RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Apr 19, 2011, 4:39 pm
BY RONALD R. CARPENTER
CLERK

No. 84422-4

RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DONIA TOWNSEND and BOB PEREZ, individually, on behalf of their marital community, and as class representatives; PAUL YSTEBO and JO ANN YSTEBO, individually, on behalf of their marital community, and as class representatives; VIVIAN LEHTINEN and TONY LEHTINEN, individually, on behalf of their marital community, and on behalf of their minor children, NIKLAS LEHTINEN and LAUREN LEHTINEN; JOHN SIGAFOOS and CHRISTA SIGAFOOS, individually, on behalf of their marital community, and on behalf of their minor children, COLTON SIGAFOOS and HANNA SIGAFOOS,

Plaintiffs/Petitioners,

vs.

THE QUADRANT CORPORATION, a Washington corporation; WEYERHAEUSER REAL ESTATE COMPANY, a Washington corporation; and WEYERHAEUSER COMPANY, a Washington corporation,

Defendants/Respondents.

BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

Bryan P. Harnetiaux
WSBA No. 05169
517 E. 17th Avenue
Spokane, WA 99203
(509) 624-3890

David P. Gardner
WSBA No. 39331
601 W. Riverside, Suite 1900
Spokane, WA 99201
(509) 838-6131

George M. Ahrend
WSBA No. ~~25106~~ 25160
100 E. Broadway Avenue
Moses Lake, WA 98837
(509) 764-9000

On Behalf of
Washington State Association
for Justice Foundation

ORIGINAL

TABLE OF CONTENTS

		Page
I.	IDENTITY AND INTEREST OF AMICUS CURIAE	1
II.	INTRODUCTION AND STATEMENT OF THE CASE	1
III.	ISSUES PRESENTED	4
IV.	SUMMARY OF ARGUMENT	5
V.	ARGUMENT	6
	A.) As Nonsignatories To The PSAs, The Children's Personal Injury Claims Are Not Subject To The Arbitration Clause, To The Extent That Their Claims Are Based Upon An Independent Tort Duty Owed By Quadrant.	7
	B.) Procedural Unconscionability Alone Will Invalidate An Arbitration Clause, And The Court's Inquiry Focuses On Whether The Party Was Denied A Meaningful Choice In Selecting Arbitration Over Court; The Separate and Distinct Inquiry Whether A Party Knowingly, Intelligently And Voluntarily Waived Trial By Jury Is Not Presented In This Case.	11
VI.	CONCLUSION	16
Appendix		

TABLE OF AUTHORITIES

Cases	Page
Adler v. Fred Lind Manor, 153 Wn. 2d 331, 103 P.3d 773 (2004)	14-15
Affiliated FM Ins. v. LTK Consulting, 170 Wn.2d 442, 243 P.3d 521 (2010)	9
American Nursery Prods., Inc. v. Indian Wells Orchards, 115 Wn. 2d 217, 797 P.2d 477 (1990)	14
Davis v. Baugh Indus. Contractors, Inc., 159 Wn.2d 413, 150 P.3d 545 (2007)	9
Eastwood v. Horse Harbor Found., 170 Wn.2d 380, 241 P.3d 1256 (2010)	9
Huntington v. Samaritan Hospital, 101 Wn.2d 466, 680 P.2d 58 (1984)	6
In re Weekly Homes Ltd., 180 S.W.3d 127 (Tex. 2005)	10-11
Kelley v. Centennial Contractors, 169 Wn.2d 381, 236 P.3d 197 (2010)	6-7
McKee v. AT&T Corp., 164 Wn.2d 372, 191 P.3d 845 (2008)	14
Powell v. Sphere Drake Ins. P.L.C., 97 Wn.App. 890, 988 P.2d 12 (1999)	7-8
Public Employees Mut. Ins. Co. v. Hertz Corp., 59 Wn. App. 641, 800 P.2d 831 (1990)	13
Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 225 P.3d 213 (2009)	7,10
Schroeder v. Fageol Motors, Inc., 86 Wn. 2d 256, 544 P.2d 20 (1975)	12-13
Scott v. Pacific West Mt. Resort, 119 Wn.2d 484, 834 P.2d 6 (1992)	6

Simmons Housing, Inc. v. Shelton,
36 So.3d 1283 (Miss. 2010) 11

State v. Stegall,
124 Wn. 2d 719, 881 P.2d 979 (1994) 15

Torgerson v. One Lincoln Tower, LLC,
166 Wn. 2d 510, 210 P.3d 318, 322 (2009) 12-13

Townsend v. Quadrant Corp.,
152 Wn.App. 870, 224 P.3d 818 (2009), *review granted*,
169 Wn.2d 1021 (2010) passim

Trimper v. Terminix Int'l Co.,
82 F.Supp.2d 1 (N.D.N.Y 2000) 10

Volt Info. Sciences v. Stanford Univ.
489 U.S. 468 (1980) 7

Wilson v. Horsley,
137 Wn. 2d 500, 974 P.2d 316 (1999) 15

Woodall v. Avalon Care Ctr.,
155 Wn.App. 919, 231 P.3d 1252 (2010) 7-8

Zuver v. Airtouch Communications, Inc.,
153 Wn.2d 293, 103 P.3d 753 (2004) 4,12-13

Constitution & Statutes

Ch. 7.04 RCW 3,15

Ch. 7.04A RCW 3-5,15

Ch. 19.86 RCW 2

Ch. 64.50 RCW 10

Federal Arbitration Act, 9 U.S.C. §§1 et seq. 7,14-16

RCW 4.08.050 6

RCW 4.24.560 9

RCW 7.04A.030 3

RCW 7.04A.060(1)-(4) 13

RCW 7.04A.060(2) 5,14

RCW 7.04A.060(3) 14

RCW 7.04A.901 13

RCW 64.50.010(1) 10

Washington Constitution, Art. I §21 6,14

Other Authorities

Revised Uniform Arbitration Act, Prefatory Note (2000) 16

Revised Uniform Arbitration Act §6, cmt. 7 (2000) 13

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of injured persons, including an interest in the law governing arbitration of claims arising from their injuries.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case is about the applicability and enforceability of an arbitration clause in a purchase and sale agreement (PSA) for the construction and sale of new homes, including 1) whether the arbitration clause is procedurally unconscionable, and 2) whether the clause is binding on minor children of contracting parties, with respect to personal injury claims brought on the children's behalf.

This appeal involves consolidated lawsuits brought by Donia Townsend and Bob Perez and three other couples, including the minor children of two couples, against The Quadrant Corporation, Weyerhaeuser Real Estate Company, and Weyerhaeuser Company. Plaintiffs/Petitioners

are collectively referred to in this amicus curiae brief as "Townsend," except that the minor children are separately referred to as "the Children." Defendants/Respondents are collectively referred to as "Quadrant," except where indicated otherwise.[1]

The underlying facts are drawn from the Court of Appeals opinion and the briefing of the parties. See Townsend v. Quadrant Corp., 152 Wn.App. 870, 224 P.3d 818 (2009), *review granted*, 169 Wn.2d 1021 (2010); Quadrant Supp. Br. at 2-5; Townsend Pet. for Rev. at 3-9; Quadrant Ans. to Pet. for Rev. at 2-5; Quadrant Br. at 3-11; Townsend Br. at 1-9.

For purposes of this amicus curiae brief, the following facts are relevant: These consolidated actions are against Quadrant for selling and constructing substandard new homes, and consist of individual claims, claims on behalf of marital communities, claims on behalf of the Children, and a putative class action. Townsend contends that Quadrant's substandard construction and heavy-handed sales techniques render it liable on a number of grounds including fraud, outrage, violation of the Consumer Protection Act, Ch. 19.86 RCW, negligence, negligent misrepresentation, rescission, and breach of warranty. Townsend also seeks a declaration that the arbitration clauses in the PSAs are unenforceable.

[1] The Quadrant Corporation is a subsidiary of Weyerhaeuser Real Estate Company ("WRECO"), and WRECO is a subsidiary of Weyerhaeuser Company ("Weyerhaeuser").

The briefing indicates that the Children's claims are for personal injuries sustained as a result of Quadrant's negligence. See Townsend Supp. Br. at 2; Townsend Pet. for Rev. at 11-12; Townsend Br. at 9.[2]

The PSAs were executed from October 2000 to June 2006. See Quadrant Br. at 3-4. The PSAs apparently contained "virtually identical" arbitration clauses. See id. at 4. One such clause provides:

> Any controversy or claim arising out of or relating to this agreement, any claimed breach of this agreement, or any claimed defect relating to the property, including, without limitation, any claim brought under the Washington State Consumer Protection Act, (but excepting any request by Seller to quiet title to the Property) shall be determined by arbitration commenced in accordance with RCW 7.04.060.

Id. at 3-4; see also Townsend, 153 Wn.App. at 877. Although the arbitration clauses reference Ch. 7.04 RCW, the parties agree that this appeal is governed by Washington's Revised Uniform Arbitration Act, Ch. 7.04A RCW (RUAA). See Quadrant Br. at 12; Townsend Br. at 10; see also RCW 7.04A.030 (setting forth when revised act applies).[3]

Quadrant moved the superior court to compel arbitration of all claims based on the PSA arbitration clauses. Townsend contended these clauses are unenforceable on a number of grounds, including procedural unconscionability. Townsend also argued that WRECO and Weyerhaeuser had waived their right to compel arbitration because they had previously sought affirmative relief from the court in this litigation.

---

[2] It also appears that Townsend seeks recovery for personal injuries sustained by party plaintiffs, generally. See Quadrant Br. at 6; Townsend Br. at 2-3.

[3] The full text of RCW 7.04A.030 is reproduced in the Appendix to this brief.

The Children separately argued they are not bound by the arbitration provisions because they were not signatories to the PSAs.

The superior court denied Quadrant's motions to compel arbitration. Quadrant appealed, and the Court of Appeals reversed. The Court of Appeals held, inter alia: 1) the Children are bound by the arbitration clauses, as their claims relate to the PSAs, see Townsend, 153 Wn.App. at 887-88; 2) the arbitration clauses are not procedurally unconscionable merely because they are part of contracts of adhesion, and the unconscionability challenges here are related to the PSAs as a whole and thus reserved for the arbitrator, see id. at 883-86[4]; and 3) WRECO and Weyerhaeuser did not waive their right to arbitration by moving for summary judgment on the basis that they were not proper parties to the lawsuit, see id. at 888-90. Townsend petitioned for review challenging these three determinations, and this Court granted review.

III. ISSUES PRESENTED

1.) Under Ch. 7.04A RCW, to what extent are minor children of signatories to a residential real estate purchase and sale agreement bound by its arbitration clause in pursuing personal injury claims against the builder and seller?

2.) Under Ch. 7.04A RCW, is procedural unconscionability alone sufficient to avoid enforcement of an arbitration clause, and, if so, what may a court consider in resolving a claim of procedural unconscionability?

---

[4] In the course of addressing the procedural unconscionability issue, the Court of Appeals questioned Quadrant's argument that procedural unconscionability alone is not a sufficient basis for invalidating an arbitration clause. See Townsend, 152 Wn.App. at 884 n.12 (recognizing that in Zuver v. Airtouch Communications, Inc., 153 Wn.2d 293, 303-04 n.4, 103 P.3d 753 (2004), the Supreme Court suggested that procedural unconscionability alone may invalidate an arbitration clause); Quadrant Br. at 17 n.12.

IV. SUMMARY OF ARGUMENT

Re: The Children & The Arbitration Clause

To the extent the Children's personal injury claims are based upon an independent tort duty owed by Quadrant, they are not bound by the arbitration clauses in the PSAs executed by their parents. As nonsignatories to the PSAs, the Children would be deemed bound by the arbitration clauses only if they relied on the agreements as a source of the duty of care, or otherwise clearly availed themselves of the PSAs.

Re: Townsend's Procedural Unconscionability Claim

Under Washington law, a court may invalidate an arbitration clause based upon procedural unconscionability alone. Nothing in Ch. 7.04A RCW dictates otherwise. Pursuant to RCW 7.04A.060(2), a court's procedural unconscionability inquiry should focus on whether a party was denied a meaningful choice between arbitrating the dispute and exercising the right to proceed to court and trial by jury. The party asserting procedural unconscionability has the burden of proof on this issue, and the issue must be resolved under the particular facts and circumstances of each case.

(The separate but related inquiry whether a party has knowingly, voluntarily, and intelligently waived the constitutional right to trial by jury is not involved in this appeal.)

V. ARGUMENT

Introduction

This amicus curiae brief only addresses the issues of whether 1) the minor children are bound by the PSA arbitration clauses, and 2) under what circumstances an arbitration clause may be invalidated on procedural unconscionability grounds.

This appeal does not appear to involve a claim by Quadrant that under the relevant PSAs the Townsend parents expressly waived the Children's right to proceed to court and trial by jury by agreeing to arbitration on the Children's behalf. See Quadrant Supp. Br. at 11-12.[5]

The Court of Appeals noted Quadrant's concern whether the Children were proper parties plaintiff, without court-appointed guardians under RCW 4.08.050. See Townsend, 153 Wn.App. at 888 n.16. This brief assumes the Children are proper parties plaintiff, and that any lack of guardians may be cured on remand to the superior court. See Huntington v. Samaritan Hospital, 101 Wn.2d 466, 468, 680 P.2d 58 (1984) (noting absence of duly appointed personal representative in wrongful death action, but proceeding to the merits of the appeal "because proper appointment of a personal representative could be obtained").[6]

---

[5] A parent should not be able to waive a minor child's right to trial by jury of a personal injury claim. Cf. Scott v. Pacific West Mt. Resort, 119 Wn.2d 484, 494-95, 834 P.2d 6 (1992) (holding a parent's pretrial release of a minor child's cause of action for personal injuries violates public policy). Impairment of a minor child's right to trial by jury under Washington Constitution, Art. I §21 should be entitled to no less protection.

[6] This Court has recognized that minor children's rights are subject to protection by guardians. See Scott, 119 Wn.2d at 494 (noting guardian ad litem or equivalent required for approval of minor settlement). But cf. Kelley v. Centennial Contractors, 169 Wn.2d 381, 236 P.3d 197 (2010) (lacking majority holding on necessity of guardian for minor

For purposes of this brief, it is the law of the case that tort claims are subject to arbitration. See Townsend at 886; Townsend Pet. for Rev. at 3. This brief only addresses whether the Children are bound by the PSA arbitration clauses with respect to their particular tort claims for personal injury. See Townsend Supp. Br. at 2, 7.

A.) As Nonsignatories To The PSAs, The Children's Personal Injury Claims Are Not Subject To The Arbitration Clause, To The Extent That Their Claims Are Based Upon An Independent Tort Duty Owed By Quadrant.

Arbitration is premised on agreement, and the policy in favor of arbitration has no effect where the parties have not agreed to submit their dispute to arbitration. See Volt Info. Sciences v. Stanford Univ., 489 U.S. 468, 478 (1980) (explaining effect of Federal Arbitration Act, 9 U.S.C. §§1 et seq. (FAA), on private arbitration agreements); Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 810, 225 P.3d 213 (2009) (confirming need for agreement to arbitrate under FAA and Washington law).

Accordingly, nonsignatories to an agreement that contains an arbitration clause are not bound by the clause, and are entitled to vindicate their rights in court. See Woodall v. Avalon Care Ctr., 155 Wn.App. 919, 231 P.3d 1252 (2010); Powell v. Sphere Drake Ins. P.L.C., 97 Wn.App. 890, 895, 988 P.2d 12 (1999). There are exceptions to this rule, binding

---

children with personal injury claims; four opinions). In Kelley, the Court left unresolved whether parents may act on behalf of minor children with respect to decision-making bearing on the children's entitlement to civil remedies. WSAJ Foundation appeared as amicus curiae in Kelley, urging that a court-supervised guardian must act on behalf of minor children who have personal injury claims.

nonsignatories to an arbitration clause when required by the specific facts, based on ordinary contract and agency principles. See Woodall, 155 Wn.App. at 923-24; Powell, 97 Wn.App. at 895-96. These exceptions include instances where nonsignatories have availed themselves of the agreement because of (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing/alter ego, or (5) estoppel. See Woodall, 155 Wn.App. at 924; Powell, 97 Wn.App. at 896.

In this case, the Court of Appeals' analysis appears to be based upon the estoppel exception, in that it concludes that the Children's personal injury claims are grounded in the PSAs as "the source of the duty of care" owed by Quadrant. Townsend, 153 Wn.App. at 888. The Court does not explain whether this conclusion is tied to the record before the court, or whether the court believed that no common law duty of care applies to the Children's claims, so that the PSAs must be the source of any tort duty.

The parties' briefing differs in characterizing the underlying basis for the Children's personal injury claims. The Children contend that their claims are not contractual and sound in tort, asserting that "[n]one of the causes of action asserted by ... the Children[] rely on or arise from any of the terms of the PSAs." Townsend Supp. Br. at 7 (citation omitted). Quadrant urges that the Children's tort claims are directly related to the PSAs. See Quadrant Supp. Br. at 10. Neither party explores in their briefing the extent to which Washington common law supports a duty of

care owed by Quadrant that runs to nonsignatories to the PSAs, such as the Children. This question seems relevant to the inquiry here, and whether any contract or agency exception to the nonsignatory rule applies.

The precise gravamen of the Children's personal injury claims is for the Court to decide, based upon its examination of the record. However, in light of three recent opinions by this Court there should be little doubt under Washington common law that construction contractors may be liable in tort to those foreseeably sustaining personal injuries as a result of negligent acts or omissions, regardless of considerations of privity of contract. See Affiliated FM Ins. v. LTK Consulting, 170 Wn.2d 442, 461, 243 P.3d 521 (2010) (lead and concurring opinions) (recognizing common law duty of care for professionals, including engineers); Eastwood v. Horse Harbor Found., 170 Wn.2d 380, 406, 241 P.3d 1256 (2010) (lead opinion and Chambers, J., concurrence) (describing evolution of "independent duty doctrine," and recognizing liability of lessees for tort damages for waste separate and distinct from contract-based damages); Davis v. Baugh Indus. Contractors, Inc., 159 Wn.2d 413, 150 P.3d 545 (2007) (abrogating contractor "completion and acceptance" defense because it is grounded in outdated privity notions and undermines deterrent effect of tort law on builders).

Additionally, Washington statutory law presupposes that a contractor has a common law duty of care. See RCW 4.24.560 (providing limited defense for damages due to injury caused by indoor air pollutants

in a residential structure); Ch. 64.50 RCW (requiring contractors be given prelitigation notice and opportunity to cure construction defects, but excluding from requirement personal injury and wrongful death claims under RCW 64.50.010(1)).

Under the foregoing authorities, if the gravamen of the Children's negligence claims for personal injury is based upon an independent tort duty, then these claims are not subject to the PSA arbitration clauses. Cf. Satomi, 167 Wn.2d at 812 (holding nonsignatory condominium owners association bound to arbitrate disputes derived from duty owed to individual owners who signed arbitration agreement).

Nonetheless, Quadrant argues that the Children are subject to arbitration under one or more of the exceptions to the general rule that nonsignatories are not bound by an arbitration clause. Quadrant relies on two out-of-state cases, Trimper v. Terminix Int'l Co., 82 F.Supp.2d 1 (N.D.N.Y 2000), and In re Weekly Homes Ltd., 180 S.W.3d 127 (Tex. 2005), in support of this argument. See Quadrant Supp. Br. at 8-10. Assuming for purposes of argument an exception may apply in the face of a tort claim based upon an independent tort duty, both of these cases are distinguishable. In Trimper, the court concluded the source of the alleged duty of care to the parent and (nonsignatory) minor children was the contract itself. See 82 F.Supp.2d at 4. Consequently, the children's claims were said to derive from the contract, and they were deemed bound by the arbitration clause. See id. at 4-5. To the extent the Children's claims

against Quadrant are based upon an independent tort duty, Trimper is distinguishable.

The Texas Supreme Court's opinion in Weekly Homes is likewise distinguishable. Under a fact-intensive analysis, that court held a nonsignatory *adult* child was bound by a home construction contract arbitration clause because she was intimately involved in effectuating the contract for her father, and because she was the sole beneficiary of the family trust, a party to the litigation, that took over ownership of the home. See 180 S.W.2d at 132-35.[7]

The Court should determine whether the Children's claims are based on an independent tort duty. If so, they should not be bound by the arbitration clause signed by their parents.[8]

B.) Procedural Unconscionability Alone Will Invalidate An Arbitration Clause, And The Court's Inquiry Focuses On Whether The Party Was Denied A Meaningful Choice In Selecting Arbitration Over Court; The Separate and Distinct Inquiry Whether A Party Knowingly, Intelligently And Voluntarily Waived Trial By Jury Is Not Presented In This Case.

In the Court of Appeals, Quadrant argued that a party seeking to avoid enforcement of an arbitration clause must prove both substantive and procedural unconscionability, and that procedural unconscionability

[7] The Mississippi Supreme Court's recent opinion in Simmons Housing, Inc. v. Shelton, 36 So.3d 1283 (Miss. 2010), is a much closer fit to this case. In Shelton, an action against a mobile home seller and manufacturer for, inter alia, strict liability and negligence, the court held that nonsignatory minor children were not bound by an arbitration clause in their parents' contract, and the mere fact the children lived with their parents in the mobile home did not render them subject to the arbitration clause.

[8] A similar independent duty analysis may have to be undertaken as to some of the other claims for relief pursued by the Children.

alone is insufficient. See Quadrant Br. at 17 n.12. In dicta, the Court of Appeals questioned this argument, relying principally on this Court's decision in Zuver, 153 Wn.2d at 303-04 n.4. See Townsend, 153 Wn.App. at 884 n.12; text supra at 4 n.4. The sufficiency of procedural unconscionability alone to avoid enforcement of an arbitration clause has not been raised in the petition for review, nor in any cross petition for review, and it appears to be assumed by the parties at this stage of the case. However, the issue will surface if this Court should conclude the arbitration clauses in question are procedurally unconscionable, requiring it to consider the consequences of this conclusion.

The sufficiency of procedural unconscionability as a basis for invalidating an arbitration clause is implicit in this Court's cases, in that it is consistently analyzed independently from substantive unconscionability. See Zuver at 303 n.4. The Court has "distinguished between 'procedural' unconscionability, involving blatant unfairness in the bargaining process and a lack of meaningful choice, and 'substantive' unconscionability, or unfairness of the terms or results." Torgerson v. One Lincoln Tower, LLC, 166 Wn. 2d 510, 518, 210 P.3d 318 (2009).

The conceptual underpinnings of procedural and substantive unconscionability also confirm their independence. The absence of meaningful choice that is the hallmark of procedural unconscionability tends to vitiate the mutual assent that is at the foundation of any contractual relationship. See Schroeder v. Fageol Motors, Inc., 86 Wn. 2d

256, 260, 544 P.2d 20 (1975) (stating "procedural unconscionability relates to impropriety during the process of forming a contract").

On the other hand, the unfairness that is the hallmark of substantive unconscionability involves public policy-based limits on the extent to which Washington courts will enforce a contract. See Public Employees Mut. Ins. Co. v. Hertz Corp., 59 Wn. App. 641, 651 n.2, 800 P.2d 831 (1990) (stating "the question of substantive unconscionability is subsumed in our holding that the [contract provision in question] does not violate public policy"). These distinct rationales for procedural and substantive unconscionability justify continued independent application of both doctrines.[9]

"Procedural unconscionability is determined in light of the totality of the circumstances, including (1) the manner in which the parties entered into the contract, (2) whether the parties had a reasonable opportunity to understand the terms, and (3) whether the terms were 'hidden in a maze of fine print.'" Torgerson, 166 Wn. 2d at 518-19 (citation omitted). The foregoing factors are not applied formalistically, but rather for the purpose

[9] Under the RUAA, "consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it." RCW 7.04A.901. However, this uniformity relates to the interpretation of the RUAA itself, not the substantive law applicable to arbitrations conducted pursuant to the act. The RUAA "Drafting Committee determined to leave the issue of adhesion contracts and unconscionability to developing law," in part because "the doctrine of unconscionability reflects so much the substantive law of the States and not just arbitration[.]" RUAA §6, Cmt. 7 (available at http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm; viewed April 18, 2011). RUAA §6(a)-(d) was adopted verbatim in Washington as RCW 7.04A.060(1)-(4), the full text of which is reproduced in the Appendix. This Court is not therefore obligated to follow the lead of other states that combine the analysis of substantive and procedural unconscionability to promote uniformity under the RUAA. See Zuver at 303 n.4 (noting amicus' argument regarding unconscionability law of other states); Quadrant Br. at 17 n.12 (noting unconscionability law of other states).

of determining whether a meaningful choice existed. See id. The burden of proving procedural unconscionability rests on the party seeking to avoid enforcement of the contract. See American Nursery Prods., Inc. v. Indian Wells Orchards, 115 Wn. 2d 217, 222, 797 P.2d 477 (1990).

When the validity of an arbitration clause is at issue, it appears to be settled, as acknowledged by the parties, that courts must focus on the procedural unconscionability of *the arbitration clause in particular*, rather than the contract in general. See RCW 7.04A.060(2); see also McKee v. AT&T Corp., 164 Wn.2d 372, 394, 191 P.3d 845 (2008) (discussing provision of FAA similar to RCW 7.04A.060); Townsend, 153 Wn.App. at 879-81 (discussing RCW 7.04A.060). Evidence and arguments regarding the procedural unconscionability of *the contract in general* may be considered by the arbitrator within the context of arbitration. See RCW 7.04A.060(3). Whether procedural unconscionability relates to the arbitration clause in particular or the contract in general involves a case-specific analysis of the record, a task beyond the scope of this amicus brief.

Lastly, although not presented in this appeal, the Court should be mindful of a related question, which is distinct from the procedural unconscionability analysis. That is, in determining the validity of an arbitration clause, whether the requirements for waiver of the constitutional right to trial by jury have been satisfied. See Washington Constitution, Art. I §21; see also Adler v. Fred Lind Manor, 153 Wn. 2d

331, 360-61, 103 P.3d 773 (2004) (treating valid waiver of jury trial as prerequisite to enforcement of arbitration agreement). In this case, only the Children's right to trial by jury has been raised by Townsend, although it is framed in terms of their status as nonsignatories to the PSA. See Townsend Pet. for Rev. at 12-13; Townsend Supp. Br. at 1 & 7-8.

Under Washington law, the right to trial by jury must be "knowingly, voluntarily, and intelligently" waived. See Adler, 153 Wn. 2d at 360-61 (remanding to determine whether agreement to arbitrate was induced by threat of termination, thereby precluding a finding of waiver of jury trial); see also Wilson v. Horsley, 137 Wn. 2d 500, 511, 974 P.2d 316 (1999) (stating waiver of right to jury trial must be strictly construed). The burden of proving waiver of jury trial should be placed on the party seeking to compel arbitration, as part of the burden to prove that an agreement to arbitrate exists. See State v. Stegall, 124 Wn. 2d 719, 730, 881 P.2d 979 (1994) (criminal case indicating burden of proving waiver of jury trial rests on party asserting waiver).

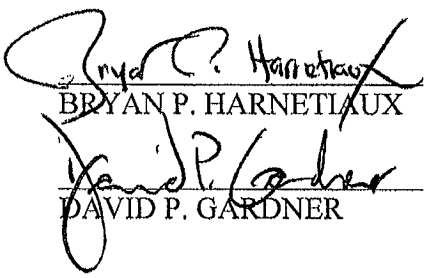
This requirement should not be viewed as "anti-arbitration" under the FAA or Washington law. The requirements for waiver of jury trial are not limited to arbitration clauses, but also apply to any contractual agreement affecting the right to trial by jury, such as a contract requiring disputes to be resolved by means of a bench trial. As recognized in the National Conference of Commissioners on Uniform State Laws Prefatory Note to the RUAA, "ascertaining when a particular contractual agreement

to arbitrate is enforceable is a matter to be decided under the general contract law principles of each State."[10] "The sole limitation on state law" under the FAA is "that the enforceability of arbitration agreements must be determined by the same standards as are used for all other contracts." Id. Since the requirements for waiver under the Washington Constitution apply with equal force to all contracts affecting the right to jury trial, they are fully consistent with state and federal arbitration laws.

VI. CONCLUSION

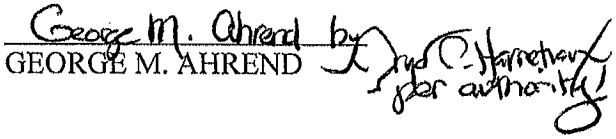
The Court should adopt the analysis set forth in this brief and resolve each of the issues addressed accordingly.

DATED this 19th day of April, 2011.



BRYAN P. HARNETIAUX

DAVID P. GARDNER



GEORGE M. AHREND

On behalf of WSAJ Foundation

[10] The full text of the RUAA Prefatory Note is reproduced in the Appendix and at the beginning of Ch. 7.04A RCW. It is also available to the Court at the following website: http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm.

Appendix

Prefatory Note to the Revised Uniform Arbitration Act by National Conference of Commissioners on Uniform State Laws.

The Uniform Arbitration Act (UAA), promulgated in 1955, has been one of the most successful Acts of the National Conference of Commissioners on Uniform State Laws. Forty-nine jurisdictions have arbitration statutes; 35 of these have adopted the UAA and 14 have adopted substantially similar legislation. A primary purpose of the 1955 Act was to insure the enforceability of agreements to arbitrate in the face of oftentimes hostile state law. That goal has been accomplished. Today arbitration is a primary mechanism favored by courts and parties to resolve disputes in many areas of the law. This growth in arbitration caused the Conference to appoint a Drafting Committee to consider revising the Act in light of the increasing use of arbitration, the greater complexity of many disputes resolved by arbitration, and the developments of the law in this area.

The UAA did not address many issues which arise in modern arbitration cases. The statute provided no guidance as to (1) who decides the arbitrability of a dispute and by what criteria; (2) whether a court or arbitrators may issue provisional remedies; (3) how a party can initiate an arbitration proceeding; (4) whether arbitration proceedings may be consolidated; (5) whether arbitrators are required to disclose facts reasonably likely to affect impartiality; (6) what extent arbitrators or an arbitration organization are immune from civil actions; (7) whether arbitrators or representatives of arbitration organizations may be required to testify in another proceeding; (8) whether arbitrators have the discretion to order discovery, issue protective orders, decide motions for summary dispositions, hold prehearing conferences and otherwise manage the arbitration process; (9) when a court may enforce a preaward ruling by an arbitrator; (10) what remedies an arbitrator may award, especially in regard to attorney's fees, punitive damages or other exemplary relief; (11) when a court can award attorney's fees and costs to arbitrators and arbitration organizations; (12) when a court can award attorney's fees and costs to a prevailing party in an appeal of an arbitrator's award; and (13) which sections of the UAA would not be waivable, an important matter to insure fundamental fairness to the parties will be preserved, particularly in those instances where one party may have significantly less bargaining power than another; and (14) the use of electronic information and other modern means of technology in the arbitration process. The Revised Uniform Arbitration Act (RUAA) examines all of these issues and provides state legislatures with a more up-to-date statute to resolve disputes through arbitration.

There are a number of principles that the Drafting Committee agreed upon at the outset of its consideration of a revision to the UAA. First, arbitration is a consensual process in which autonomy of the parties who enter into

arbitration agreements should be given primary consideration, so long as their agreements conform to notions of fundamental fairness. This approach provides parties with the opportunity in most instances to shape the arbitration process to their own particular needs. In most instances the RUAA provides a default mechanism if the parties do not have a specific agreement on a particular issue. Second, the underlying reason many parties choose arbitration is the relative speed, lower cost, and greater efficiency of the process. The law should take these factors, where applicable, into account. For example, Section 10 allows consolidation of issues involving multiple parties. Such a provision can be of special importance in adhesion situations where there are numerous persons with essentially the same claims against a party to the arbitration agreement. Finally, in most cases parties intend the decisions of arbitrators to be final with minimal court involvement unless there is clear unfairness or a denial of justice. This contractual nature of arbitration means that the provision to vacate awards in Section 23 is limited. This is so even where an arbitrator may award attorney's fees, punitive damages or other exemplary relief under Section 21. Section 14 insulates arbitrators from unwarranted litigation to insure their independence by providing them with immunity.

Other new provisions are intended to reflect developments in arbitration law and to insure that the process is a fair one. Section 12 requires arbitrators to make important disclosures to the parties. Section 8 allows courts to grant provisional remedies in certain circumstances to protect the integrity of the arbitration process. Section 17 includes limited rights to discovery while recognizing the importance of expeditious arbitration proceedings.

In light of a number of decisions by the United States Supreme Court concerning the Federal Arbitration Act (FAA), any revision of the UAA must take into account the doctrine of preemption. The rule of preemption, whereby FAA standards and the emphatically pro-arbitration perspective of the FAA control, applies in both the federal courts and the state courts. To date, the preemption-related opinions of the Supreme Court have centered in large part on the two key issues that arise at the front end of the arbitration process-enforcement of the agreement to arbitrate and issues of substantive arbitrability. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 35 (1967); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Southland Corp. v. Keating*, 465 U.S. 2 (1984); *Perry v. Thomas*, 482 U.S. 483 (1987); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Doctor's Assocs. v. Cassarotto*, 517 U.S. 681 (1996). That body of case law establishes that state law of any ilk, including adaptations of the RUAA, mooting or limiting contractual agreements to arbitrate must yield to the pro-arbitration public policy voiced in Sections 2, 3, and 4 of the FAA.

The other issues to which the FAA speaks definitively lie at the back end of the arbitration process. The standards and procedure for vacatur, confirmation and modification of arbitration awards are the subject of Sections 9, 10, 11, and 12 of the FAA. In contrast to the "front end" issues of enforceability and substantive arbitrability, there is no definitive Supreme Court case law speaking to the preemptive effect, if any, of the FAA with regard to these "back end" issues. This dimension of FAA preemption of state arbitration law is further complicated by the strong majority view among the United States Circuit Courts of Appeals that the Section 10(a) standards are not the exclusive grounds for vacatur.

Nevertheless, the Supreme Court's unequivocal stand to date as to the preemptive effect of the FAA provides strong reason to believe that a similar result will obtain with regard to Section 10(a) grounds for vacatur. If it does, and if the Supreme Court eventually determines that the Section 10(a) standards are the sole grounds for vacatur of commercial arbitration awards, FAA preemption of conflicting state law with regard to the "back end" issues of vacatur (and confirmation and modification) would be certain. If the Court takes the opposite tack and holds that the Section 10(a) grounds are not the exclusive criteria for vacatur, the preemptive effect of Section 10(a) would most likely be limited to the rule that state arbitration acts cannot eliminate, limit or modify any of the four grounds of party and arbitrator misconduct set out in Section 10(a). Any definitive federal "common law," pertaining to the nonstatutory grounds for vacatur other than those set out in Section 10(a), articulated by the Supreme Court or established as a clear majority rule by the United States Courts of Appeals, likely would preempt contrary state law. A holding by the Supreme Court that the Section 10(a) grounds are not exclusive would also free the States to codify other grounds for vacatur beyond those set out in Section 10(a). These various, currently nonstatutory grounds for vacatur are discussed at length in the Section C to the Comment to Section 23.

An important caveat to the general rule of FAA preemption is found in *Volt Information Sciences, Inc. v. Stanford University*, 489 U.S. 468 (1989) and *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). The focus in these cases is on the effect of FAA preemption on choice-of-law provisions routinely included in commercial contracts. Volt and Mastrobuono establish that a clearly expressed contractual agreement by the parties to an arbitration contract to conduct their arbitration under state law rules effectively trumps the preemptive effect of the FAA. If the parties elect to govern their contractual arbitration mechanism by the law of a particular State and thereby limit the issues that they will arbitrate or the procedures under which the arbitration will be conducted, their bargain will be honored-as long as the state law principles invoked by the choice-of-law provision do not conflict with the FAA's prime directive that

agreements to arbitrate be enforced. See, e.g., *ASW Allstate Painting & Constr. Co. v. Lexington Ins. Co.*, 188 F.3d 307 (5th Cir. 1999); *Russ Berrie & Co. v. Gantt*, 988 S.W.2d 713 (Tex. Ct. App. 1999). It is in these situations that the RUAA will have most impact. Section 4(a) of the RUAA also explicitly provides that the parties to an arbitration agreement may waive or vary the terms of the Act to the extent otherwise permitted by law. Thus, when parties choose to contractually specify the procedures to be followed under their arbitration agreement, the RUAA contemplates that the contractually-established procedures will control over contrary state law, except with regard to issues designated as "nonwaivable" in Section 4(b) and (c) of the RUAA.

The contractual election to proceed under state law instead of the FAA will be honored presuming that the state law is not antithetical to the pro-arbitration public policy of the FAA. Southland and Terminix leave no doubt that anti-arbitration state law provisions will be struck down because preempted by the federal arbitration statute.

Besides arbitration contracts where the parties choose to be governed by state law, there are other areas of arbitration law where the FAA does not preempt state law, in the absence of definitive federal law set out in the FAA or determined by the federal courts. First, the Supreme Court has made clear its belief that ascertaining when a particular contractual agreement to arbitrate is enforceable is a matter to be decided under the general contract law principles of each State. The sole limitation on state law in that regard is the Court's assertion that the enforceability of arbitration agreements must be determined by the same standards as are used for all other contracts. *Terminix*, 513 U.S. at 281 (1995) (quoting Volt, 489 U.S. at 474 (1989)) and quoted in *Cassarotto*, 517 U.S. 681, 685 (1996); and *Cassarotto*, 517 U.S. at 688 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). Arbitration agreements may not be invalidated under state laws applicable only to arbitration provisions. Id. The FAA will preempt state law that does not place arbitration agreements on an "equal footing" with other contracts.

During the course of its deliberations the Drafting Committee considered at length another issue with strong preemption undertones-the question of whether the RUAA should explicitly sanction contractual provisions for "opt-in" review of challenged arbitration awards beyond that presently contemplated by the FAA and current state arbitration acts. "Opt-in" provisions of two types are in limited use today. The first variant permits a party who is dissatisfied with the arbitral result to petition directly to a designated state court and stipulates that the court may vacate challenged awards, typically for errors of law or fact. The second type of "opt-in" contractual provision establishes an appellate arbitral mechanism to which

challenged arbitration awards can be submitted for review, again most typically for errors of law or fact.

As explained in detail in Section B of the Comment to Section 23, there were a number of reasons that resulted in the decision not to include statutory sanction of the "opt-in" device for expanded judicial review in the RUAA: (1) the current uncertainty as to the legality of a state statutory sanction of the "opt-in" device, (2) the "disconnect" between the Act's purpose of fostering the use of arbitration as a final and binding alternative to traditional litigation in a court of law, and (3) the inclusion of a statutory provision that would permit the parties to contractually render arbitration decidedly non-final and non-binding. Simply stated, the potential gain to be realized by codifying a right to opt-into expanded judicial review that has not yet been definitively confirmed to exist does not outweigh the potential threat that adoption of an opt-in statutory provision would create for the integrity and viability of the RUAA as a template for state arbitration acts.

Unlike the "opt-in" judicial review mechanism, there are few, if any, legal concerns raised by statutory sanction of "opt-in" provisions for appellate arbitral review. Nevertheless, as explained in the Section B of the Comments to Section 23, because the current, contract-based view of arbitration establishes that the parties are free to design the inner workings of their arbitration procedures in any manner they see fit, the Drafting Committee determined that codification of that right in the RUAA would add nothing of substance to the existing law of arbitration.

The decision not to statutorily sanction either form of the "opt-in" device in the RUAA leaves the issue of the legal propriety of this means for securing review of awards to the developing case law under the FAA and state arbitration statutes. Parties remain free, within the constraints imposed by the existing and developing law, to agree to contractual provisions for arbitral or judicial review of challenged awards.

It is likely that matters not addressed in the FAA are also open to regulation by the States. State law provisions regulating purely procedural dimensions of the arbitration process (e.g., discovery [RUAA Section 17], consolidation of claims [RUAA Section 10], and arbitrator immunity [RUAA Section 14]) likely will not be subject to preemption. Less certain is the effect of FAA preemption with regard to substantive issues like the authority of arbitrators to award punitive damages (RUAA Section 21) and the standards for arbitrator disclosure of potential conflicts of interest (RUAA Section 12) that have a significant impact on the integrity and/or the adequacy of the arbitration process. These "borderline" issues are not purely procedural in nature but unlike the "front end" and "back end" issues they do not go to the essence of the agreement to arbitrate or

effectuation of the arbitral result. Although there is no concrete guidance in the case law, preemption of state law dealing with such matters seems unlikely as long as it cannot be characterized as anti-arbitration or as intended to limit the enforceability or viability of agreements to arbitrate.

The subject of international arbitration is not specifically addressed in the RUAA. Twelve States have passed arbitration statutes directed to international arbitration. Seven States have based their statutes on the Model Arbitration Law proposed in 1985 by the United Nations Commission on International Trade Law (UNCITRAL). Other States have approached international arbitration in a variety of ways, such as adopting parts of the UNCITRAL Model Law together with provisions taken directly from the 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (commonly referred to as the New York Convention) or by devising their own international arbitration provisions.

Any provisions of these state international arbitration statutes that are inconsistent with the New York Convention, to which the United States adhered in 1970 (terms of the New York Convention can be found at 9 U.S.C. 201), or with the federal legislation in Chapter 2 of Title 9 of the United States Code are preempted. Chapter 2 creates federal-question jurisdiction in the federal district courts for any case "falling under the [New York] Convention" and permits removal of any such case from a state court to the federal court "at any time prior to trial." 9 U.S.C. 203, 205. The statute covers any commercial agreement to arbitrate and the resultant arbitration award unless the matter involves only American citizens and has no reasonable relationship to any foreign country and the courts have broadly applied the statute. Therefore, it is unlikely that state arbitration law will have major application to an international case. There are two instances where state arbitration law might apply in the international context: (1) where the parties designate a specific state arbitration law to govern the international arbitration and (2) where all parties to an arbitration proceeding involving an international transaction decide to proceed on a matter in state court and do not exercise their rights of removal under Chapter 2 of Title 9 and the relevant provision of state arbitration law is not preempted by federal arbitration law or the New York Convention. In these relatively rare cases, the state courts will refer to the RUAA unless the State has enacted a special international arbitration law.

Because few international cases are likely to be dealt with in state courts and because of the diversity of state law already enacted for international cases, the Drafting Committee decided not to address international arbitration as a specific subject in the revision of the UAA; however, the Committee utilized provisions of the UNCITRAL Model Law, the New

York Convention, and the 1996 English Arbitration Act as sources of statutory language for the RUAA.

The members of the Drafting Committee to revise the Uniform Arbitration Act wish to acknowledge our deep indebtedness and appreciation to Professor Stephen Hayford and Professor Thomas Stipanowich who devoted extensive amounts of time by providing invaluable advice throughout the entire drafting process.

RCW 7.04A.030. When chapter applies

(1) Before July 1, 2006, this chapter governs agreements to arbitrate entered into:

(a) On or after January 1, 2006; and

(b) Before January 1, 2006, if all parties to the agreement to arbitrate or to arbitration proceedings agree in a record to be governed by this chapter.

(2) On or after July 1, 2006, this chapter governs agreements to arbitrate even if the arbitration agreement was entered into before January 1, 2006.

(3) This chapter does not apply to any arbitration governed by chapter 7.06 RCW.

(4) This chapter does not apply to any arbitration agreement between employers and employees or between employers and associations of employees.

[2005 c 433 § 3, eff. Jan. 1, 2006.]

RCW 7.04A.060. Validity of agreement to arbitrate

(1) 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 contract.

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

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

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

[2005 c 433 § 6, eff. Jan. 1, 2006.]