its meaning precisely from the fact that a contract to arbitrate is at issue”²⁵⁹

In her study of judicial attitudes towards arbitration, Susan Randall analyzed the number of unconscionability claims in state courts from 1982–1983 and 2002–2003 in both arbitration and non-arbitration agreements, and the rate of unconscionability findings in those cases.²⁶⁰ Randall found that in the early 1980s, very few claims of unconscionability involved arbitration agreements and “courts were no more likely to find arbitration agreements unconscionable than nonarbitration agreements.”²⁶¹ Twenty years later, in 2002–2003, most of the claims of unconscionability involved arbitration agreements and “courts were much more likely to hold arbitration agreements unconscionable than nonarbitration agreements.”²⁶²

Is this judicial expansion of findings of unconscionability in arbitration agreements evidence of a renewed “judicial hostility” to arbitration? Is it a coincidence that this increase has taken place during the recent decades of the United States Supreme Court’s expansion of the scope and applicability of the FAA? Randall points out that there may be many possible reasons for the negative judicial reactions to arbitration, including “self-interested protection of the judicial function,” but that judicial reactions might also be an acknowledgement that “arbitration does in

257. *Id.*

258. 9 U.S.C. § 2.

259. *Dr.’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 685 (1996).

260. Randall, *supra* note 50, at 187.

261. *Id.*

262. *Id.*

fact create serious problems for potential claimants.”²⁶³ As the Supreme Court “has foreclosed more direct state law solutions to the problems posed by arbitration,” it may be reasonable for courts to address those problems through the doctrine of unconscionability, “despite preemption concerns under the [FAA].”²⁶⁴

In *Allied-Bruce Terminix Companies, Inc. v. Dobson*, “[t]wenty state attorneys general argued unsuccessfully to overturn *Southland* based on legislative history and public policy and to return control over arbitration to the individual states.”²⁶⁵ Both Justice O’Connor (concurring) and Justices Thomas and Scalia (dissenting) claimed that *Southland* had been wrongly decided and discussed overruling *Southland* based on its conclusion that Section 2 of the FAA “appl[ies] in state as well as federal courts,” and “withdr[aws] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”²⁶⁶ In addition to expanding the scope of the FAA to include state courts, over the past thirty years the Supreme Court has extended it to cover statutory claims, to “exercise Congress’ commerce power to the full,” to cover individual employer-employee disputes, to preclude class actions, and increasingly, to preempt any state law intended to protect consumers, even those that apply to all contracts.²⁶⁷ Randall argues that absent Supreme Court reconsideration of its expanding interpretation of the scope of the FAA, “application of the unconscionability doctrine may be one of the judiciary’s only remaining tools for protection of individuals and small businesses,”²⁶⁸ although she advocates for “restrained use of the doctrine to avoid potential preemption issues.”²⁶⁹

Like *Marmet Health Care*,²⁷⁰ however, the earlier *Doctor’s Associates, Inc. v. Casarotto*²⁷¹ provides a cautionary tale of a state’s use of the

263. *Id.*

264. *Id.* at 188. *See also id.* (“[T]he malleability of the doctrine of unconscionability is acknowledged as one of its chief virtues.”).

265. *Id.* at 189. *See Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 272 (1995).

266. *Allied-Bruce Terminix*, 513 U.S. at 286 (Thomas, J. dissenting) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10, 12 (1984)) (internal citations and quotation marks omitted).

267. *See Allied-Bruce Terminix* 523 U.S. at 273. *See also* *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

268. Randall, *supra* note 50, at 188.

269. *Id.*

270. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012).

271. *Dr.’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).

doctrine of unconscionability in the context of mandatory predispute arbitration agreements. As noted above, the Montana Supreme Court had invalidated an arbitration agreement that violated a statute requiring a special typeface notice on the first page of a contract that alerted readers that it contained an arbitration agreement.²⁷² At oral argument before the Supreme Court, Casarotto's counsel argued that rather than highlighting the state statute specifically targeting arbitration agreements, the Montana court could have invalidated the arbitration clause under general, informed consent principles.²⁷³ She urged the Supreme Court to view the Montana statute "as but one illustration of a cross-the-board rule: Unexpected provisions in adhesion contracts must be conspicuous."²⁷⁴ Justice Ginsberg disagreed, stating, "the Montana Supreme Court announced no such sweeping rule. The court did not assert as a basis for its decision a generally applicable principle of 'reasonable expectations' governing any standard form contract term."²⁷⁵ The opinion then reiterated, "that a court may not rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot."²⁷⁶

Would the FAA have preempted, and would the result in the United States Supreme Court have been different if the Montana Supreme Court had relied on Montana's general contract law principles to hold the arbitration agreement unconscionable, if the agreement was, in fact, inconspicuous, provided inadequate notice and ran counter to consumers' "reasonable expectations?"²⁷⁷ State courts "have the power to hold, as a matter of common law, that a particular agreement is one-sided, oppressive and unfair What they may not say, under the Federal Arbitration Act, is that the agreement is one-sided, oppressive and unfair simply because it is an arbitration agreement."²⁷⁸

Section 2 of the FAA and the rules articulated in *Doctor's Associates*, *Marmet Health Care* and New Mexico's *Cordova*, *Rivera*, and *Strausberg* prohibit arbitration-specific applications of unconscionability

272. MONT. CODE ANN. § 27-5-114(4) ("Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration.").

273. *Dr.'s Associates*, 517 U.S. at 687 n.3.

274. *Id.*

275. *Id.*

276. *Id.* (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)).

277. Randall, *supra* note 50, at 193.

278. *Id.* at 194.

doctrine. Since “the chief values of unconscionability are its flexibility and adaptability to a variety of situations,”²⁷⁹ Randall argues that in order to escape FAA preemption, state court judges must emphasize, first, not that the contract at issue is an arbitration agreement, but that it is revocable under the established principles of contract law under which any contract is revocable.²⁸⁰ In holding an arbitration agreement unconscionable, courts must address one-sidedness, unequal bargaining power, and other features that apply to other unconscionable contracts.²⁸¹ Second, “conclusions that a particular arbitration agreement or provision is unconscionable should be assessed against other [contract case] decisions in the jurisdiction.”²⁸² Finally, an arbitration agreement must be held unconscionable without creating arbitration-specific rules, which will almost certainly be found to violate Section 2 of the FAA.²⁸³ In New Mexico, as well as in other states, arbitration agreements have been found to be unconscionable, not because they mandate arbitration, but because they feature unconscionable contract elements.²⁸⁴ “Restrained judicial application of the unconscionability doctrine will avoid preemption problems while permitting judges to invalidate arbitration agreements in appropriate cases.”²⁸⁵

C. *The Missing Contract Formation Element of Mutual Assent*

Although unconscionability is frequently used by state courts to invalidate arbitration agreements, the lurking issue in *Strausberg* and other cases disputing the enforceability of mandatory predispute arbitration clauses is whether the contract formation element of mutual assent is actually present, and whether there is “clear and unmistakable intent” of both parties to arbitrate.²⁸⁶ Although both the district court and the New Mexico Supreme Court determined that *Strausberg* had voluntarily entered into the arbitration agreement with the nursing home, *Strausberg*’s counsel consistently claimed that her client had not voluntarily entered into nor agreed to be bound by the “purported” arbitration agreement.²⁸⁷

279. *Id.* at 221.

280. *Id.* at 222.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 277 (2011).

287. Brief for Appellant at 8, *Strausberg v. Laurel Healthcare Providers, LLC*, 2012-NMCA-006, 269 P.3d 914 (No. 29,238).

Public Justice argues that although “[t]he Supreme Court regularly characterizes arbitration as a creature of consent,” and corporations that use arbitration clauses “emphasize the argument that they are supposedly voluntarily agreed to by consumers,” there is evidence that very few consumers actually know of, or meaningfully agree to, mandatory predispute arbitration agreements.²⁸⁸ In terms of consumer arbitration, while there are many situations in which consumers “may have technically or constructively consented (*e.g.*, they continue to use a credit card after receiving a fine print contract term adding an arbitration clause, or they clicked ‘accept’ to a lengthy set of un-read conditions on some website), there is almost never *actual knowing consent* by consumers.”²⁸⁹ “[I]n fact, the overwhelming majority of consumers are completely unaware of these terms in standard form agreements unless and until a dispute arises and they seek the assistance of an attorney.”²⁹⁰ Public Justice notes that “[a] cornerstone of the Supreme Court’s jurisprudence and the corporate case for mandatory arbitration rests on the notion that arbitration is supposedly voluntarily and consensual,” but that, “consumers do not, in fact, do more than ‘constructively consent’ to arbitration clauses by failing to do something affirmative, and do not meaningfully understand these terms.”²⁹¹

In *Casarotto v. Lombardi*, which was appealed to the United States Supreme Court in *Doctor’s Associates*, the Montana Supreme Court directly challenged the contention that the majority of consumers voluntarily and knowingly enter into mandatory predispute arbitration agreements.²⁹² “Montana’s notice requirement does not preclude parties from *knowingly* entering into arbitration agreements, nor do our courts decline to enforce arbitration agreements which are entered into *knowingly*.”²⁹³ Justice Trieweler, in his special concurrence, argued that federal judges misinterpreted congressional intent in enacting the FAA, and that:

288. Public Justice, *supra* note 48, at 10.

289. *Id.*

290. *Id.* at 5.

291. *Id.*

292. *Casarotto v. Lombardi*, 886 P.2d 931, 939 (1994) (“Presumably, therefore, the Supreme Court would not find it a threat to the policies of the Federal Arbitration Act for a state to require that before arbitration agreements are enforceable, they be entered knowingly. To hold otherwise would be to infer that arbitration is so onerous as a means of dispute resolution that it can only be foisted upon the uninformed. That would be inconsistent with the conclusion that the parties to the contract are free to decide how their disputes should be resolved.”)

293. *Id.* at 939–40 (emphasis added) (noting that Montana tort and contract laws “protect [its] citizens from bad faith, fraud, unfair business practices, and oppression

[D]ue to their naïve assumption that arbitration provisions and choice of law provisions are knowingly bargained for, all of [Montana's] procedural safeguards and substantive laws are easily avoided by any party with enough leverage to stick a choice of law and an arbitration provision in its pre-printed contract and require the party with inferior bargaining power to sign it.²⁹⁴

Justice Trieweler emphasized that one of the primary principles of a contract is mutuality, and mutuality was the key element missing from many agreements that “typically impose arbitration as the means for resolving disputes.”²⁹⁵ Can anyone honestly assert that by signing a form arbitration agreement as a mandatory precondition for admission to a nursing home, or to purchase a computer, or to sign up for online banking or a credit card any one of us has “knowingly and voluntarily bargained” and agreed to resolve any further disputes by arbitration?²⁹⁶ Are these mandatory predispute arbitration agreements truly “negotiated by sophisticated parties of approximately equivalent bargaining power who under[stand] the benefits and costs of their bargains?”²⁹⁷

IMPLICATIONS

With *Cordova*, *Rivera*, and now *Strausberg*, New Mexico case law provides a clear pathway for courts to analyze and determine the enforceability of arbitration agreements in a way that does not preempt the FAA.²⁹⁸ At the same time, New Mexico and other states continue to confront the problems raised by the United States Supreme Court's ever-expanding scope of the FAA. In 2010's *Rent-A-Center v. Jackson*, the Su-

by the many large national corporations who control many aspects of their lives but with whom they have no bargaining power.”).

294. *Id.* at 940. Justice Trieweler highlighted the lack of procedural safeguards inherent in the arbitration process, the financial hardship that forced arbitration often imposes, and the notion that “people like the Casarottos have knowingly and voluntarily bargained and agreed to resolve their contractual disputes or tort claims by arbitration . . . naïve at best, and cynical at worst.”). *Id.*

295. *Id.*

296. *Id.*

297. Demaine, *supra* note 45, at 55–56.

298. *Contra* *THI of New Mexico at Hobbs Ctr., LLC v. Patton*, 741 F.3d 1162, 1164 (10th Cir. 2014) (“Under New Mexico law a compulsory-arbitration provision in a contract may be unconscionable, and therefore unenforceable, if it applies only, or primarily, to claims that just one party to the contract is likely to bring. The question before us is whether the Federal Arbitration Act (FAA) preempts this state law for contracts governed by the FAA. We hold that New Mexico law is preempted in this case and the arbitration clause must be enforced.”).

preme Court considered “whether, under the Federal Arbitration Act . . . a district court may decide a claim that an arbitration agreement is unconscionable, where the agreement explicitly assigns that decision to the arbitrator,” and upheld a provision in an employment arbitration agreement that delegated to the arbitrator exclusive authority to resolve any dispute relating to the arbitration agreement’s enforceability.²⁹⁹ By holding the insertion of a clause into an arbitration agreement which delegates to the arbitrator, rather than the courts, the power to determine the validity of an agreement to arbitrate, the United States Supreme Court has further removed contract interpretation and enforcement from the province of state courts.³⁰⁰

At the same time, stakeholders from leading alternative dispute resolution organizations acknowledge that legitimate issues of fairness and unequal bargaining power arise in disputes involving the most vulnerable consumers.³⁰¹ In response to growing concerns about the use of mandatory predispute arbitration agreements, the American Arbitration Association, the American Bar Association, the American Medical Association, and the Commission on Health Care Dispute Resolution have developed due process protocols to address potential inequities in both the process by which consumers are bound to arbitration and arbitration procedures themselves. The Consumer Due Process Protocol acknowledges that “because consumer contracts often do not involve arm’s length negotiation of terms, and frequently consist of boilerplate language presented on a take-it-or-leave it basis by suppliers of goods or services, there are legitimate concerns regarding the fairness of consumer conflict resolution mechanisms required by suppliers.”³⁰² It goes on to say, “[t]his is particularly true in the realm of binding arbitration, where the courts are displaced by private adjudication systems. In these cases, consumers are often unaware of their procedural rights and obligations until the realities of out-of-court arbitration are revealed to them after disputes have arisen.”³⁰³ The Commercial Healthcare Due Process Protocol Guide em-

299. See *Rent-A-Ctr., West, Inc. v. Jackson*, 561 U.S. 63, 65 (2010) (internal citations omitted).

300. *Id.* at 76 (Stevens, J., dissenting) (“Even when a litigant has specifically challenged the validity of an agreement to arbitrate he must submit that challenge to the arbitrator unless he has lodged an objection to the particular line in the agreement that purports to assign such challenges to the arbitrator—the so-called ‘delegation clause.’”).

301. See, e.g., *Consumer Due Process Protocol*, AMERICAN ARBITRATION ASSOCIATION, https://adr.org/aaa/ShowPDF?doc=ADRSTG_005014, (last visited Nov. 24, 2014).

302. *Id.*

303. *Id.*

phasizes that “[it] is essential that due process protections be afforded to all participants in the ADR process.”³⁰⁴ It recommends that “[t]he agreement to use ADR should be knowing and voluntary In disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises.”³⁰⁵ Ironically, “protections against being ‘surprised’ after-the-fact by an arbitration provision evolved first in the commercial realm,” with the New York Court of Appeals ruling in 1978 that “an inclusion of an arbitration agreement without the consent of all parties materially alters a contract for the sale of goods and therefore does not become part of the contract.”³⁰⁶

After a ten-year period during which arbitration agreements were regularly found by state courts to be unconscionable because they were one-sided, some companies began to cover the costs of arbitration, which can be prohibitively expensive for individuals.³⁰⁷ However, after *Rent-A-Center*, state courts may be shunted to the sidelines in favor of an arbitrator assigned to determine the “arbitrability” of an arbitration agreement that he or she is being paid to arbitrate.³⁰⁸ If the arbitration clauses in *Cordova*, *Rivera*, or *Strausberg* had delegated to an arbitrator the power to determine the validity of the arbitration agreements at issue, none of the parties in those cases would have had the opportunity to challenge those agreements on the basis of unconscionability in New Mexico courts.

In June of 2013, in yet another alarming decision for consumers, the United States Supreme Court considered “whether a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff’s cost of individually arbitrating a federal statutory claim exceeds the potential recovery.”³⁰⁹ The majority noted that in *Concepcion* the Court had “specifically rejected the argument that class arbitration was necessary to prosecute claims ‘that might otherwise slip through the legal system,’” and concluded that the same applied here.³¹⁰ Justice Kagan, joined by Justices Ginsburg and Breyer dissented and described the “nutshell version” of the case:

304. *Healthcare Due Process Protocol*, AMERICAN ARBITRATION ASSOCIATION, 1 (July 27, 1998) https://www.adr.org/aaa/faces/aoe/commercial/healthcarelifesciences/healthcare?_afzLoop=228887063266161&_afzWindowMode=0&_afzWindowId=null#%40%3F_afzWindowId%3Dnull%26_afzLoop%3D228887063266161%26_afzWindowMode%3D0%26_adf.ctrl-state%3D1057wu9kxw_4.

305. *Id.* at 32 (emphasis added).

306. *Marlene Indus. v. Carnac Textiles*, 380 N.E.2d 239, 334 (N.Y. 1978).

307. Telephone Interview with Rita Siegel, Attorney/Arbitrator/Mediator, New Mexico Board of Specialization (Nov. 1, 2013).

308. *Id.*

309. *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2307 (2013).

310. *Id.* at 2312.

The owner of a small restaurant (Italian Colors) thinks that American Express (Amex) has used its monopoly power to force merchants to accept a form contract violating the antitrust laws. The restaurateur wants to challenge the allegedly unlawful provision (imposing a tying arrangement), but the same contract's arbitration clause prevents him from doing so. That term imposes a variety of procedural bars that would make pursuit of the antitrust claim a fool's errand. So if the arbitration clause is enforceable, Amex has insulated itself from antitrust liability—even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse . . . And here is the nutshell version of today's opinion, admirably flaunted rather than camouflaged: Too darn bad.³¹¹

. . . .

As a result, Amex's contract will succeed in depriving Italian Colors of any effective opportunity to challenge monopolistic conduct allegedly in violation of the Sherman Act. The FAA, the majority says, so requires. Do not be fooled. Only the Court so requires; the FAA was never meant to produce this outcome. The FAA conceived of arbitration as a "method of *resolving* disputes"—a way of using tailored and streamlined procedures to facilitate redress of injuries. *Rodriguez de Quijas* 490 U.S., at 481, 109 S.Ct. 1917 (emphasis added). *In the hands of today's majority, arbitration threatens to become more nearly the opposite—a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability.* The Court thus undermines the FAA no less than it does the Sherman Act and other federal statutes providing rights of action. I respectfully dissent.³¹²

As states continue to apply the doctrine of unconscionability to arbitration agreements in an attempt to provide some small degree of protection for consumers, the more permanent solution lies in Congress adopting legislation such as the Arbitration Fairness Act of 2013-2014, which is designed to:

[E]nd the growing predatory practice of forcing non-union employees and consumers to sign away their Constitutional rights to legal protections and access to federal and state courts by making pre-dispute binding mandatory arbitration ("forced arbitration") clauses unenforceable in civil rights, employment, antitrust and

311. *Id.* at 2313.

312. *Id.* at 2320 (emphasis added).

consumer disputes. Forced arbitration is proliferating in employment (from minimum wage-workers to whistleblowers to highly compensated executives), and in everyday consumer contracts for products and services such as credit cards, child care, cell phones, car loans, home construction, student loans, health insurance policies, and nursing homes.³¹³

The Arbitration Fairness Act of 2013-2014 (S.B. 878 and H.R. 1844), sponsored by Senator Al Franken and Representative Henry “Hank” Johnson, Jr. is supported by numerous consumer groups, and is designed to “restore Congressional intent, limiting the application of the [FAA] to disputes between commercial entities of generally similar sophistication and bargaining power.”³¹⁴ Arguing that the Supreme Court’s recent decisions have “made it significantly more difficult for consumers and employees to challenge even the most abusive forced arbitration clauses[,]” these decisions “have also stripped the power of state supreme courts to rule on matters involving state law claims.”³¹⁵ The Congressional findings of the draft bill note that the FAA “was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power” but that a series of Supreme Court decisions have greatly expanded the scope of the Act.³¹⁶ The Congressional findings go on to note that not only do “most consumers and employees have little or no meaningful choice whether to submit their claims to arbitration,” often they “are not even aware that they have given up their rights.”³¹⁷ In addition, the lack of transparency and inadequate judicial review of arbitrators’ decisions in mandatory arbitration undermines the development of public law.³¹⁸ Harkening back to the historic roots of arbitration, the text continues, “[A]rbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and occurs after the dispute arises.”³¹⁹ The proposed text of the bill adds Section 402 entitled Validity and enforceability. It states, “[n]otwithstanding any other provision of this title, no predispute arbitration agreements shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, anti-trust dispute, or civil rights dispute.”³²⁰ The bill also ensures that courts,

313. Letter in Support of the Arbitration Fairness Act of 2013, S.878 (May 7, 2013), <http://www.citizen.org/documents/afa-senate-support-letter-may-2013.pdf>.

314. *Id.*

315. *Id.*

316. H.R. 1844, 113th Congress, § 2 (2013).

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at § 3.

rather than arbitrators, shall determine the validity and enforceability of arbitration agreements.³²¹

As of October 2014, H.R. 1844 had 81 co-sponsors in the House, all Democrats and had been referred to the Committee on Regulatory Reform, Commercial and Antitrust Law. According to www.govtrack.us, the bill had a 2% chance of being enacted.³²² Its Senate counterpart (S.878) had 24 co-sponsors in the Senate, 23 Democrats and one Independent and had been referred to the Senate Judiciary Committee. According to www.govtrack.us, the bill had a 3% chance of being enacted.³²³ Congress is unlikely to provide the needed relief in the near future, given that only 11% of bills made it out of committee and only 3% were enacted from 2011–2013.³²⁴ But while the Arbitration Fairness Act may not pass during either this Congress or the next, as the public increasingly becomes aware of the problems with mandatory predispute arbitration agreements, something like it will surely pass sometime down the road.³²⁵

The New Mexico Supreme Court had little choice in *Strausberg v. Laurel Healthcare* but to affirm that New Mexico's doctrine of unconscionability will be applied to arbitration agreements in the same way it is applied to any other contract.³²⁶ In the meantime, nursing homes have become the latest battleground in the debate over "mandatory" versus "voluntary" arbitration, in part, because of the increasing interest in protecting vulnerable populations and ensuring that "volunteering" to arbitrate really means "volunteering."³²⁷ Although the use of mandatory predispute arbitration agreements in nursing home admissions processes may be particularly egregious, consumer advocates and legislators should continue to push for policies that ensure that all arbitration agreements are voluntarily entered into and "negotiated by sophisticated parties of approximately equivalent bargaining power who under[stand] the benefits and costs of their bargains."³²⁸

321. *Id.*

322. See <http://www.govtrack.us/congress/bills/113/hr1844>.

323. See <https://www.govtrack.us/congress/bills/113/s878>.

324. See <https://www.govtrack.us/congress/bills/113/hr1844>.

325. Telephone Interview with Paul Bland, Senior Attorney, Public Justice (Nov. 12, 2013).

326. *Figueroa v. THI of New Mexico at Casa Arena Blanca, LLC*, 2013-NMCA-077, ¶ 10, 306 P.3d 480.

327. Telephone Interview with Rita Siegel, Attorney/Arbitrator/Mediator, New Mexico Board of Specialization (Nov. 1, 2013).

328. Demaine, *supra* note 45, at 55–56.