NEW MEXICO LAW REVIEW

Volume 50
Issue 1 *Winter*

Winter 2020

Not Waiting for Superman: Lessons for Unfair Practices Act Litigants From State Ex Rel. Balderas V. ITT Educational Services

Lionel Conrad Betsch
University of New Mexico - School of Law

NOT WAITING FOR SUPERMAN: LESSONS FOR UNFAIR PRACTICES ACT LITIGANTS FROM *STATE EX REL. BALDERAS V. ITT EDUCATIONAL SERVICES*

Lionel Conrad Betsch*

INTRODUCTION

In *State ex rel. Balderas v. ITT Educational Services, Inc.*, the New Mexico Court of Appeals applied public policy under the Unfair Practices Act (hereinafter "UPA" or "Act") to void both an arbitration provision and the confidentiality clause contained therein.[1] The status of the plaintiff Attorney General was dispositive to the court's analysis, and therefore the court did not reach the question of whether a private UPA plaintiff would likewise be able to defeat a defendant's motion to enforce an arbitration provision.[2] However, that question has potential significance for future UPA plaintiffs, especially as arbitration provisions have become popular contract provisions to preclude or obstruct lawsuits.[3] This Comment argues that, depending on the facts of the specific case, such a private UPA plaintiff could prevail based on legislative intent, public policy, and courts' equitable application of the UPA.

Imagine a high school graduate enrolls in a for-profit college on the basis of the institution's misleading advertising. Perhaps late-night television spots entice this student by making inflated claims about employers' regard for the college's degrees; by deceptively implying that many high-paying jobs await the college's alumni; or by falsely suggesting that the college's placement services will ensure

* University of New Mexico School of Law, Class of 2020. For their legal instruction and guidance, I especially thank Professors Carol M. Suzuki and J. Walker Boyd, as well as my Law Review colleagues. For their elemental presence in all other phases of my life, e.g. supporting my second career, I praise and appreciate my fabulous family. *See generally*, love.

1. State *ex rel.* Balderas v. ITT Educ. Servs., Inc., 2018-NMCA-044, ¶¶ 16–18, 421 P.3d 849, 855 ("[W]e conclude that, under the circumstances of this case, it would be contrary to public policy to allow ITT to use the confidentiality clause with its students to shield itself from the State's investigation and litigation authorized under the UPA. . . . ITT's appeal of the order denying its motion to compel arbitration fails for the same reason."). Such contractual violations of public policy have been defined by courts as patently offensive to the public good; clearly and unmistakably repugnant to the public interest; injurious to the interests of the public, or in contravention of some established interest of society or some public statute; and against good morals, or tending to interfere with public welfare. *See* 17A Am. Jur. 2d Contracts § 238 (2020).

2. *State ex rel. Balderas*, 2018-NMCA-044, ¶¶ 16–18, 421 P.3d at 854–55.

3. *See* Christopher R. Leslie, *Conspiracy to Arbitrate*, 96 N.C. L. REV. 381, 393 (stating that the inability of consumers to avoid arbitration clauses can fundamentally undermine laws designed to protect consumer interests).

prompt employment upon graduation. The educational consumer who enrolls on the strength of these claims will not be in a position to negotiate or amend his or her terms of enrollment, including the institution's adhesive forms. Whether or not this consumer has program options elsewhere, the student may very well feel compelled to sign the proffered and mandatory enrollment forms that include arbitration provisions.

Now imagine the student approaches graduation and discovers that the educational degree has very limited value, contrary to the claims that drew him or her to the institution. In addition, the student has amassed significant debt and the school's placement services fall far below reasonable expectations. That student might then pursue a legal claim under the UPA against the for-profit college for "using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if doing so deceives or tends to deceive."[4] In response, the college invokes an arbitration clause contained within the original student enrollment agreement to block the plaintiff's discovery and litigation, contrary to the legitimate purpose of such a provision. Is this fair? More importantly, does the private litigant have the legal means to void the institution's attempt to use the arbitration provision as a shield against litigation for its alleged unfair practices?

This Case Comment discusses the implications of *ITT Educational Services* for private UPA litigants who face a motion to enforce an arbitration agreement to block their litigation and proposes the arguments that could prevail against such a motion. First, Part I describes the *ITT Educational Services* decision in detail and examines its immediate implications. Next, Part II provides relevant background information by discussing the UPA's legislative history and examples of some of the statute's acknowledged policy interests. Part III examines UPA claims in practice, in particular courts' application of equity toward achieving public policy goals. Part IV then proposes the related strategies for a hypothetical UPA litigant to pursue against such enforcement of arbitration contrary to public policy.

PART I – ITT EDUCATIONAL SERVICES

A. Procedural Posture and Factual Background

Now bankrupt, ITT Educational Services, Inc., d/b/a ITT Technical Institute (hereinafter "ITT"), stands accused of violations of the UPA arising from alleged misrepresentations to students about its nursing program and financial aid process.[5] At the trial court, ITT argued that the plaintiff Attorney General (hereinafter "AG") was bound by the arbitration provision in the ITT student enrollment agreement despite not being a party to the agreement.[6] The arbitration provision specifies that "any dispute arising out of or in any way related" to the agreement "including without limitation, any statutory, tort, contract or equity claim" be resolved by binding arbitration.[7] ITT asserted that the AG was bound by the binding arbitration provision because his claims were derived from student claims or

4. N.M. STAT. ANN. § 57-12-2(D)(14) (2019).
5. *State ex rel. Balderas*, 2018-NMCA-044, ¶ 2, 421 P.3d at 851.
6. *Id.*
7. *Id.*

were brought in a representative capacity on behalf of students.[8] On this basis, ITT filed a motion asking the trial court to compel arbitration by the State for each individual student represented in the claim.[9]

The AG had filed subpoenas *duces tecum* to discover information from prior arbitration proceedings brought by ITT students against the institution.[10] ITT objected to the subpoenas on two grounds relating to the arbitration provision and its confidentiality clause.[11] First, ITT claimed that the subpoenas would violate student privacy.[12] Second, ITT claimed that the informal nature of the arbitration process rendered parties less careful than in litigation, and thus keeping arbitration proceedings confidential served public policy.[13]

In weighing both sides' arguments, the trial court expressed both student privacy concerns and concern against using contract provisions to block discovery. "I understand confidentiality agreements. I understand arbitration agreements between parties. . . . I don't have a problem with the concept of the confidentiality agreement, but I do have a problem with using it as a shield."[14] ITT was unable to provide authority for a trial court's enforcement of such a confidentiality clause against discovery by "an investigative or enforcement agency like the Attorney General . . . pursuant to its statutory authority."[15] The trial court granted the State's motion to compel production,[16] and ITT timely appealed pursuant to the New Mexico Uniform Arbitration Act (hereinafter "NMUAA"), NMSA 1978, § 44-7A-29(a)(1) (2001).[17]

B. Interlocutory Appeal

In weighing the enforceability of the arbitration provision and confidentiality clause with respect to UPA claims, the Court of Appeals reviewed the case *de novo* for several pertinent reasons. First, *de novo* is the required standard of review for interpretation of all relevant contract terms.[18] Second, a court determination regarding a contract being against public policy "'is a question of law for the court to determine from all the circumstances of each case,' considering both statutory and judicial expressions of public policy."[19] In addition, the court applies a *de novo* standard "'to a district court's denial of a motion to compel arbitration[,]' as well as to the applicability and construction of a contractual provision requiring arbitration."[20] These considerations demonstrate that the court conducted its analysis with full awareness of contract and public policy concerns, whereas the status of the

8. *Id.*
9. *Id.*
10. *Id.* ¶ 3, 433 P.3d at 851.
11. *Id.* ¶¶ 3–5, 433 P.3d at 851–52.
12. *Id.* ¶ 5, 433 P.3d at 852.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* ¶ 2, 433 P.3d at 851.
18. *Id.* ¶ 8, 433 P.3d at 852.
19. *Id.* (quoting Castillo v. Arrieta, 2016-NMCA-040, ¶ 15, 368 P.3d 1249, 1254).
20. *Id.* (quoting Piano v. Premier Distrib. Co., 2005-NMCA-018, ¶ 4, 107 P.3d 11, 13).

Attorney General plaintiff was not a distinct factor regarding the standard of review. Thus, a private UPA litigant would not face a different standard of review due to lacking the AG's status with respect to the Act.

The court first took up the issue of the State's motion to compel compliance with its subpoenas.[21] ITT argued for enforcement of the arbitration provision and the confidentiality clause therein based on the Federal Arbitration Act (hereinafter "FAA") and on public policy favoring arbitration.[22] The State argued that the trial court's ruling comported with New Mexico's broad discovery rules.[23] The State further asserted that ITT should not be allowed to invoke the arbitration provision's confidentiality clause as a shield against its statutorily mandated investigation and enforcement obligations as authorized by the UPA.[24]

(1) Discussion of the FAA

Regarding ITT's argument, the Court of Appeals analyzed the FAA's purpose and potential preemption of state law.[25] The court cited the U.S. Supreme Court's recognition of the FAA's purpose "'to reverse the longstanding judicial hostility to arbitration agreements' and 'to place arbitration agreements upon the same footing as other contracts.'"[26] The court then quoted the New Mexico Supreme Court's recognition of the FAA's power to "preempt[] not only state laws that prohibit arbitration outright, but also state laws that stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[27] However, the court then recognized that the FAA does not completely displace state law that governs contract formation and enforcement, and it does not make arbitration agreements more enforceable than other contracts.[28] Therefore, the court concluded, arbitration provisions—like other contract provisions—are subject to generally applicable contract defenses, including fraud, duress, and unconscionability.[29]

In clarifying the scope of the FAA, the court repeatedly cited *Strausberg* and *Rivera*, including those cases' recognitions of the holding in *Waffle House*.[30] These citations to U.S. Supreme Court caselaw served plausible purposes beyond establishing the New Mexico Supreme Court's own framework of authority and credibility. The court also may have been signaling that New Mexico's UPA jurisprudence is cognizant of the U.S. Supreme Court's FAA ruling and does not stand in contradiction to that ruling. As well, the court may have been signaling that the New Mexico Supreme Court has experience in analyzing the UPA against the full purposes and objectives of Congress, further precluding a potential argument

21. *Id.* ¶ 9, 433 P.3d at 852–53.

22. *Id.*

23. *Id.*

24. *Id.* ¶¶ 9, 11, 433 P.3d at 852–53.

25. *Id.* ¶ 12, 433 P.3d at 853–54.

26. *Id.* (quoting E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 289 (2002)).

27. *Id.* (quoting Strausberg v. Laurel Healthcare Providers, LLC, 2013-NMSC-032, ¶ 55, 304 P.3d 409, 423 (quoting Rivera v. Am. Gen. Fin. Servs., Inc., 2011-NMSC-033, ¶ 17, 259 P.3d 803, 810)).

28. *Id.* (citing *Strausberg*, 2013-NMSC-032, ¶ 52, 304 P.3d at 422).

29. *Id.* (citing *Rivera*, 2011-NMSC-033, ¶ 17, 259 P.3d at 810).

30. *Id.*

that the court here ignores *Concepcion*.[31] Finally, the court's citations here also included a signal to the Fourth Circuit's shared view of the outer reach of the FAA's scope, likely communicating that the court's position is consistent with federal rulings.[32]

(2) Discussion of the State's Competing Contract Interests

The court stated that in New Mexico, the enforceability of a contract relies on the balancing of two competing interests: freedom of contract and the public interest against any contract that is contrary to public policy.[33] The New Mexico Supreme Court recognized the State's commitment to freedom of contract such that contracts must be enforced unless they "clearly contravene some law or rule of public morals."[34] The Supreme Court has also stated that it "jealously guard[s]" the right to contract, but a contractual clause that clearly contravenes a positive rule of law cannot be enforced.[35] The court further cited the Supreme Court's position that invalidation of a contract may be favored by public policy that originates from either statutory or common law.[36] The court then demonstrated that New Mexico public policy can invalidate contract terms that are contrary to statutory provisions by citing five examples from four New Mexico Supreme Court cases.[37] Significantly, none of these cases involved the State as a party nor the statutory authority of the AG.[38]

(3) Discussion of the UPA & Public Policy

Having established that New Mexico statutory authority can be the basis of public policy to invalidate a contract, the court then turned to the specific question of whether the UPA provides such a basis in the case of ITT's confidentiality clause.[39]

The court began by recognizing that the UPA represents New Mexico public policy for preventing consumer harm and resolving consumer claims.[40] The UPA grants broad statutory authority to the AG's office to investigate violations and enforce the provisions of the UPA.[41] This authority includes the duty of the

31. *Id.* (citing *Strausberg*, 2013-NMSC-032, ¶ 55, 304 P.3d at 423 (citing *Rivera*, 2011-NMSC-033, ¶ 17, 259 P.3d at 810)).

32. *Id.* (citing Supak & Sons Mfg. Co. v. Pervel Indus., Inc., 593 F.2d 135, 137 (4th Cir. 1979) (stating that the FAA's purpose is "to make arbitration agreements as enforceable as other contracts, but not more so") (quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967)).

33. *Id.* ¶ 13, 433 P.3d at 854.

34. *Id.* (quoting Berlangieri v. Running Elk Corp., 2003-NMSC-024, ¶ 20, 76 P.3d 1098, 1105).

35. *Id.* (quoting Acacia Mut. Life Inc. Co. v. Am. Gen. Life Ins. Co., 1990-NMSC-107, ¶ 1, 802 P.2d 11, 12).

36. *Id.* (citing *Berlangieri*, 2003-NMSC-024, ¶ 20, 76 P.3d at 1105).

37. *Id.* ¶ 14, 433 P.3d at 854 (citing First Baptist Church of Roswell v. Yates Petroleum Corp., 2015-NMSC-004, ¶ 15, 345 P.3d 310, 314–15; *Berlangieri*, 2003-NMSC-024, ¶ 53, 76 P.3d at 1113; *Acacia Mut. Life Inc. Co.*, 1990-NMSC-107, ¶ 11, 802 P.2d at 14; DiGesu v. Weingardt, 1978-NMSC-017, ¶ 7, 575 P.2d 950, 951–52).

38. *Id.*

39. *Id.* ¶ 15, 433 P.3d at 854.

40. *Id.* ¶ 16, 433 P.3d at 854–55 (citing Fiser v. Dell Computer Corp., 2008-NMSC-046, ¶ 9, 188 P.3d 1215, 1218).

41. *Id.*

Consumer Protection Division of the AG's Office to resolve dissatisfied customers' complaints, educate citizens about consumers' rights, and bring suits on behalf of the public.[42] Such duties of the AG have been deemed by the Supreme Court to demonstrate the State's fundamental public policy ensuring that consumers have an opportunity to "redress their harm."[43] The court then cited details from the UPA regarding the AG's responsibility and process in conducting discovery in furtherance of public policy.[44]

Weighing these considerations, the court concluded that it would be against public policy to allow ITT to use a confidentiality clause with its students as a shield against the State's investigation and litigation as authorized by the UPA.[45] Thus, the court affirmed the trial court's granting of the State's motion to compel production.[46] Further, the court held that ITT's motion to compel arbitration failed "for the same reason as its appeal of the district court's discovery order."[47]

C. Implications

The court's opinion closes with the statement that it neither considers nor decides "the propriety of a defendant's use of an arbitration provision to compel arbitration or a confidentiality clause to prevent the disclosure of information sought in a private suit brought under NMSA 1978, Section 57-12-10 (2005) of the UPA."[48] Though the question was not addressed here, courts and parties have much to gain from the answer. As arbitration has become a popular contract provision to protect potential defendants,[49] future UPA plaintiffs will likely confront this issue.

Whereas the State focused its UPA argument on the AG's statutory power under the Act, the court's analysis recognized that power within a broader context of the UPA's expression of public policy.[50] The AG's statutory responsibility under the UPA is to serve the public interest by preventing consumer harm and resolving consumer claims. The broad and specific authority granted to the AG to achieve this public interest is greater than that legislated for private remedies. However, private UPA plaintiffs have also been granted authority by the legislature to serve the same public interest, and the courts have affirmed the public value of that authority on numerous occasions and in varied cases. In that light, *ITT Educational Services* raises a reasonable question as to whether the State's public policy under the UPA can furnish sufficient authority for such a private plaintiff to effect a result equal or similar to that achieved by the AG.

42. *Id*.
43. *Id*.
44. *Id*.
45. *Id*.
46. *Id*.
47. *Id*. ¶ 17, 433 P.3d at 855.
48. *Id*. ¶ 18, 433 P.3d at 855.
49. *See* Leslie, *supra* note 3.
50. *State ex rel. Balderas*, 2018-NMCA-044, ¶¶ 11–16, 433 P.3d at 853–55.

PART II – THE UNFAIR PRACTICES ACT: HISTORY AND POLICY INTERESTS

New Mexico's Unfair Practices Act[51] provides a mechanism of "damages and other remedial relief for persons damaged by unfair, deceptive, and unconscionable trade practices."[52] A typical claim under the UPA consists of three allegations:

> (1) the defendant made an oral or written statement, a visual description or a representation of any kind that was either false or misleading; (2) the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant's business; and (3) the representation was of the type that may, tends to, or does deceive or mislead any person.[53]

Though there have been noteworthy changes to the UPA, the gravamen of an unfair or deceptive trade practice under the statute has remained "a misleading, false, or deceptive statement made knowingly in connection with the sale of goods or services."[54] An unconscionable trade practice under the statute is one that "to a person's detriment: (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or (2) results in a gross disparity between the value received by a person and the price paid."[55]

A. Legislative History of the UPA

In 1964, the National Conference of Commissioners on Uniform State Laws put forth the Uniform Deceptive Trade Practices Act to supplement existing state legislation.[56] This proposed legislation was adopted to varying degrees by several states by 1967,[57] perhaps because its purpose was to unify the laws relating to unfair competition that had varied greatly by state legislatures applying federal common law.[58] The Uniform Law aimed to protect consumers from misleading business practices such as false advertising, trademark infringement, misrepresentation, and false disparagement.[59]

---

51. N.M. STAT. ANN. §§ 57-12-2 to 10 (2019) are also referred to as the Unfair Trade Practices Act (UTPA); *see, e.g.*, Valdez v. Metro. Prop. & Cas. Ins. Co., 867 F. Supp. 2d 1143, 1148–49 (D.N.M. 2012).

52. Quynh Truong v. Allstate Ins. Co., 2010-NMSC-009, ¶ 30, 227 P.3d 73, 81.

53. Daye v. Cmty. Fin. Loan Serv. Centers, LLC, 280 F. Supp. 3d 1222, 1246 (D.N.M. 2017) (citing Lohman v. Daimler–Chrysler Corp., 2007-NMCA-100, ¶ 5, 166 P.3d 1091, 1093 (citing N.M. STAT. ANN. § 57-12-12(D) (2003))).

54. *Id.* (citing Diversey Corp. v. Chem–Source Corp., 1998-NMCA-112, ¶ 17, 965 P.2d 332, 338).

55. N.M. STAT. ANN. § 57-12-2 (2019).

56. Robert F. Dole, Jr., *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 YALE L.J. 485 (1967).

57. *Id.*

58. *A Guide to the Uniform Deceptive Trade Practices Act, 1989*, TEX. ARCHIVAL RESOURCES ONLINE, https://legacy.lib.utexas.edu/taro/utlaw/00040/law-00040p74.html [https://perma.cc/VB43-TTP2].

59. *Id.*

The Uniform Act addressed a significant problem of consumer protection: most existing relevant state legislation carried criminal penalties, so only flagrant abuses were enjoined due to the limited budgets of most enforcing agencies.[60] In contrast, the Uniform Act empowered "injured merchants . . . and affected consumers" to pursue private and class actions against any and all deceptive trade practices that adversely affected the broad marketplace.[61]

As proposed to the New Mexico Legislature in 1967 as Senate Bill 233, the broad scope of the Uniform Act was evident in its listing of thirteen specific "unfair methods of competition and unfair or deceptive acts or practices."[62] (The current UPA has expanded this list to eighteen items.[63]) These ranged from "advertising goods or services with intent not to supply reasonably expectable public demand" to "engaging in any other conduct which similarly creates a likelihood of confusion or misunderstanding."[64] In addition, SB233 included clear language empowering the Attorney General to bring an action in the name of the state whenever he "has reasonable belief that any person is using or is about to use" an unfair practice and that such a proceeding would be in the public interest.[65] Practical details for the Attorney General's pursuit of such claims were also included from the Uniform Law.[66]

The legislative intent of New Mexico's UPA is also revealed by the noteworthy addition to SB233 of the "Private Remedies" section to the enacted law.[67] While not all states included this text in adopting the Uniform Law, New Mexico authorized private litigants to pursue claims without "[p]roof of monetary damage, loss of profits, or intent to deceive" being required.[68] Private remedies under principles of equity and on terms that the court considers reasonable included both injunctive relief and costs and attorney fees to the prevailing party.[69] As discussed *infra* with regard to *Jones v. Gen. Motors Corp.*,[70] the Washington Court of Appeals has noted that the public policy interest of awarding attorney fees includes reimbursing "the individual plaintiff and his counsel for enforcing the Act on behalf of the general citizenry.'"[71]

Amendments to the 1967 law have only served to broaden or strengthen the authority granted to private litigants. The current UPA includes "restitution" as a remedy available in addition to injunctive relief.[72] Moreover, private remedies were

60. Dole, *supra* note 56, at 486.

61. *Id.*

62. S.B. 233, 28th Leg., 1st Sess. (N.M. 1967).

63. N.M. STAT. ANN. § 57-12-2 (2019).

64. S.B. 233, 28th Leg., 1st Sess. (N.M. 1967).

65. *Id.*

66. *Id.*

67. 1967 N.M. Laws, ch. 268 § 8.

68. *Id.*

69. *Id.*

70. Jones v. Gen. Motors Corp., 1998-NMCA-020, 953 P.2d 1104.

71. *Id.* ¶ 25, 953 P.2d at 1109 (quoting Brian J. Linn & Gretchen Newman, Comment, *Reasonable Attorneys' Fees and Treble Damages–Balancing the Scales of Consumer Justice*, 10 GONZ. L. REV. 593, 598 (1975)).

72. N.M. STAT. ANN. § 57-12-8 (1977).

expanded to include actions to recover actual damages or one hundred dollars, whichever is greater, thus adding individual motivation for private litigants to advance claims that serve the public interest.[73] Further, on June 19, 1987, the legislature added the following:

> Where the trier of fact finds that the party charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice, the court may award up to three times actual damages or three hundred dollars ($300), whichever is greater, to the party complaining of the practice.[74]

By this trebling component for actual and statutory damages, the legislature signaled its clear intention that protection of consumers generally might be effected through the mechanism of private remedies.

B. Policy Interests of the UPA

Throughout its broad application, the UPA has represented a strong public policy focused on remedying collective consumer harm and ensuring collective consumer protection.

One powerful aspect of the UPA's purpose serving the general public interest lies in its lack of requirement of a contract or commercial transaction. The language of Section 57-12-10 directs that a UPA plaintiff may include a person "likely to be damaged," and the legislature has provided statutory damages for those plaintiffs with no direct monetary damage or loss.[75] Further evidence of this interpretation comes from the federal court for the District of New Mexico, which recognized in 2018 that the plain language and the relevant statutory provisions of the UPA "do not require a contract for the sale of goods or services."[76] The *Bar J Sand & Gravel* court's conclusion cited numerous decisions by the New Mexico Supreme Court and the Court of Appeals that support the proposition that the UPA does not require the existence of a commercial transaction between parties for a valid claim.[77]

Regarding this aspect of public policy and others, the New Mexico Supreme Court has explained that it interprets the provisions of the UPA liberally because it is remedial legislation.[78] In order to accomplish the purposes and intent of the legislation against all misleading or deceptive statements, the court tries to ensure that the UPA "lends the protection of its broad application to innocent consumers."[79] The *Truong* court demonstrated this deference to legislative intent by explaining its

73. § 57-12-10(B) (2005).

74. Hale v. Basin Motor Co., 1990-NMSC-068, ¶ 17, 795 P.2d 1006, 1011.

75. § 57-12-10 (2005).

76. Bar J Sand & Gravel, Inc. v. Fisher Sand & Gravel Co., No. CV 15-228 SCY/KK, 2018 WL 3128991, at *12 (D.N.M. June 26, 2018).

77. *Id.* at *11–13.

78. Quynh Truong v. Allstate Ins. Co., 2010-NMSC-009, ¶ 30, 227 P.3d 73, 81.

79. Ashlock v. Sunwest Bank of Roswell, N.A., 1988-NMSC-026, ¶ 7, 753 P.2d 346, 348, *overruled on other grounds by* Gonzales v. Surgidev Corp., 1995-NMSC-036, ¶ 16, 899 P.2d 576, 583.

resolution of a statutory ambiguity in favor of general provisions over exceptions.[80] In that case, the court sided with the general remedial consumer protection purposes of the UPA over the variously-interpreted "expressly permitted" requirement of the exemption in Section 57-12-7.[81]

Further, the Supreme Court has determined that the legislature did not include any requirement of intent on the part of a UPA defendant. Evidence for this interpretation is found in Section 57-12-10(B), applying trebled damages when the charged party is found to have "willfully engaged" with the unfair or deceptive trade practice or unconscionable trade practice.[82] The Court took this language to indicate that the legislature anticipated that some statements "would not be intentionally unfair or deceptive" initially but could become so during the life of the transaction.[83]

In the same case, the Supreme Court similarly clarified that the UPA does not include any requirement of recurring conduct by defendants.[84] In the absence of any statutory exception for "an isolated occurrence," the court deferred to the legislative intent served by the UPA.[85]

In conclusion, these examples of courts' recognition of the UPA's purpose to serve public policy are instructive both to the instant case and its related hypothetical. Against the backdrop of UPA jurisprudence, the *ITT* court's holding appears clearly appropriate to the legislative intent of the statute. Enforcement of the arbitration provision in ITT's student enrollment agreement against the AG would have been directly contrary to the enumerated purposes of the UPA. Additionally, courts' awareness of the larger policy purposes of the UPA support the proposition that enforcement of the arbitration provision against even a private litigant may be contrary to public policy.

PART III – CASELAW: NEW MEXICO COURTS' APPLICATION OF THE UPA

In a wide range of cases, New Mexico courts have consistently recognized the importance of private remedies under the UPA as an expression of New Mexico's strong policy preference for consumer protection. In support of this public policy, courts often apply equitable doctrines and liberally apply the remedial provisions of the UPA. In so doing, courts often note the legislative intent behind the UPA as serving the public interest generally. These consistent features of UPA jurisprudence support the claim that private UPA plaintiffs may prevail against enforcement of certain contract provisions if the facts indicate such enforcement would be contrary to public policy. In other words, the question raised but not answered in *ITT Educational Services* may favor the plaintiffs in individual cases.

80. *Quynh Truong*, 2010-NMSC-009, ¶ 31, 227 P.3d at 82.

81. *See id.* ¶¶ 30–66, 227 P.3d at 81–89.

82. *Ashlock*, 1988-NMSC-026, ¶ 7, 753 P.2d at 348.

83. *Id.* ¶ 5.

84. *See id.* ¶ 9.

85. *See id.*

A. New Mexico Supreme Court UPA Jurisprudence

In *Gandydancer, LLC v. Rock House CGM, LLC*, the New Mexico Supreme Court determined that, while the UPA should be applied broadly to effect its policy goal of consumer protection,[86] the Act does not create a cause of action for competitive business injury.[87] The court ruled that the plaintiff business competitor lacked standing to bring a UPA claim, because a cause of action to recover lost profits in competitive injury claims—even as a result of an unfair or deceptive business practice—falls outside of the "zone of interest" of consumer protection intended by the legislature.[88] The court reasoned that the legislature's removal in 1971 of "unfair methods of competition" from the text of the UPA intended to exclude such claims henceforth.[89]

For the private UPA plaintiff envisioned in this Comment, *Gandydancer* stands for the proposition that UPA standing is predicated on injury from "prohibited conduct" as defined by the Act,[90] and ambiguity regarding the zone of interest of the Act will be resolved by applying "equity, legislative history, or other sources" to determine "the spirit of the statute."[91] The court clarified that there is no significant difference between having standing to sue and having a cause of action under the UPA, so the key to determining whether a UPA plaintiff has an enforceable "right in the courts" is to show that the plaintiff's asserted interests are "arguably within the zone of interests to be protected or regulated by the statute."[92] The court clarified this zone of interests by stating that "the UPA 'lends the protection of its broad application to innocent consumers.'"[93] While the question of standing in *Gandydancer* would not apply to private consumer plaintiffs, the reasoning in this case reinforces the readiness of the court to apply the UPA broadly to serve the state's consumer protection policy where a claim establishes its interests do fall within the Act's zone of interests.

In *State ex rel. King v. B & B Investment Group, Inc.*, the New Mexico Supreme Court analyzed the "consumer-protective legislative intent" behind the UPA as it applied to cases of payday lenders charging exorbitant interest rates.[94] The court noted that the UPA prohibits "the economic exploitation of others," such as the

86. Gandydancer, LLC v. Rock House CGM, LLC, 2019-NMSC-021, ¶ 24, 453 P.3d 434, 441.

87. *Id.* ¶ 10, 453 P.3d at 438.

88. *Id.* ¶ 20, 453 P.3d at 440.

89. *Id.* ¶ 19–20, 453 P.3d at 440. This begs the question of why the legislature did not remove "disparaging the goods, services, or business of another by false or misleading representations" from its list of defined unfair or deceptive trade practices. *See* N.M. STAT. ANN. § 57-12-2(D)(8) (2019). It is hard to imagine anyone other than a business competitor bringing such a claim or showing such injury. Some aspects of the zone of interest of the UPA may remain unresolved.

90. *Gandydancer*, 2019-NMSC-021, ¶ 21, 453 P.3d at 440 (citing NMSA §§ 57-12-2(D) and -3 (2019)).

91. *Cf. id.* ¶ 14, 453 P.3d at 439 (quoting State v. Smith, 2004-NMSC-032, ¶¶ 9–10, 98 P.3d 1022, 1025–26).

92. *Id.* ¶ 8, 453 P.3d at 438 (quoting Key v. Chrysler Motors Corp., 1996-NMSC-038, ¶ 11, 918 P.2d 350, 354); *see id.* ¶ 17, 453 P.3d at 439 (stating that under the UPA the concepts of injury and zone of interest are intertwined).

93. *Id.* ¶ 15, 453 P.3d at 439 (quoting Stevenson v. Louis Dreyfus Corp., 1991-NMSC-051, ¶ 12, 811 P.2d 1308, 1311).

94. State *ex rel.* King v. B & B Inv. Grp., Inc., 2014-NMSC-024, ¶¶ 34–35, 329 P.3d 658, 671.

signature loans in *B & B Investment Group, Inc.* that carried a finance charge of at least $999.71 on a $100 loan.[95] The *B & B* court concluded from the language of the UPA that the legislature recognized "that, under certain conditions, the market is not truly free," and therefore the courts must be empowered to stop or remedy cases of consumer exploitation.[96] The court declared that the legislature's intent for the statute to serve such policy goals was made clear by empowering "the Attorney General and private citizens to fight unconscionable practices through the UPA."[97] The court cited other Supreme Court precedents in asserting that it should interpret the UPA's provisions liberally to "facilitate and accomplish its purposes and intent"[98] to protect "innocent consumers."[99] In addition, the court approved the reasoning in *Williams v. Walker–Thomas Furniture Co.*[100] that courts possess the inherent equitable power to rule a contract substantively unconscionable as contrary to public policy "[e]ven in the absence of binding precedent or statutory power."[101] The court stated that the rules of equity "aim at securing substantial justice when the strict rules of common law might work hardship."[102]

To further clarify the UPA's public policy, the *B & B* court examined the context of other similar statutes, presuming that the legislature "acted with full knowledge of relevant statutory and common law."[103] The court inferred that the legislature intended for the UPA to operate in harmony with public policy as expressed within existing statutes. Thus, the court inferred a harmonious relationship between the policy goals of the UPA and the Small Loan Act of 1955, which serves a "consumer-protective public policy goal" by facilitating the elimination of exploitation and abuse of borrowers.[104] The court found a similar relationship between the policy goals of the UPA and the unconscionability clause of the Uniform Commercial Code, which was adopted in 1961 to prevent "oppression and unfair surprise" by policing against unconscionable contracts and clauses.[105] This statute clarifies the courts' broad remedial power to void or limit the application of a contract or clause that would otherwise create an unconscionable result. As well, the court found the UPA shared a consumer-protective public policy with the Money, Interest, and Usury Act of 1851, which prohibits excessive charges and requires forfeiture of profits from usury.[106]

---

95. *Id.* ¶¶ 34, 36, 329 P.3d at 671–72.

96. *Id.* ¶ 34, 329 P.3d at 671.

97. *Id.* ¶ 45, 329 P.3d at 674.

98. *Id.* ¶ 48, 329 P.3d at 675 (quoting Quynh Truong v. Allstate Ins. Co., 2010-NMSC-009, ¶ 30, 227 P.3d 73, 81).

99. *Id.* (quoting Ashlock v. Sunwest Bank of Roswell, N.A., 1988-NMSC-026, ¶ 7, 753 P.2d 346, 348).

100. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448 (D.C. Cir. 1965) (reversing the District of Columbia Court of Appeals).

101. *State ex rel. King*, 2014-NMSC-024, ¶ 33, 329 P.3d at 670.

102. *Id.*

103. *Id.* ¶ 38, 329 P.3d at 672 (quoting State *ex rel.* Quintana v. Schnedar, 1993-NMSC-033, ¶ 4, 855 P.2d 562, 565).

104. *Id.* ¶ 40, 329 P.3d at 672.

105. *Id.* ¶ 41, 329 P.3d at 673 (quoting N.M. STAT. ANN. § 55-2-302 cmt. 1 (1978)).

106. *Id.* ¶¶ 39, 42, 329 P.3d at 672, 673.

In *Fiser v. Dell Computer Corp.*, the Supreme Court recognized that the UPA represents "[t]he fundamental New Mexico policy of providing consumers a mechanism for dispute resolution".[107] The court declared that the UPA is "unequivocal" in strongly supporting the resolution of consumer claims, regardless of the scale of the damages alleged.[108] As in *B & B Investment Group*, the *Fiser* court analyzed this public policy of the UPA in the context of its relationship with that of other relevant statutes, in this case the False Advertising Act and the Consumer Protection Division of the Attorney General's Office.[109] The court noted the connected policies of those statutes to the UPA as including the empowerment of private individuals to brings claims on behalf of the public[110] and ensuring that consumers have an opportunity to redress their harms.[111]

The *Fiser* court applied the UPA in holding that a class action ban in the arbitration provision of a computer sales contract violated New Mexico public policy.[112] Despite New Mexico policy to respect choice-of-law provisions, the court declined to apply Texas law since the application thereof "would 'violate some fundamental principle of justice'"[113] by removing a viable "mechanism for [consumers'] dispute resolution."[114] Here the court clarified that public policy in New Mexico seeks to achieve greater consumer protection than that allowed under Texas law: the court concluded that Texas law would likely enforce the provision against class actions, thus effectively precluding individual clients from gaining relief for the claim of only ten to twenty dollars per computer.[115] The court recognized that the UPA applies to such plaintiff claims since the statute "was clearly drafted to include a remedy for small claims"[116] and because it specifically identifies class actions as a private remedy.[117] The court reached its holding despite assuming—in light of dispute between the parties—that the plaintiff had agreed to the defendant's "terms and conditions."[118] Thus, the holding here demonstrates the court's willingness to apply equity to achieve fundamental public policy as represented by the UPA.

In *Hale v. Basin Motor Co.*, the Supreme Court's holding and dicta demonstrate several applications of the Unfair Trade Practices Act that serve relevant public policy.[119] First, the *Hale* court approved the lower court's trebling of damages based on the defendant's willful failure to disclose prior damages to the automobile that was sold to the plaintiffs.[120] The court reasoned that disclosure by affidavit is

107. Fiser v. Dell Computer Corp., 2008-NMSC-046, ¶ 10, 188 P.3d 1215, 1218–19.
108. *Id.* ¶ 9, 188 P.3d at 1218 (citing N.M. STAT. ANN. § 57-12-3 (1978)).
109. *Id.* ¶¶ 9–11, 188 P.3d at 1218–19.
110. *Id.* ¶ 10, 188 P.3d at 1218–19.
111. *Id.* ¶ 11, 188 P.3d at 1219.
112. *Id.* ¶ 25, 188 P.3d at 1222.
113. *Id.* ¶ 7, 188 P.3d at 1218.
114. *Id.* ¶ 10, 188 P.3d at 1218–19.
115. *Id.* ¶ 7, 188 P.3d at 1218.
116. *Id.* ¶ 9, 188 P.3d at 1218.
117. *Id.* ¶ 13, 188 P.3d at 1219.
118. *Id.* ¶ 4, 188 P.3d at 1217–18.
119. *See generally* Hale v. Basin Motor Co., 1990-NMSC-068, 795 P.2d 1006.
120. *Id.* ¶¶ 7, 10–11, 795 P.2d at 1009, 1011–12 (citing N.M. STAT. ANN. § 57-12-6(B) (1995)).

required by Section 57-12-6(B) to protect consumers' reasonable expectations such as the perceived value of the purchased automobile.[121] Since remedial statutes are applied retroactively,[122] the court approved the increased damages for the willful trade practice on the 1985 sale despite the trebling provision being added to the statute on June 19, 1987.[123] The court reasoned that the provision was not a new duty, right or obligation, but instead provided a new remedy for an already established substantive right under the Unfair Trade Practices Act.[124]

Further, the *Hale* court discussed policy considerations for consumers regarding damages and appellate attorney fees. The plaintiffs claimed on appeal that their "damages and costs" included "lost paid vacation time" that had been spent preparing for and attending depositions and trial.[125] Since the plaintiffs had listed this at trial as *costs* only, the alleged amount could not be included at appeal as *damages*.[126] Thus, the court did not award these alleged costs, since the trial court did not demonstrate abuse of discretion.[127] However, the court stated that it "may have looked favorably" on such a damages claim if properly raised, since such damages serve to remedy the "frustration experienced by consumers having to run around to straighten out unfair or deceptive trade practices."[128] Finally, the *Hale* court approved of the plaintiffs' argument on cross-appeal that they were entitled to appellate attorney fees and costs under Section 57-12-10(C).[129] The court reasoned that awarding attorney fees and costs on appeal serves "the statutory purpose of creating a private remedy to redress wrongs resulting from unfair or deceptive trade practices."[130] Reinforcing the public policy of the statute, the court concluded that such awards to successful appellate litigants "make[] the private remedy an effective one."[131]

B. New Mexico Court of Appeals UPA Jurisprudence

In *Lohman v. Daimler-Chrysler Corp.*, the New Mexico Court of Appeals analyzed the language, historical purpose, and public policy of the UPA in determining that the Act warrants the "broadest possible application."[132] In *Lohman*, a class action lawsuit against an automobile manufacturer and the manufacturer of allegedly defective seatbelts, the court rejected numerous interpretations of UPA requirements that had been advanced by the defendants.[133] Notably, the court held that the UPA does not require a direct commercial transaction between a claimant

121. *Id.*
122. *Id.* ¶ 18, 795 P.2d at 1011–12 (citing Gray v. Armijo, 1962-NMSC-082, 372 P.2d 821).
123. *Id.* ¶ 17, 795 P.2d at 1011.
124. *Id.* ¶ 18, 795 P.2d at 1011–12.
125. *Id.* ¶ 24, 795 P.2d at 1013.
126. *Id.* ¶¶ 24–25, 795 P.2d at 1013.
127. *Id.* ¶ 25, 795 P.2d at 1013.
128. *Id.* ¶ 24, 795 P.2d at 1013.
129. *Id.* ¶ 26–27, 795 P.2d at 1013–14.
130. *Id.* ¶ 27, 795 P.2d at 1013–14.
131. *Id.*
132. Lohman v. Daimler-Chrysler Corp., 2007-NMCA-100, ¶ 25, 166 P.3d 1091, 1096–97.
133. *See generally id.* ¶ 20–40, 166 P.3d at 1095–99.

and a defendant,[134] a ruling that has been cited in many subsequent cases.[135] Rather, the court stated that the UPA "seems designed to encompass a broad array of commercial relationships" based on its prohibition against "misrepresentations 'made *in connection with* the sale . . . of goods or services . . . by a person in the regular course of his trade or commerce.'"[136] The court's plain language analysis focused on the Act's use of broad language such as "in connection with,"[137] "[a]ny person,"[138] and "as a result of any,"[139] leading to the court's conclusion that the legislature intended the UPA to have a scope "broad enough to encompass misrepresentations which bear on downstream sales by and between third parties."[140] The court found policy support for this position in the remedial purpose of the Act and "the principle favoring liberal application" thereof.[141]

The court's broad interpretation and application of the UPA in *Lohman* favors potential claims in which the plaintiff's injury does not present a typical transactional consumer. This interpretation and application centered on *the manner in which* alleged misrepresentations are made under the Act,[142] and included the conclusion that the UPA's focus on false or deceptive advertising was directed at remedying harm to the public at large, as consumers.[143] The court applied this reasoning further in stating that the UPA reaches misrepresentations made by and between third parties in the course of commercial transactions, "particularly when misrepresentations are designed to enable a manufacturer to sell a product to consumers."[144] As well, the court rejected the argument that the UPA requires a plaintiff to allege detrimental reliance, since the Act "does not require that the defendant's conduct actually deceive a consumer; it permits recovery even if the conduct only 'tends to deceive.'"[145] Finally, the court found sufficient support under the UPA for the plaintiff's theory of deliberate concealment and non-disclosure in relation to indirect misrepresentations.[146] The court concluded that the Act "imposes a duty to disclose material facts reasonably necessary to prevent any [other] statements from being misleading."[147] The range of the *Lohman* court's interpretation and application of the UPA lends support to arguments under the Act generally that use policy or legislative intent to assert public interests.

---

134. *Cf. id.* ¶ 25–26, 166 P.3d at 1096–97.

135. *See, e.g.*, Gandydancer, LLC v. Rock House CGM, LLC, 2019-NMSC-021, ¶ 31, 453 P.3d 434, 443; Dollens v. Wells Fargo Bank, N.A., 2015-NMCA-096, ¶ 17, 356 P.3d 531, 538; Hicks v. Eller, 2012-NMCA-061, ¶ 19, 280 P.3d 304, 309.

136. *Lohman*, 2007-NMCA-100, ¶ 21, 166 P.3d at 1096 (quoting N.M. STAT. ANN. § 57-12-2(D) (2019)) (emphasis added).

137. § 57-12-2(D).

138. § 57-12-10(B) (2005).

139. *Id.*

140. *Lohman*, 2007-NMCA-100, ¶ 30, 166 P.3d at 1097.

141. *Id.* ¶ 31, 166 P.3d at 1097.

142. *See id.* ¶ 6, 166 P.3d at 1093.

143. *Id.* ¶ 22, 166 P.3d at 1096.

144. *Id.* ¶ 26, 166 P.3d at 1097.

145. *Id.* ¶ 35, 166 P.3d at 1098 (quoting Smoot v. Physicians Life Ins. Co., 2004-NMCA-027, ¶ 21, 87 P.3d 545, 550 (quoting N.M. STAT. ANN. § 57-12-2(D)(14) (2019))).

146. *Id.* ¶ 39–40, 166 P.3d at 1098–99.

147. *Id.* ¶ 40, 166 P.3d at 1099 (quoting *Smoot*, 2004-NMCA-027, ¶ 15, 87 P.3d at 549).

In *Aguilera v. Palm Harbor Homes, Inc.*, the Court of Appeals expressly asserted the public policy value of encouraging private individuals to pursue UPA claims and of reimbursing such individuals and their attorneys for enforcing the UPA.[148] The court considered that the public interest served by such UPA claims justifies the awarding of attorney fees, since such fees could well exceed the size of the judgment in question.[149] Thus, even on appeal the court should apply the UPA's statutory provision regarding awarding of attorney fees to serve "the goal of encouraging plaintiffs to pursue justice even where the damages are minor in nature."[150] The court's consideration here of the UPA's public purposes supports the position that disincentives to pursuing UPA claims for even small amounts should be removed.[151]

It is noteworthy that the *Aguilera* court found the defendant's argument unpersuasive that, unlike the current arbitration statute, the arbitration act under which the initial dispute arose contained no provision for the awarding of "reasonable attorney's fees."[152] The defendant had a reasonable argument here, since the earlier version of the Uniform Arbitration Act stated that the "expenses of arbitration 'not including counsel fees . . . shall be paid as provided in the award.'"[153] However, the court determined that the trial court may award attorney fees as authorized by the applicable law, and in this case the underlying cause of action was pursuant to the UPA including its provision regarding attorney fees.[154]

Pursuant to the public interest served by the awarding of attorney fees, the court went even further regarding a prior concession of attorney fees by the plaintiff.[155] In the previous appeal of the case, the plaintiff had voluntarily given up her claim to attorney fees relating to "post-arbitration fees incurred in the district court."[156] The court recognized this concession but rejected the defendant's contention that *res judicata* should apply and extend the concession to the plaintiff's claim for attorney fees on appeal. Here again the defendant had a reasonable claim, as res judicata bars subsequent claims where a previous claim involved (1) identical parties; (2) acting in an identical capacity; (3) litigating the identical cause of action; and (4) with respect to the same subject matter.[157] However, the court deemed the cause of action and the subject matter here to be distinct from the previous claim in trial court, since the instant case was for fees incurred at the Court of Appeals and Supreme Court.[158] The court found sufficient distinction in the plaintiff having raised the issue in her appellate briefs, and thus her UPA-supported claim prevailed over

148. Aguilera v. Palm Harbor Homes, Inc., 2004-NMCA-120, ¶ 10, 99 P.3d 672, 676 (citing Jones v. Gen. Motors Corp., 1998-NMCA-020, ¶ 25, 953 P.2d 1104, 1109).

149. *Id.*

150. *Id.*

151. *See id.* ¶¶ 10–11, 99 P.3d at 676.

152. *Id.* ¶ 13, 99 P.3d at 676 (citing N.M. STAT. ANN. §§ 44-7A-22(b) (2001) and 44-7-10 (1971)).

153. *Id.* (quoting § 44-7-10).

154. *Id.* ¶ 14, 99 P.3d at 676.

155. *Id.* ¶¶ 17–19, 99 P.3d at 677–78.

156. *Id.* ¶ 18, 99 P.3d at 677–78.

157. *Id.* ¶ 19, 99 P.3d at 678 (citing Moffat v. Branch, 2002-NMCA-067, ¶ 14, 49 P.3d 673, 677; Bank of Santa Fe v. Marcy Plaza Associates, 2002-NMCA-014, ¶ 13, 40 P.3d 442, 445).

158. *Id.*

the defendant's res judicata argument.[159]

The *Aguilera* court cited *Jones v. Gen. Motors Corp*. in stating that public policy is served by awarding fees on appeal of UPA claims.[160] In holding for the plaintiff's right to recover attorney fees under the UPA, the *Jones* court noted with approval the rationale offered by the Washington Court of Appeals for that state's Consumer Protection Act: "(1) on the individual level, to enable the injured plaintiff to pursue his own claim; and, (2) on the public level, to reimburse the individual plaintiff and his counsel for enforcing the Act on behalf of the general citizenry."[161] The *Jones* court further observed that the purpose of awarding attorneys' fees and costs under similar statutes is to encourage private plaintiffs to pursue their claims where attorneys may be reluctant to represent consumer claims with smaller recoveries.[162] Thus, the court reasoned, attorney fees in such cases are not just nominal and should in fact "reflect the full amount of fees fairly and reasonably incurred by Plaintiff in securing an award under the UPA."[163]

C. Conclusion

UPA jurisprudence indicates a strong willingness by courts to recognize and enforce the legislatively intended power of the Act to serve public interests of consumer protection. In service to this purpose, courts are willing to apply equity to secure substantial justice when it falls within their power to do so. Caselaw demonstrates further that courts see unity between the UPA and other statutes that express public policy interests, thus lending weight to courts' authority to apply equity under such circumstances.

Additionally, UPA caselaw generally indicates little significant separation between the role of the AG and the role of private litigants in terms of public policy interests. In recent UPA cases involving the AG as a party, the courts recognized the enhanced statutory authority of the AG as serving the same consumer protection goals as those served by private litigants.[164] In a related instance, the Court of Appeals in *Atherton v. Gopin* treated the AG and private litigants as concurrent plaintiffs, where the trial court had heard their shared motion for summary judgment and combined oral argument on the motions.[165] Thus, UPA jurisprudence supports the theory that (1) private litigants serve the same public policy interests as the AG in ensuring that consumers have an opportunity to redress their harm, and (2) such litigants may receive equity to void a contract provision that is contrary to public policy.

---

159. *Id.*

160. *Id.* ¶ 10 (citing Jones v. Gen. Motors Corp., 1998-NMCA-020, ¶ 25, 953 P.2d 1104, 1109).

161. *Jones*, 1998-NMCA-020, ¶ 25, 953 P.2d at 1109 (quoting Linn & Newman, *supra* note 71); *see also* Atherton v. Gopin, 2012-NMCA-023, ¶ 8, 272 P.3d 700, 702 (stating that absent reasonable attorney fees, "prospective plaintiffs might have difficulty pursuing their claims and enforcing the UPA on behalf of the public").

162. *Jones*, 1998-NMCA-020, ¶ 25, 953 P.2d at 1109 (citing Linn & Newman, *supra* note 71).

163. *Id.*

164. *See generally State ex rel. King*, 2014-NMSC-024, 329 P.3d 658; *State ex rel. Balderas*, 2018-NMCA-044, 421 P.3d 849.

165. *Atherton*, 2015-NMCA-013, ¶¶ 13–15, 272 P.3d at 703–04.

PART IV – UNCONSCIONABILITY ANALYSIS AND COUNTERARGUMENTS

Against the long and broad backdrop of the UPA's legislative intent and judicial application, the hypothetical private claimant of this Comment has multiple opportunities to prevail but also faces multiple obstacles.

Initially, the degree of clarity of the complaint itself may contribute to the court's evaluation of the claim's legitimacy as a UPA case.[166] A proper UPA complaint should make clear which facts will be applied to prove which issues.[167] As stated above, this Comment envisions a private litigant raising a claim against a private institution for alleged misrepresentations regarding promised results of its educational degrees.[168] These misrepresentations may include regard held for such a degree by potential employers or the professional community; high-paying jobs awaiting the degree holder; or the services provided by the institution to ensure professional placement. The facts in the complaint may support allegations of unfair or deceptive trade practices under the UPA such as "representing that goods or services are of a particular standard, quality or grade"; "using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if doing so deceives or tends to deceive"; or "failing to deliver the quality or quantity of goods or services contracted for."[169] In addition, the facts in the complaint may support allegations of unconscionable trade practices under the UPA that took advantage of the disparity in the plaintiff's knowledge to a grossly unfair degree or resulted in a gross disparity between the value received by the plaintiff and the price paid.

Presuming the complaint's facts and allegations sufficiently support a UPA claim, the question here is whether a subsequent motion by the defendant to enforce an arbitration clause in a student enrollment agreement could be voided by the court. The court would first conduct unconscionability analysis of the contract provisions under question if such a claim had been raised by the plaintiff. While the defendant would bear the initial burden to prove the arbitration provision to be valid, the plaintiff would then bear the burden to show the provision to be unconscionable.[170]

If a contract provision under question survives unconscionability analysis, then a court applying contract law would enforce the provision unless a plaintiff demonstrates a sufficient basis for voiding the provision, such as the provision being contrary to public policy. The plaintiff's position would have to withstand significant counterarguments available to a defendant.

A. Unconscionability Analysis

Rooted in public policy, unconscionability doctrine is one of several "well-defined equitable exceptions" that justify a court rendering an agreement

166. *See* Heimann v. Kinder-Morgan CO2 Co., L.P., 2006-NMCA-127, ¶¶ 25–26, 144 P.3d 111, 119–20.

167. *See id.*

168. *See supra* at 2.

169. N.M. STAT. ANN. § 57-12-2(7), (14), (17) (2009).

170. Strausberg v. Laurel Healthcare Providers, LLC, 2013-NMSC-032, ¶ 45, 304 P.3d 409, 420–21.

unenforceable.[171] An agreement is deemed unconscionable when it is unreasonably unfavorable to one side and precludes the other party from making a meaningful choice.[172] A contract provision may be struck down as either substantively unconscionable or procedurally unconscionable or a combination of both.[173]

To determine if any contract is substantively unconscionable, a court analyzes the contract terms on their face to analyze whether they are commercially reasonable, fair, and consistent with public policy.[174] A substantively unconscionable contract is one in which the provisions are "grossly unreasonable and against our public policy under the circumstances."[175] New Mexico courts have found contracts to be substantively unconscionable due to the terms being one-sided and unreasonably benefitting one party over the other.[176]

To determine if a contract is procedurally unconscionable, a court analyzes the "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."[177] Procedurally unconscionable contracts may include contracts of adhesion, wherein a party with superior bargaining power offers standardized terms without the weaker side having recourse to negotiate or bargain for those terms.[178] In such a contract of adhesion, contract terms that are "patently unfair" to the weaker party create a procedurally unconscionable agreement.[179]

In the hypothetical case of this Comment, a student enrollment agreement could be deemed substantively unconscionable, for example, if the provisions bound the parties to arbitration only in matters likely to be raised by students.[180] The same agreement could be deemed procedurally unconscionable, for example, if enrolling students were given no opportunity to bargain for terms that bound them to patently

171. Cordova v. World Fin. Corp. of N.M., 2009-NMSC-021, ¶ 21, 208 P.3d 901, 907 (citing Guthmann v. La Vida Llena, 1985-NMSC-106, ¶ 16, 709 P.2d 675, 679; Builders Contract Interiors, Inc. v. Hi-Lo Industries, Inc., 2006-NMCA-053, ¶ 8, 134 P.3d 795, 798 (listing unconscionability, mistake, fraud, and illegality as equitable exceptions justifying deviation from the parties' contract).

172. *Id.*

173. *Id.* (citing Fiser v. Dell Computer Corp., 2008-NMSC-046, ¶ 20, 188 P.3d 1215, 1221); *see also Strausberg*, 2013-NMSC-032, ¶ 32, 304 P.3d at 417.

174. *Strausberg*, 2013-NMSC-032, ¶ 33, 304 P.3d at 417–18; *see also* State *ex rel.* King v. B & B Inv. Grp., Inc., 2014-NMSC-024, ¶ 32, 329 P.3d 658, 670; *Fiser*, 2008-NMSC-046, ¶ 20, 188 P.3d at 1221.

175. *Strausberg*, 2013-NMSC-032, ¶ 33, 304 P.3d at 417–18 (quoting *Cordova*, 2009-NMSC-021, ¶ 31, 208 P.3d at 909).

176. *See id.* ¶ 34 (citing Rivera v. Am. Gen. Fin. Servs., Inc., 2011-NMSC-033, ¶¶ 53–54, 259 P.3d 803, 818–19); *see also Cordova*, 2009-NMSC-021, ¶¶ 26–27, 32, 208 P.3d at 908–09, 910; Figueroa v. THI of N.M. at Casa Arena Blanca, LLC, 2013-NMCA-077, ¶ 30, 306 P.3d 480, 491–92.

177. *Strausberg*, 2013-NMSC-032, ¶ 35, 304 P.3d at 418 (quoting *Cordova*, 2009-NMSC-021, ¶ 23, 208 P.3d at 907–08); *see also State ex rel. King*, 2014-NMSC-024, ¶¶ 12–13, 329 P.3d at 665. *But see* Barron v. Evangelical Lutheran Good Samaritan Soc. 2011-NMCA-094, ¶¶ 43–47, 265 P.3d 720, 732–33.

178. *Strausberg*, 2013-NMSC-032, ¶ 35, 304 P.3d at 418 (citing *Rivera*, 2011-NMSC-033, ¶ 44, 259 P.3d at 817).

179. *Id.*

180. *See Cordova*, 2009-NMSC-021, ¶¶ 26–27, 208 P.3d at 908–09.

unfair provisions.[181] In either result, a finding of unconscionability would result in the court voiding the arbitration provision under question.

B. Counterarguments

An arbitration provision that survives unconscionability analysis presents the central issue of this Comment: could the provision then be voided by a plaintiff's motion to deny enforcement based on the provision being contrary to public policy? A defendant's challenge to such a motion could be based in any of several counterarguments.

(1) State and national policy favoring arbitration

Defendants in UPA cases have argued that state and federal policy strongly favor arbitration, and thus courts are "generally bound" to enforce arbitration provisions.[182] Arbitration is recognized by courts as an alternative form of dispute resolution that may serve to relieve judicial congestion, speed up resolution of disputes, and do so economically.[183] UPA defendants cite the New Mexico Uniform Arbitration Act[184] and the Federal Arbitration Act[185] as binding authorities that require enforcement of an arbitration provision unless it violates established contract principles at law or in equity.[186] UPA defendants further argue that the FAA preempts state law as the act represents Congress's express intent "to counteract judicial hostility to arbitration" and to ensure that states treat arbitration agreements equally with other contracts.[187]

However, New Mexico courts have clarified that the reach of the UAA and the FAA does not extend protection to arbitration agreements any greater than exists for any other form of contract.[188] In this regard, the New Mexico Supreme Court has quoted the U.S. Supreme Court's statement that state regulation of contracts may include the "invalidat[ion of] an arbitration clause" on the same basis of revocation as any other contract.[189] Thus, when a court applies scrutiny to an arbitration clause consistent with its scrutiny of contracts generally, the scrutiny does not constitute

181. *See State ex rel. King*, 2014-NMSC-024, ¶¶ 12–13, 329 P.3d at 665.

182. *See* McMillan v. Allstate Indem. Co., 2004-NMSC-002, ¶ 9, 84 P.3d 65, 69.

183. *Id. But see* Judith Resnick, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005) (noting benefits and limitations of ADR including arbitration).

184. N.M. STAT. ANN. §§ 44-7A-1 to -32 (2001).

185. 9 U.S.C. §§ 1–16 (2006).

186. Strausberg v. Laurel Healthcare Providers, LLC, 2013-NMSC-032, ¶¶ 26–27, 49, 304 P.3d 409, 416, 421 (citing 9 U.S.C. § 2 (1947) (stating that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract")); *see also* Cordova v. World Fin. Corp. of N.M., 2009-NMSC-021, ¶ 35, 208 P.3d 901, 910.

187. *Strausberg*, 2013-NMSC-032, ¶ 51, 304 P.3d at 422 (quoting Fiser v. Dell Computer Corp., 2008-NMSC-046, ¶ 23, 188 P.3d 1215, 1222); *see also* State *ex rel*. Balderas v. ITT Educ. Servs., Inc.,, 2018-NMCA-044, ¶ 12, 421 P.3d 849, 853–54 (citing E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 289 (2002)).

188. *Strausberg*, 2013-NMSC-032, ¶ 49, 304 P.3d at 421; *see also Cordova*, 2009-NMSC-021, ¶ 36, 208 P.3d at 910–11; *Fiser*, 2008-NMSC-046, ¶ 23, 188 P.3d at 1222; Figueroa v. THI of N.M. at Casa Arena Blanca, LLC, 2013-NMCA-077, ¶ 21, 306 P.3d 480, 489–90.

189. *Strausberg*, 2013-NMSC-032, ¶ 31, 304 P.3d at 417 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686 (1996)); *see also Cordova*, 2009-NMSC-021, ¶ 36, 208 P.3d at 910–11.

disparate treatment of arbitration clauses, and preemption does not apply.[190] Courts cannot refuse to enforce arbitration clauses based on defenses specific to arbitration, but generally applicable contract analysis does not violate the purposes and objectives of Congress as expressed in the FAA.[191] The state Supreme Court has recognized that Congress's legitimate purposes behind the FAA are violated when businesses use "one-sided, unfair, and legally unconscionable arbitration schemes" to take advantage of consumers.[192] Thus, the court "will not allow our courts to be used to enforce unconscionable arbitration clauses any more than [it] will allow them to be used to enforce any other unconscionable contract in New Mexico."[193]

Therefore, the hypothetical UPA plaintiff of this Comment could prevail here provided the claim follows general contract law principles and does not attack arbitration provisions per se. The claim in *ITT Educational Services* illustrated this principle as the plaintiff AG contested enforcement of both confidentiality and arbitration provisions.

(2) Concepcion doctrine prohibiting state rules that target arbitration

Since *AT&T Mobility LLC v. Concepcion* was decided in 2011, defendants seeking to enforce arbitration have argued that the U.S. Supreme Court therein ruled state courts' unconscionability analysis of arbitration generally to be preempted by the FAA.[194] This interpretation of *Concepcion* asserts that the court's overturning of California's blanket invalidation of class action waivers in arbitration agreements closes the door generally to consumer protection class actions.[195] Courts have articulated the broad potential impact of *Concepcion* as "foreclose[ing] the possibility of any recovery for many wronged individuals"[196] and "casting significant doubt on virtually any 'device [or] formula' which might be a vehicle for 'judicial hostility toward arbitration.'"[197] Scholars have argued that the court's holding and its focus on "fundamental attributes" of arbitration portend FAA preemption of most if not all state unconscionability doctrine.[198] Within New Mexico jurisprudence, this interpretation further contends that *Concepcion* extends to effectively overturn prominent UPA cases such as *Fiser* and *Cordova*.[199]

However, New Mexico courts and other legal authorities have clarified the limits of *Concepcion* to essentially require case-by-case analysis of

190. *Strausberg*, 2013-NMSC-032, ¶ 49, 304 P.3d at 421 (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011)); *see also Cordova*, 2009-NMSC-021, ¶¶ 36–37, 208 P.3d at 910–11; *Fiser*, 2008-NMSC-046, ¶ 23, 188 P.3d at 1222.

191. *Strausberg*, 2013-NMSC-032, ¶ 52, 304 P.3d at 422; *see also State ex rel. Balderas*, 2018-NMCA-044, ¶ 12, 421 P.3d at 853–54; *Cordova*, 2009-NMSC-021, ¶¶ 36–38, 208 P.3d at 910–11.

192. *Cordova*, 2009-NMSC-021, ¶¶ 34–38, 208 P.3d at 910–11.

193. *Id.*

194. Figueroa v. THI of N.M. at Casa Arena Blanca, LLC, 2013-NMCA-077, ¶¶ 11–12, 306 P.3d 480, 485–86; *see also Strausberg*, 2013-NMSC-032, ¶¶ 51–52, 304 P.3d at 422.

195. Megan Barnett, *There Is Still Hope for the Little Guy: Unconscionability Is Still A Defense Against Arbitration Clauses Despite* AT&T Mobility v. Concepcion, 33 WHITTIER L. REV. 651 (2012).

196. *Id.* at 670 n.4 (quoting Bernal v. Burnett, 793 F. Supp. 2d. 1280, 1288 (D. Colo. 2011)).

197. *Id.* (quoting D'Antuono v. Serv. Rd. Corp., 789 F. Supp. 2d 308, 331 (D. Conn. 2011)).

198. Richard Frankel, Concepcion *and Mis*-Concepcion*: Why Unconscionability Survives the Supreme Court's Arbitration Jurisprudence*, 2014 J. DISP. RESOL. 225, 227 (2014).

199. *See Figueroa*, 2013-NMCA-077, ¶ 12, 306 P.3d at 486.

unconscionability in arbitration agreements involving consumer protection class actions.[200] The scope of *Concepcion* is restricted to prohibiting states from issuing blanket rules that employ generally applicable contract doctrines, such as unconscionability, "in a fashion that disfavors arbitration."[201] The *Figueroa* court recognized that a broad interpretation of *Concepcion* would be contradictory to the court's reasoning therein, as special exemption from unconscionability analysis would "place arbitration agreements on an *unequal* footing" from other contracts.[202] Therefore, the saving clause in the FAA applies to rules that do not "directly target[] a specific term of an agreement or a class of agreements."[203] Further, the *Figueroa* court recognized that the New Mexico Supreme Court in its post-*Concepcion* holding in *Rivera* reaffirmed its relevant pre-*Concepcion* unconscionability holding in *Cordova*.[204] Thus, New Mexico courts have recognized that the state's policy of general applicability contract analysis remains a valid equitable remedy on a case-by-case basis in light of *Concepcion*.

Therefore, the hypothetical UPA plaintiff of this Comment could prevail here provided the courts remain consistent in their interpretation of *Concepcion*. Under the narrow interpretation applied thus far by New Mexico courts, a private UPA litigant would not violate *Concepcion* doctrine by pursuing a claim that places all classes of agreements on equal footing.

(3) Applicable scope policy favoring arbitration

The nature of a UPA allegation is likely to exceed the subject matter of the underlying contract. Nonetheless, some defendants argue that courts should read the scope of arbitration clauses to generally apply to particular claims, thus requiring enforcement of such clauses. This applicable scope argument has been asserted under both narrow and broad arbitration provisions.[205] The applicable scope argument draws its authority from the FAA's language asserting that "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."[206] Proponents of this theory argue

200. *See id.* ¶¶ 13, 15, 306 P.3d at 486, 487 (citing Rivera v. Am. Gen. Fin. Servs., Inc., 2011-NMSC-033, ¶¶ 16, 42, 259 P.3d 803, 810, 816 (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) for a general rule of law, but concluding that NMSC precedent controls)); *see also* Clay v. N.M. Title Loans, Inc., 2012-NMCA-102, ¶ 8, 288 P.3d 888, 893 (citing Fiser v. Dell Computer Corp., 2008-NMSC-046, ¶ 23, 188 P.3d 1215, 1222); Frankel, *supra* note 199, at 253 (stating that *Concepcion* "authorizes state courts and legislatures to regulate adhesive agreements in a way that preserves choice instead of taking it away").

201. *Concepcion*, 563 U.S. at 334.

202. *Figueroa*, 2013-NMCA-077, ¶ 14, 306 P.3d at 486.

203. *Id.* ¶ 13, 306 P.3d at 486 (citing *Concepcion*, 563 U.S. at 336–52).

204. *Id.* ¶ 15, 306 P.3d at 487 (citing *Rivera*, 2011-NMSC-033, ¶¶ 16, 42, 259 P.3d at 810, 816 (citing *Concepcion* for a general rule of law)).

205. *See* McMillan v. Allstate Indem. Co., 2004-NMSC-002, 84 P.3d 65; *see also* Heimann v. Kinder-Morgan CO2 Co., L.P., 2006-NMCA-127, 144 P.3d 111; Santa Fe Techs., Inc. v. Argus Networks, Inc., 2002-NMCA-030, 42 P.3d 1221.

206. Clay v. N.M. Title Loans, Inc., 2012-NMCA-102, ¶ 7, 288 P.3d 888, 892–93 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)).

that arbitration is proper where an agreement's scope can be read to encompass the plaintiffs' claims.[207]

However, courts apply careful scrutiny to the scope of arbitration agreements and may deny enforcement of such agreements if the nature of the complaint does not fall clearly within such scope, whether narrow or broad. In *Heimann v. Kinder-Morgan CO2 Co.*, the court clarified that a narrow arbitration agreement should be enforced only regarding matters that fall within the scope which the parties negotiated and agreed upon.[208] The *Heimann* court could not determine that the claims raised were covered by the narrow arbitration clause targeting non-qualified contract or transportation prices, and therefore enforcement of the clause would be inappropriate.[209] In *Santa Fe Techs., Inc., v. Argus Networks, Inc.*, the court clarified that arbitration clauses that "are drafted with broad strokes . . . require broad interpretation," but that even such broad clauses are limited in applicability to the subject matter of the underlying contract.[210] The parties' broad agreement in *Santa Fe Techs.* stated clearly that arbitration would be the "sole and exclusive remedy . . . respecting any dispute, protest, controversy, or claim arising out of or relating to this Agreement."[211] Nonetheless, the court found no "overlap" between the subject matter of the broad agreement and the subject matter of the plaintiffs' claims of tortious substitution of another company to the contracted merger.[212] The court recognized that parties possess the freedom to contract to arbitration for all disputes, but there the nature of the claims exceeded the scope of the negotiated agreement, even with such a broad arbitration clause.[213]

Therefore, the hypothetical UPA plaintiff of this Comment could prevail here provided the scope of the claim exceeds the scope of the arbitration agreement. The student enrollment agreement in *ITT Educational Services* used broad terms to bind "without limitation, any statutory, tort, contract or equity claim" to arbitration.[214] Nonetheless, the nature of an allegation of an unfair or deceptive act or an unconscionable act is likely to exceed the subject matter of the underlying contract.[215] UPA claims are likely to include allegations that fall outside of the scope of the underlying transaction or negotiated relationship.[216] Thus, even the broad language of ITT's adhesive student enrollment agreement might not shield such a defendant from litigation.

---

207. *Santa Fe Techs., Inc.*, 2002-NMCA-030, ¶ 54, 42 P.3d at 1238.

208. *Heimann*, 2006-NMCA-127, ¶ 13, 144 P.3d at 115–6.

209. *Id.* ¶ 25, 144 P.3d at 119 (citing Cummings v. FedEx Ground Package Sys., Inc., 404 F.3d 1258, 1262 (10th Cir. 2005) (noting that "[i]n construing the scope of a narrow arbitration clause, we must take care to carry out the specific and limited intent of parties")).

210. *Santa Fe Techs., Inc.*, 2002-NMCA-030, ¶ 55, 42 P.3d at 1238.

211. *Id.* ¶ 53, 42 P.3d at 1238.

212. *Id.* ¶¶ 55–56, 42 P.3d at 1238–39.

213. *Id.* ¶¶ 55–57, 42 P.3d at 1238–39.

214. State *ex rel*. Balderas v. ITT Educ. Servs., Inc., 2018-NMCA-044, ¶ 2, 421 P.3d 849, 851.

215. Heimann v. Kinder-Morgan CO2 Co., L.P., 2006-NMCA-127, ¶ 25 144 P.3d 111, 119 (citing Cummings v. FedEx Ground Package Sys., Inc., 404 F.3d 1258, 1262 (10th Cir. 2005) (noting that "[i]n construing the scope of a narrow arbitration clause, we must take care to carry out the specific and limited intent of parties")).

216. *See* Daye v. Cmty. Fin. Loan Serv. Centers, LLC, 280 F. Supp. 3d 1222, 1245–46 (D.N.M. 2017).

CONCLUSION

In *ITT Educational Services*, the Court of Appeals rightly denied the defendant's motion to compel arbitration. Given the AG plaintiff, the court's decision was made easier to reach by the statutory language of the UPA directing the AG's role and responsibilities. However, the court's holding was rooted not in the AG's status but in public policy interests served by the Act generally and the AG specifically. Private UPA litigants serve the same public policy interests as the AG, and thus courts often apply equity where such plaintiffs bring claims to redress consumer harm. Given the legislative intent and broad jurisprudence of the UPA, a private litigant may prevail where a defendant attempts to enforce a contract provision such as an arbitration clause to block litigation that would serve these public policy interests. Such a plaintiff must navigate many considerations, but the UPA presents a positive mechanism of consumer protection to potentially void a contract provision that is contrary to public policy.