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**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

Donia Townsend and Bob Perez, individually, on behalf of their marital community, and as class representatives; Paul Ysteboe and Jo Ann Ysteboe, 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 and Lauren; Jon Sigafos and Christa Sigafos, individually, on behalf of their marital community and on behalf of their minor children, Colton and Hannah,

Plaintiffs-Respondent,

vs.

**The Quadrant Corporation, a Washington Corporation;
Weyerhaeuser Real Estate Company, a Washington Corporation;
and Weyerhaeuser Company, a Washington Corporation,**

Defendants-Appellant.

BRIEF OF APPELLANTS

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I. INTRODUCTION

Plaintiffs-Respondents (collectively, the “Homeowners”) all purchased houses designed, built, and sold by Defendant-Appellant The Quadrant Corporation (“Quadrant”). The Homeowners sued Quadrant, Defendant-Appellant Weyerhaeuser Real Estate Company (“WRECO”), and Defendant-Appellant Weyerhaeuser Company (“Weyerhaeuser”). The Homeowners allege that their houses have dangerous construction defects. The Residential Real Estate Purchase and Sale Agreements (“PSAs”) between the Homeowners and Quadrant include a broad and commonly-used arbitration provision covering “[a]ny controversy or claim arising out of or relating to [the PSA], any claimed breach of [the PSA], or any claimed defect relating to the property” Quadrant, WRECO, and Weyerhaeuser moved to compel arbitration of the Homeowners’ claims. On December 2, 2008, the trial court issued an order denying those motions.

The trial court offered two justifications for its order. First, the court found a dispute of fact concerning whether the PSAs are contracts of adhesion. Second, the court determined that the arbitration provisions do not apply to the Homeowners’ claims “regarding subsequent remediation costs due to construction defects.” Both of the trial court’s rationales constitute error. All claims in these

actions are arbitrable. The trial court's December 2, 2008 order should be reversed, a stay of trial court proceedings imposed, and arbitration of all claims ordered.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in denying Quadrant's, WRECO's, and Weyerhaeuser's motions to compel arbitration and stay trial court proceedings.

B. Issues Pertaining to Assignments of Error

1. Did the trial court err in considering whether the PSAs at issue are invalid contracts of adhesion when, as a matter of law, issues pertaining to the enforceability of a contract as a whole must be decided by an arbitrator? (Assignment of Error 1.)

2. Did the trial court err in concluding that the PSAs are invalid if they are contracts of adhesion when, under Washington law, a contract of adhesion is not, on that basis alone, invalid? (Assignment of Error 1.)

3. Did the trial court err in concluding that claims regarding subsequent remediation costs due to construction defects fall outside the scope of the PSAs' arbitration provisions, and that not all claims asserted in these actions are arbitrable, when the arbitration

provisions expressly cover all disputes “arising out of or relating to” the PSAs themselves, as well as any disputes “*arising out of or relating to . . . any claimed defects relating to the property*”?

(Assignment of Error 1.)

III. STATEMENT OF THE CASE

A. The Parties

The Homeowners are four married couples who purchased houses from Quadrant: (1) Donia Townsend and Bob Perez (the “Perezes”); (2) Paul and Jo Ann Ysteboe (the “Ysteboes”); (3) Vivian and Tony Lehtinen (the “Lehtinens”); and (4) Jon and Crista Sigafos (the “Sigafoses”). The Homeowners filed three separate suits that each named Quadrant, WRECO, and Weyerhaeuser as defendants. Quadrant is a wholly owned subsidiary of WRECO. WRECO is a wholly owned subsidiary of Weyerhaeuser.

B. The Homeowners Signed Purchase and Sale Agreements Containing Arbitration Provisions

The Lehtinens purchased their house from Quadrant in October 2000. CP 633. They executed a PSA containing the following arbitration provision:

20. **Arbitration.** 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. The decision and award rendered by the arbitrator(s) shall be final and binding upon the parties, and judgment upon the award may be entered in any court having jurisdiction. The attorney fee and cost provisions of Paragraph q, General Terms, of the Real Estate Purchase and Sale Agreement shall apply in any action related to such claims.

CP 640. The arbitration provision was located just above the signature line, and was written in the same size and style font used throughout the PSA. *See id.* The provision was separated from the signature line only by a handwritten paragraph added by the Lehtinens: “21) Buyers [sic] offer is subject to verification of basic features of home @ this price, w/o upgrades. (Within 2 days of M.A.)” *Id.*

The Sigafoses purchased their house from Quadrant in February 2005. CP 171. The Perezes purchased theirs in March 2006, CP 39, and the Ysteboes purchased theirs in June 2006, CP 50. Each pair of Homeowners executed a PSA containing an arbitration provision virtually identical to the Lehtinens’, quoted above. CP 48, 59, 178.

C. The Homeowners Have Alleged Various Construction Defects

The Homeowners all have the same counsel, and filed three nearly identical complaints against Quadrant and its parent

companies.¹ The Perezes and Ysteboes joined in filing one complaint on December 12, 2007.² The Lehtinens and Sigafosoes then filed separate complaints on January 23, 2008. The three actions were consolidated for pre-trial purposes on February 28, 2008. CP 143-44.

The allegations in each complaint boil down to this: “Plaintiffs did not receive the homes they bargained, expected or paid for as their Quadrant homes were neither properly built nor safe and healthy to live in.” CP 12, 752, 775. The “Factual Background” section in each complaint begins by describing the allegedly “Reckless Production of Quadrant Homes.” CP 9, 749, 772. The Homeowners allege that “Quadrant recklessly produces homes in a rapid, ‘assembly line’ style – allowing only 54 total working days . . . for the entire production of each Quadrant Home.” CP 10, 750, 773. According to the Homeowners, that 54-day construction schedule results in serious construction defects, including: (a) defective heating and ventilation systems; (b) improperly installed or missing vapor barriers in crawl

¹ The wording of the complaints varies slightly. For example, the Perezes and Ysteboes filed a putative class action complaint that sometimes references “similarly situated” homeowners where the other complaints do not. *E.g.*, CP 12. When complaints are quoted, the quotation is intended to reflect the language of all three complaints, even if one of the complaints is worded slightly differently. Inconsequential wording differences will not be identified.

² As noted above, the Perezes and Ysteboes filed a putative class action complaint. However, they have not attempted to certify the class and therefore represent only themselves.

spaces; (c) excessive water and wet soil in crawl spaces; (d) poorly draining lawn and soil; (e) improperly built roofs that permit water intrusion; (f) improperly sealed top plates, electrical, plumbing, and duct penetrations between the attic and living spaces; (g) improperly built plumbing, siding, and windows that permit water intrusion; (h) the improper use of wet building materials in the construction process. CP 13, 752-53, 775-76.

The Homeowners contend that those alleged defects cause serious problems. They allege that, “[a]s a direct and proximate result of Defendants’ unlawful conduct and reckless production practices,” Quadrant homeowners have been sickened by, among other things, mold growth, “poisonous gases,” and “vermin and pests” living in their houses. CP 14-15, 754-55, 777-78.

The Homeowners allege eight causes of action on behalf of themselves and their minor children³: (1) outrage; (2) fraud; (3) violation of the Consumer Protection Act (CPA); (4) negligence; (5) negligent misrepresentation; (6) rescission; (7) breach of warranty; and (8) “Declaration of Unenforcability of Arbitration Clause in Purchase and Sale Agreement.” CP 16-26, 755-63, 778-86. Each

³ Only the Lehtinens and Sigafosoes filed claims on behalf of minor children.

cause of action is alleged against the “Defendants” (Quadrant, WRECO, and Weyerhaeuser) collectively.⁴ *See id.*⁵

The Homeowners’ first seven causes of action arise out of the alleged construction defects described in the complaints. For example, the Homeowners’ claims for fraud and negligent misrepresentation are based on “material misrepresentations” “concerning the character and quality” of the Homeowners’ houses. CP 17, 23, 756, 760-61, 779, 783-84. The Homeowners contend that Quadrant, WRECO, and Weyerhaeuser knew, or should have known, that the houses were “not produced in compliance with local laws and building codes or in a workmanlike manner,” CP 17, 23, 756, 761, 779, 784, and “contained numerous construction defects,” CP 17, 23, 761, 784. The Homeowners also claim that the defendants’ alleged misrepresentations induced the Homeowners enter into the PSAs to buy their houses. CP 18, 24, 756, 761, 779, 784.

⁴ WRECO and Weyerhaeuser are mentioned by name only twice in each complaint. First, at the beginning, where the defendants are introduced by name. CP 9, 749, 772. Second, at the end, where the Homeowners contend that their claims against WRECO and Weyerhaeuser are not arbitrable. CP 26, 763, 786. Everywhere else, WRECO and Weyerhaeuser are grouped with Quadrant and identified as the “Defendants.” *E.g.*, CP 16-25, 755-62, 778-85.

⁵ In the complaint filed by the Perezes and Ysteboes, the claim for rescission appears to be directed only at Quadrant. The claim for rescission is directed at all “Defendants” in the Lehtinen and Sigafos complaints.

The Homeowners' claims for rescission, breach of warranty, violation of the CPA, negligence, and outrage also arise from alleged construction defects. The Homeowners request rescission because they "may determine that the home that they purchased cannot be . . . repaired." CP 24, 761, 784. They allege breach of warranty because "Defendants impliedly and explicitly warranted to [the Homeowners], that their Quadrant home was built in compliance with applicable building laws and codes in a workmanlike manner and were [sic] fit to be inhabited." CP 25, 762, 785.

The Homeowners allege that Quadrant and its parent companies violated the CPA "by designing, producing, marketing, warranting, and selling [to the Homeowners] Quadrant home[s] when they knew, or should have known, the home construction violated applicable laws and building codes or were defectively constructed" CP 18, 757, 780.

The Homeowners allege negligence because their houses were allegedly "designed and recklessly produced . . . in a [dangerous] manner," because the three defendants "failed to notify [the Homeowners]" that their home allegedly was not produced "in a workmanlike manner" and that serious health problems might result, and because the three defendants "failed to conduct a timely and

thorough investigation of [the Homeowners'] home[s]" to determine whether remediation was necessary. CP 22, 760, 783. Those same allegations form the bases for the Homeowners' claims of outrage, which are directed at the defendants' entire "course of conduct." CP 16-17, 755-56, 778-79.

The Homeowners' eighth and final cause of action, for a "Declaration of Unenforceability of Arbitration Clause in Purchase and Sale Agreement," relates directly to the PSAs themselves.⁶ CP 26, 763, 786. The Homeowners allege that "[t]he purchase and sale agreement signed by [the Homeowners] and Defendant Quadrant is an adhesion contract obtained through Defendants' fraud." *Id.* "Hidden" in that "unfair contract of adhesion," the Homeowners claim, "is a clause purporting to compel arbitration and deny Quadrant home purchasers their constitutional right to a jury trial." CP 763, 786. The Homeowners contend that the clause is invalid, and, even if valid, inapplicable to non-signatories (i.e., WRECO, Weyerhaeuser, and any minor children). The Homeowners also claim that the arbitration clause does not apply to claims "aris[ing] independently of" the PSAs. CP 26, 763, 786.

⁶ The Homeowners' claims for rescission, breach of warranty, fraud, and negligent misrepresentation also relate directly to the PSAs.

D. The Trial Court Denied Quadrant's, WRECO's, and Weyerhaeuser's Motions to Compel Arbitration

On January 11, 2008, Quadrant moved to compel arbitration of all claims brought by the Perezes and Ysteboes. CP 28-33. Quadrant also sought a stay of trial court proceedings pending arbitration.

See id. Oral argument on Quadrant's motion was heard on February 8, 2008. The trial court ordered supplemental briefing and took the matter under advisement.⁷ *See* CP 97-111, 112-130, 146-157, 158-59, 164-66.

On September 18, 2008, Quadrant moved to compel arbitration of all claims brought by the Lehtinens and Sigafoses and to stay trial court proceedings pending arbitration. CP 197-209. WRECO and Weyerhaeuser also moved to compel arbitration of all claims asserted against them. CP 213-225.

Oral argument was heard on the three pending motions to compel arbitration on November 10, 2008. On December 2, 2008, the trial court entered an order denying all three motions. CP 734-36. The order specified two reasons for the denial. First, the trial court found

⁷ WRECO and Weyerhaeuser did not immediately move to compel arbitration because they moved for summary judgment of dismissal on January 11, 2008. These two corporations have no connection to the Homeowners or the houses at issue. The trial court denied WRECO's and Weyerhaeuser's motion, and WRECO and Weyerhaeuser moved for reconsideration. That, too, was denied on March 17, 2008.

“disputes of fact concerning whether the [Homeowners’ PSAs] were negotiated contracts or contracts of adhesion.” CP 735. Second, the trial court held that, as a matter of law, the arbitration clauses “do not apply to [the Homeowners’] claims regarding subsequent remediation costs due to construction defects.” *Id.*

Quadrant, WRECO, and Weyerhaeuser appealed from that order on December 3, 2008. CP 737-41. On December 22, 2008, this Court’s Commissioner entered a stay of all trial court proceedings pending this appeal, and ordered an expedited briefing schedule.

IV. SUMMARY OF ARGUMENT

All claims in these actions are arbitrable. The trial court erred in denying arbitration on the basis that the PSAs may be invalid adhesion contracts. Under Washington law, only an arbitrator may decide whether a contract containing an arbitration clause is enforceable.

The trial court also erred in finding that claims relating to subsequent remediation costs are excluded from arbitration. In light of Washington’s strong policy favoring arbitration, the broad arbitration

WRECO and Weyerhaeuser subsequently moved to compel arbitration of all claims alleged against them.

provisions at issue easily encompass every claim asserted in these consolidated actions.

V. ARGUMENT

Questions of arbitrability are reviewed *de novo*. *Otis Hous. Ass'n, Inc. v. Ha*, 140 Wn. App. 470, 474, 164 P.3d 511 (2007).

Arbitrability in this case must be determined under Washington's Uniform Arbitration Act (UAA), RCW 7.04A.010 *et seq.*⁸

Courts have a well-defined and circumscribed role under Washington's UAA. First, as a threshold matter, they are charged with determining whether an agreement to arbitrate exists.

RCW 7.04A.060(2). If an arbitration agreement is identified, the party opposing arbitration bears the burden of showing that the agreement is unenforceable. *Otis Hous.*, 140 Wn. App. at 474. Arbitration agreements are thus presumed "valid, enforceable, and irrevocable" unless the party opposing arbitration demonstrates that the agreement is invalid "upon a ground that exists at law or in equity for the revocation of contract." RCW 7.04A.060(1).

⁸ The arbitration clauses themselves specify that Washington's UAA applies here, and the revised UAA, which was adopted in Washington on January 1, 2006, governs agreements to arbitrate even if the agreements were entered into before January 1, 2006. RCW 7.04A.030(2).

If the arbitration agreement is enforceable, the court must next determine whether “a controversy is subject to [that] agreement.” RCW 7.04A.060(2). If a valid arbitration agreement extends to the controversy before the court, the court “*shall* order the parties to arbitrate.” RCW 7.04A.070(1) (emphasis added). The UAA gives courts “no discretionary power in [that] respect.” 1 Martin Domke, *Domke on Commercial Arbitration* § 22:2 (3d ed. 2003).

In the proceedings below, the trial court refused to order arbitration because, according to the court, (1) an issue of fact existed as to whether the PSAs were negotiated contracts or contracts of adhesion; and (2) as a matter of law, the arbitration clauses do not apply to the Homeowners’ claims for subsequent remediation costs incurred because of construction defects. In other words, the court held (1) that the arbitration agreements are unenforceable because they may be part of a contract of adhesion; and (2) even if they were enforceable, they do not encompass every claim asserted in these actions. The trial court erred as a matter of law with respect to both grounds.

A. The PSAs Contain a Valid Agreement to Arbitrate

No party disputes that the Homeowners and Quadrant executed the PSAs, and that the PSAs contain an arbitration provision.

However, in the proceedings below, the Homeowners argued that the PSAs are unenforceable for reasons of procedural unconscionability (and that, as a result, the arbitration provisions are also unenforceable). The trial court agreed, and denied the motions to compel. This ruling was in error.

1. *An Arbitrator, Not the Court, Must Determine Whether the PSAs Are Invalid for Reasons of Procedural Unconscionability*

Under Washington's UAA, "[a]n arbitrator shall decide . . . whether a contract containing a valid agreement to arbitrate is enforceable." RCW 7.04A.060(3). The same rule obtains under the Federal Arbitration Act. *E.g., Preston v. Ferrer*, ___ U.S. ___, 128 S. Ct. 978, 984, 169 L. Ed. 2d 917 (2008) (under the FAA, an arbitrator decides the validity of contract as a whole); *Rojas v. TK Commc 'ns Inc.*, 87 F.3d 745, 749 (5th Cir. 1996) (arbitrator must resolve claim that contract is unenforceable contract of adhesion). Courts are thus prohibited, by statute, from considering challenges to a contract as a whole when that contract contains an otherwise-valid arbitration clause. *See* RCW 7.04A.060.

Here, the Homeowners contest the enforceability of the arbitration clauses by *explicitly challenging the formation of the PSAs*, not the arbitration provisions themselves. In their eighth cause of

action, the Homeowners claim that “[t]he *purchase and sale agreement* signed by [the Homeowners] and Defendant Quadrant is an adhesion contract obtained through Defendants’ fraud.” CP 26,763, 786 (emphasis added). The Homeowners claim that, as a result, “[t]he arbitration clause is invalid, unconscionable and unenforceable.” *Id.*

In subsequent papers filed with the trial court, the Homeowners explained their allegations of procedural unconscionability in greater detail. They complained that the PSAs were presented to them on a “take-it-or-leave-it” basis, that Quadrant employed high pressure sales tactics, and that the Homeowners were induced to buy because of misrepresentations made by Quadrant about the quality of their houses. *E.g.*, CP 693. Those allegations all relate to the formation of the PSAs themselves, not to the arbitration clauses in particular.

The trial court’s December 2, 2008 order also erroneously focused on the validity of the PSAs as a whole rather than on the arbitration clauses. In its order, the trial court denied the motions to compel arbitration because “[t]here are disputes of fact concerning whether [the Homeowners’] *Residential Real Estate Purchase and Sale Agreements* with Quadrant were negotiated contracts or contracts of adhesion.” CP 735 (emphasis added). The court did *not* find that the arbitration clauses themselves were invalid (nor could it).

Because the Homeowners' claims of procedural unconscionability attack the formation of the PSAs themselves, the Homeowners' claims must be resolved by an arbitrator. RCW 7.04A.060(3). The trial court erred by even considering the Homeowners' claims of procedural unconscionability, and should be reversed. *Id.*

2. *A Contract of Adhesion is Not Necessarily Procedurally Unconscionable*

Even if the trial court were authorized to consider the issue, it erred in denying arbitration on the basis that the PSAs may be procedurally unconscionable contracts of adhesion.⁹ A contract is not procedurally unconscionable simply because it is one of adhesion.

Adler v. Fred Lind Manor, 153 Wn.2d 331, 348, 103 P.3d 773

(2004).¹⁰ A court must consider many other factors, even if a contract

⁹ To determine whether a contract is one of adhesion, a court will consider (1) whether the contract is a standard form printed contract, (2) whether it was prepared by one party and submitted to the other on a take-it-or-leave-it basis, and (3) whether there was no true equality of bargaining power between the parties. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 347, 103 P.3d 773 (2004).

¹⁰ In *Adler*, the court analyzed the merits of Adler's procedural unconscionability claim even though an arbitration clause existed (i.e., the court did not leave the question of procedural unconscionability to the arbitrator). However, *Adler*, which was decided in 2005, arose *before* Washington adopted the revised UAA. The revised UAA applies to all arbitration disputes after July 1, 2006. RCW 7.04A.030. The revised UAA, RCW 7.04A.060(3), is clear: "An arbitrator shall decide . . . whether a contract containing a valid arbitration agreement to arbitrate is enforceable." Washington's previous arbitration statute, RCW 7.04.010 *et seq.*, contained no similar provision.

is one of adhesion, before determining that a contract is procedurally unconscionable. *Yakima County (West Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 391-393, 858 P.2d 245 (1993) (key issue is whether a party lacked meaningful choice in entering the contract). Assuming that the PSAs here were adhesion contracts (they were not¹¹), the trial court cited no other justification for its finding of possible procedural unconscionability (nor could it). The trial court therefore erred by relying on procedural unconscionability to hold that the arbitration clauses are unenforceable.¹²

¹¹ The PSAs were negotiated. In fact, as noted above, the Lehtinens added an additional paragraph to their PSA, and made their offer contingent on verification of certain basic features in the house. *See* CP 640. Similarly, the Sigafoses altered the terms of their earnest money agreement with Quadrant. *See* CP 171.

¹² In any event, Washington courts have not established that procedural unconscionability alone can invalidate a contract. *Adler*, 153 Wn.2d at 347 (explicitly reserving the question of whether procedural unconscionability alone can invalidate a contract). Indeed, in many states, a finding of procedural unconscionability alone is insufficient to render a contract unenforceable. *E.g.*, *Carey v. Lincoln Loan Co.*, 203 Or. App. 399, 422-23, 125 P.3d 814 (2005) (Oregon); *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185, 191, 108 P.3d 332 (2005) (Idaho); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 114, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (2000) (California).

B. The Valid Arbitration Clauses Cover All Claims Asserted In These Actions

1. All Causes of Action Are Arbitrable

The trial court also erred by ruling that the arbitration clauses, if valid, do not cover claims regarding subsequent remediation costs due to construction defects. All claims in these actions are arbitrable.

Washington law favors arbitration as a means of resolving disputes. *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 891-92, 16 P.3d 617 (2000). Although “the intentions of the parties as expressed in the agreement control” an arbitration agreement’s scope, *ML Park Place Corp. v. Hedreen*, 71 Wn. App. 727, 739, 862 P.2d 602 (1993), courts interpret arbitration agreements to enforce arbitration of a dispute wherever possible, *Munsey v. Walla Walla College*, 80 Wn. App. 92, 95, 906 P.2d 988 (1995). Therefore, as a general rule, “[a]bsent an express provision excluding a particular type of dispute, ‘only the *most forceful evidence* of a purpose to exclude a claim from arbitration can prevail.’ The court must be able to say ‘with *positive assurance*’ that the arbitration clause is *not susceptible of an interpretation that covers* the asserted dispute.” *ML Park Place*, 71 Wn. App. at 739 (citations omitted and emphasis added).

Arbitration provisions containing the phrase “arising out of or relating to,” like the provisions at issue here, are broad, and encompass

a wide range of disputes. *McClure v. Davis Wright Tremaine*, 77 Wn. App. 312, 314-15, 890 P.2d 466 (1995) (citing federal cases); accord *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999) (noting that “factual allegations need only ‘touch matters’ covered by the contract containing the arbitration clause”). Such arbitration provisions cover tort claims as well as contract claims. *E.g.*, *Miller v. Two State Constr. Co.*, 118 N.C. App. 412, 416, 455 S.E.2d 678 (1995).¹³ Indeed, to determine whether a dispute falls within an arbitration provision, the court must focus on the *factual allegations* in the complaints, and not the legal labels assigned to the claims. *E.g.*, *Simula*, 175 F.3d at 721; *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile S.A.*, 863 F.2d 315, 319 (4th Cir. 1988); *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 754 (Tex. 2001).

In this case, the arbitration provisions broadly require arbitration of “[a]ny 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” CP 48, 59, 178, 640 (emphasis added). The provisions are particularly

¹³ Although this appeal must be determined under Washington’s UAA, Washington courts routinely look to federal and state precedent when construing and

sweeping because, not only do they cover disputes “arising out of or relating to” the PSAs themselves, they also cover any disputes “arising out of or relating to . . . *any claimed defect relating to the property*,” regardless of whether those claims arise directly from the PSAs. *Id.* (emphasis added). The arbitration provisions exclude only “any request by Seller to quiet title to the Property.” *Id.* No other exceptions are stated.

Because the arbitration provisions at issue are so broad (and the sole stated exception so narrow), all of the Homeowners’ claims fall within their scope. Seven of the Homeowners’ eight claims are explicitly based either on alleged misrepresentations about the quality and condition of the houses (fraud, negligent misrepresentation), the actual quality and condition of the houses (CPA, negligence, rescission, and breach of warranty), or both (outrage). They therefore relate directly to alleged defects, and are arbitrable. At least three claims arise directly out of the PSAs themselves (rescission, breach of warranty, and claim for declaratory relief), and are also, for that reason, arbitrable. The Homeowners’ claims for fraud and misrepresentation also relate directly to the PSAs because the

applying Washington arbitration law. *E.g., ML Park Place*, 71 Wn. App. at 735-36.

Homeowners claim they would not have signed the PSAs had the defendants not allegedly misrepresented the quality of Quadrant's houses. Finally, the Homeowners' CPA claims are also plainly arbitrable because such claims are explicitly named in the arbitration clauses.

In short, the Homeowners have not provided "forceful evidence" suggesting that any of their claims are excluded from the arbitration provisions. Based on the plain language of those provisions, and the stated factual bases for the Homeowners' complaints, all asserted claims are arbitrable, and the trial court erred in ruling otherwise.

2. *All Claims Asserted Against WRECO and Weyerhaeuser Are Arbitrable*

The Homeowners' claims against WRECO and Weyerhaeuser are also arbitrable. In their complaints, and in the proceedings below, the Homeowners contended that their claims against WRECO and Weyerhaeuser are not subject to arbitration because WRECO and Weyerhaeuser did not sign the PSAs. It is well settled, however, that in certain circumstances "a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*,

206 F.3d 411, 416-17 (4th Cir. 2000). Here, the parent companies can compel arbitration because (1) the Homeowners' allegations against the parent companies are intertwined with the Homeowners' arbitrable claims against Quadrant, and (2) the Homeowners' allegations against the parent companies are intertwined with subject matter within the scope of the arbitration provisions.

a. The Homeowners' allegations against the parent companies are intertwined with the Homeowners' arbitrable claims against Quadrant.

“When the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parents to arbitration even though the parent is not formally a party to the arbitration agreement.” *J.J. Ryan*, 863 F.2d at 320-21; *see also Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co.*, 271 F.3d 403, 406-07 (2d Cir. 2001). Similarly, a court should compel arbitration “when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.” *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000)

(quoting *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999)).

Here, there is no question that the claims against Quadrant and its parent companies are based on the same facts and allege interdependent and concerted misconduct by all three defendants. Indeed, throughout the complaints, Quadrant, WRECO, and Weyerhaeuser are described collectively as “Defendants.” *E.g.*, CP 16-25, 755-62, 778-85. WRECO and Weyerhaeuser are mentioned separately only twice, and never in connection with a substantive factual or legal allegation that is not also directed at Quadrant. *See* CP 9, 26, 749, 763, 772, 786.

Washington courts join other jurisdictions in compelling arbitration where claims against signatories and nonsignatories are intertwined. In *McClure v. Davis Wright Tremaine*, 77 Wn. App. 312, 316, 890 P.2d 466 (1995), a Washington court compelled arbitration where a signatory defendant, Lewison, requested that the claims brought by a signatory plaintiff, McClure, against a nonsignatory defendant, Davis Wright Tremaine, be arbitrated. Even though the court determined that arbitration was required under the unique language of the arbitration provision at issue, the court noted an additional ground for compelling arbitration:

Furthermore, in this instance, Lewison, a signatory to the agreement, requested that the dispute between Davis Wright and McClure be arbitrated. Given that his own financial condition was a central issue in the controversy, certainly Lewison was within his rights to have the matter settled in the manner prescribed by the Agreement.

Id. Here, as in *McClure*, the interests of Quadrant and its parent companies are intertwined given the inseparable nature of the Homeowners' claims and common facts underlying them. Moreover, Quadrant and its parent companies each desire arbitration of the Homeowners' claims against all three entities. Therefore, under Washington law, which is consistent with the law in other jurisdictions, the Court should compel arbitration of all claims against *all* defendants.

b. Plaintiffs' allegations against the parent companies are intertwined with subject matter within the scope of the arbitration provisions.

Arbitration is also appropriate where "the subject matter of the suit is intertwined with the subject matter within the scope of the arbitration clause." *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 47 (1st Cir. 2008). In such cases, courts will "estop a *signatory* from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are

intertwined with the agreement that the estopped party has signed.”
Id. (quoting *InterGen N.V. v. Grina*, 344 F.3d 134, 145 (1st Cir. 2003))
(emphasis in original).

As described above, all of the claims asserted in these actions, which relate to alleged defects in the Homeowners’ houses, are “intertwined with the subject matter within the scope of the arbitration clause.” Moreover, the Homeowners’ claims are directed at Quadrant, WRECO, and Weyerhaeuser alike. In fact, the Homeowners make literally *no distinction* among the defendants in asserting their causes of action. The Homeowners are therefore estopped from “escap[ing] arbitration . . . by naming as defendants two non-signatories, on the theory that there was no written agreement to arbitrate with those defendants.” *Sourcing Unlimited*, 526 F.3d at 40. Indeed, without such a rule, even a minimally creative plaintiff could avoid arbitration simply by naming nonsignatories as defendants.

3. *All Claims Asserted On Behalf Of the Lehtinens’ and Sigafoses’ Minor Children Are Arbitrable*

The Homeowners also contend that the claims brought on behalf of their minor children (in the case of the Lehtinens and Sigafoses) cannot be arbitrated because the children did not sign the

PSAs.¹⁴ The Homeowners' contention is meritless. In this case, the children are not separately identified as plaintiffs, so it is irrelevant whether they signed the arbitration agreements. Moreover, in Washington, like in other jurisdictions, non-signatories may be compelled to arbitrate in certain circumstances. *See In re Jean F. Gardner Amended Blind Trust*, 117 Wn. App. 235, 70 P.3d 168 (2003); *see also Int'l Paper Co.*, 206 F.3d at 416-17; Domke, *supra*, at § 13:1 (recognizing seven theories upon which a nonsignatory can be bound to an arbitration agreement). The claims of a nonsignatory are arbitrable where, as here, a contract containing an arbitration provision forms the underlying basis for the nonsignatory's claims. *Gardner*, 117 Wn. App. at 239. Nonsignatories are also estopped from avoiding an arbitration provision when their claims are based on the contract containing that arbitration provision, as is the case here. *FirstMerit*, 52 S.W.3d at 755-56. Finally, the claims of nonsignatories are arbitrable when, as here, they are indistinguishable from the arbitrable claims of signatories. *Trimper v. Terminix Int'l Co.*, 82 F. Supp. 2d 1, 5 (N.D.N.Y. 2000).

¹⁴ The Perezes and Ysteboes have not asserted claims on behalf of minor children.

a. The parents are the only named plaintiffs.

The Lehtinens' and Sigafoses' minor children are not separately identified as plaintiffs in these actions. In fact, no complaint alleges that the children are appearing by guardian, as would be required under RCW 4.08.050 if the children were separate plaintiffs. Instead, the Lehtinens and Sigafoses have purportedly brought their own claims under RCW 4.24.010 for injuries allegedly sustained by their children. The parents are therefore the *only* plaintiffs in these actions, and are of course signatories to the PSAs.

b. The children's claims are subject to arbitration because the PSAs form the underlying basis for the children's claims.

Even if the nonsignatory children were considered to be separate plaintiffs, they would be bound by the arbitration clauses because the PSAs containing the arbitration clauses form "the underlying basis" for all of the children's purported claims. *Gardner*, 117 Wn. App. at 239. For example, the complaints allege that "Plaintiffs" (parents and children alike) "purchased their Quadrant home with the reasonable expectation that the homes would be properly produced and provide a safe and healthy environment in

which they could live and raise their families.” CP 11, 751, 774. They then allege that “Plaintiffs did not receive the homes they bargained, expected or paid for,” CP 12, 752, 775, because their houses allegedly contained a number of defects, CP 12-13, 752-53, 775-76. The plaintiffs (parents and children alike) then allege the same legal claims, including breach of warranty and rescission, relating to the purchase of an allegedly defective home. CP 16-26, 755-763, 778-786. The PSAs thus provide the “underlying basis” for all claims in this action, and the nonsignatory children are bound by the arbitration provisions contained in those PSAs. *Gardner*, 117 Wn. App. at 239.

c. The children are estopped from avoiding the arbitration provisions contained in the PSAs.

Under a similar legal theory, the children are also estopped from seeking to benefit from the PSAs on the one hand, while attempting to avoid their burdens (i.e., the arbitration clauses) on the other. *Int’l Paper*, 206 F.3d at 418. “[A] litigant who sues based on a contract subjects him or herself to the contract’s terms,” including any arbitration clause. *FirstMerit*, 52 S.W.3d at 755. Courts consider the substance of a claim, and disregard artful pleading, to determine whether a plaintiff has sued “based on a contract,” and has thereby

subjected himself to a contract's terms. *In re Ford Motor Co.*, 220 S.W.3d 21, 24 (Tex. Ct. App. 2006).

Here, as discussed above, the children's purported claims are rooted in the defects alleged to exist in their houses. Indeed, the gravamen of each complaint is that the plaintiffs (including the children) allegedly "did not receive the homes they bargained, expected or paid for as their Quadrant homes were neither properly built nor safe and healthy to live in." CP 12, 752, 775. The PSAs are thus central to this action, and, as courts across jurisdictions repeatedly hold, "[a] nonparty cannot both have his contract and defeat it too." *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 135 (Tex. 2005); *see also Int'l Paper*, 206 F.3d at 418; *Parker v. Center for Creative Leadership*, 15 P.3d 297, 298 (Colo. 2000); *Smith v. Multi-Financial Sec. Corp.*, 171 P.3d 1267, 1274 (Colo. Ct. App. 2007) (relying on *Gardner*, 117 Wn. App. 235); *Cappadonna Elec. Mgmt. v. Cameron County*, 180 S.W.3d 364, 374-75 (Tex. Ct. App. 2005); *Ex Parte Dyess*, 709 So.2d 447, 452 (Ala. 1997). The nonsignatory children cannot sue Quadrant, WRECO, and Weyerhaeuser for damages relating to the purchase of an allegedly defective home (including claims for breach of warranty and rescission) and, at the same time, escape the arbitration clauses contained in the PSAs.

d. The children's claims are indistinguishable from the claims of their signatory parents, and are therefore subject to arbitration.

A nonsignatory may also be bound by an arbitration agreement if his claims are closely related to those of a signatory. In *Trimper v. Terminix Int'l Co.*, 82 F. Supp. 2d 1 (N.D.N.Y. 2000), the defendant, Terminix, sought to compel arbitration of the plaintiffs' claims of bodily injury and property damage arising from the application of pesticide to the plaintiffs' residence. Plaintiff Bruce Trimper had signed a service agreement that required the arbitration of "any controversy or claim . . . arising out of or relating to [the] agreement." *Id.* at 4. The court rejected the plaintiffs' argument that the arbitration clause could not be enforced against plaintiffs Karen Trimper (Bruce's wife) and Kyle Trimper (the Trimpers' minor child), neither of whom signed the service agreement. *Id.* at 4-5. Indeed, the court compelled arbitration because the nonsignatory plaintiffs' claims were "derivative of and closely related to [the arbitrable claims] of plaintiff Bruce Trimper." *Id.* at 5.

Similarly, the nonsignatory children here assert claims that are indistinguishable from the arbitrable claims asserted by their signatory

parents. Indeed, apart from the identification of the plaintiffs in the captions and in paragraph 2.2, and the assertion in the eighth cause of action that the children's claims are not arbitrable, the Homeowners' complaints do not distinguish between the parents and children at all. *See* CP 3-27, 744-64, 767-87. Because the claims of the nonsignatory children are indistinguishable from the arbitrable claims of their signatory parents, arbitration of the children's claims is proper.

4. *Even If Some Claims Are Not Arbitrable, Trial Court Proceedings Should Be Stayed Pending Resolution of the Arbitrable Claims*

Quadrant, WRECO, and Weyerhaeuser have the right to enforce the arbitration provisions even if not *all* claims are arbitrable. As noted above, the arbitrability determination is not a matter of discretion. “[O]nce a party moves to compel arbitration of a particular dispute and the court determines that the parties have agreed to arbitrate that dispute, the court *must* order the parties to proceed with arbitration.” *Kamaya Co. v. Am. Prop. Consultants*, 91 Wn. App. 703, 708, 959 P.2d 1140 (1998) (emphasis in original). The court therefore must compel arbitration of all arbitrable claims, even if that requires severing nonarbitrable claims, RCW 7.04A.070(1), (6), and even if “the result would be the possibly inefficient maintenance of separate

proceedings in different forums.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985).

The Court can avoid inefficiency, however, by ordering a stay of trial court proceedings pending the resolution of the arbitrable claims. *See* RAP 12.2 (court has broad authority, including authority to order stay). Arbitration is favored in Washington because it “eases court congestion, provides an expeditious method of resolving disputes and is generally less expensive than litigation.” *Munsey*, 80 Wn. App. at 95. In fact, the UAA presumes that the entire proceeding involving arbitrable claims will be stayed pending the results of arbitration:

If the court orders arbitration, the court *shall* on just terms stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court *may* sever it and limit the stay to that claim.

RCW 7.04A.070(6) (emphasis added). Therefore, even if the Court concludes that some claims are not subject to the arbitration provisions contained in the PSAs, the Court nevertheless can and should stay this entire proceeding pending resolution of those claims that clearly are subject to arbitration.

Indeed, given the common factual bases underlying all claims asserted by the Homeowners, parallel litigation is not appropriate for *any* claim asserted in this action. For example, the claims asserted by

the Homeowners' children are identical to the claims asserted by the Homeowners themselves. The arbitration proceeding will resolve, or at the very least substantially narrow, any nonarbitrable claims. If parallel litigation were conducted, "the arbitration proceedings would be rendered meaningless," and the state and federal "policy in favor of arbitration" would be "effectively thwarted." *J.J. Ryan*, 863 F.2d at 321 (quotations and citations omitted). If some claims are not arbitrable, a stay should be issued to preserve judicial resources, avoid duplicative discovery, and foreclose the risk of inconsistent results in separate forums.

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VI. CONCLUSION

The trial court erred in denying Quadrant's, WRECO's, and Weyerhaeuser's motions to compel arbitration. The Homeowners' attacks on the enforceability of the PSAs are reserved by statute for an arbitrator to decide. In addition, the broadly-worded arbitration provisions at issue plainly cover all of the Homeowners' claims, including those asserted by the Homeowners' minor children, and including those asserted against WRECO and Weyerhaeuser. The Court should reverse the trial court's order denying arbitration, order a stay of trial court proceedings, and compel arbitration of all claims asserted against Quadrant, WRECO, and Weyerhaeuser.

RESPECTFULLY SUBMITTED this 30th day of January, 2009.

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APPENDIX

DOMKE ON COMMERCIAL ARBITRATION

(The Law and Practice of
Commercial Arbitration)

By **MARTIN DOMKE**
Revised Edition by **Gabriel Wilner**

THIRD EDITION

By **LARRY E. EDMONSON**

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Chapter 13

Effect of Arbitration Agreement on Nonsignatories

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§ 13:1 Introduction

Generally, an arbitration clause is a contractual right which cannot be invoked by a nonparty to the arbitration contract, and only parties to the arbitration agreement are bound to arbitrate.¹

[Section 13:1]

¹Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287 (3d Cir. 1996); National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc., 165 F.3d 184 (2d Cir. 1999); U.S. v. Harkins Builders, Inc., 45 F.3d 830 (4th Cir. 1995) (judgment creditor/garnishor); Gingiss Intern., Inc. v. Bormet, 58 F.3d 328 (7th Cir. 1995); American Ins. Co. v. Cazort, 316 Ark. 314, 871 S.W.2d 575 (1994); Curtis G. Testerman Co. v. Buck, 340 Md. 569, 667 A.2d 649 (1995).

The rule that an arbitration clause is a contractual right which cannot be invoked by someone who did not sign the contract in which it appeared reflects the principle, basic to contract law, that only parties who have manifested an intent to be bound to the arbitration clause should be obligated to do so.² Although the federal policy favoring arbitration is strong, it cannot be construed to include parties that were not intended to be part of the original contract. However, even though arbitration is contractual by nature, a nonsignatory to an arbitration agreement may nonetheless be bound by the agreement under an accepted theory of agency or contract law.³ It should be noted that the persons and entities to whom this duty is attributed all have a unique relationship to a

A company which bought a consultant's employer was a party to the consultant's employment contract with the employer, and not simply a guarantor of the agreement, where the agreement gave the company the right to make additions to or place limitations on the consultant's responsibilities, where the guarantee was contained within the employment agreement, where company's vice-president signed the agreement and where the arbitration agreement was broad enough to include the consultant's salary and benefits. *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 11 I.E.R. Cas. (BNA) 361, 1995 FED App. 0360P (6th Cir. 1995).

A bank, which was not a party to the securities account agreement between the investors and the securities firm, could not compel arbitration of investors' claims against it. *Ex parte Stripling*, 694 So. 2d 1281 (Ala. 1997).

A sublessee's employee, who fell on a stairway, was not a party to a lease agreement between lessor and lessee, which contained an arbitration clause and thus, the issue of the lessee's potential liability to the employee was not subject to arbitration. *Coblentz v. Hotel Employees & Restaurant Employees Union Welfare Fund*, 112 Nev. 1161, 925 P.2d 496 (1996).

²*Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995); *Bullis v. Bear, Stearns & Co., Inc.*, 553 N.W.2d 599 (Iowa 1996).

A nonsignatory to a contract may be deemed a party to arbitration under the Federal Arbitration Act through application of contract and agency principles. The fact that the party is not covered by the arbitration clause is not dispositive. *American Ins. Co. v. Cazort*, 316 Ark. 314, 871 S.W.2d 575 (1994).

While a contract cannot bind parties to arbitrate disputes that they have not agreed to arbitrate, it does not follow that under the FAA an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision. *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000).

³*Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995).

State law contract principles will be applied in determining whether a nonsignatory to an agreement is properly considered a party to arbitration under the Federal Arbitration Act. *American Ins. Co. v. Cazort*, 316 Ark. 314, 871 S.W.2d 575 (1994); *State ex rel. United Asphalt Suppliers, Inc. v. Sanders*, 204 W. Va. 23, 511 S.E.2d 134 (1998); *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000).

Mobile home buyers sued seller, financial institution and insurance agent alleging fraudulent misrepresentation, fraudulent suppression, deceit and conspiracy to defraud in connection with the sale of the mobile home and sale of the insurance policy covering the mobile home. The claims against the nonsignatories of the

party to the original contract such that they are either involved in the performance of the contract,⁴ or have an interest in the arbitra-

arbitration agreement were so intertwined with the claims against the signatories and the arbitration clause was broad enough to encompass the claims against both the signatories and nonsignatories. *Ex parte Napier*, 723 So. 2d 49 (Ala. 1998).

⁴*Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287 (3d Cir. 1996).

A company which bought a consultant's employer was a party to the consultant's employment contract with the employer, and not simply a guarantor of the agreement, where the agreement gave the company the right to make additions to or place limitations on the consultant's responsibilities, where the guarantee was contained within the employment agreement, where company's vice-president signed the agreement and where the arbitration agreement was broad enough to include the consultant's salary and benefits. *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 11 I.E.R. Cas. (BNA) 361, 1995 FED App. 0360P (6th Cir. 1995).

A nonsignatory may be bound by arbitration clause if subsequent conduct indicates a party is assuming the obligation to arbitrate. *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995) (dicta).

A computer equipment buyer was bound by an arbitration agreement between its predecessor and the seller of the equipment where the buyer ratified and accepted the agreement by its conduct in (1) continuing to deal with the seller after the buyer was formed, (2) failing to notify the seller that the predecessor was no longer the customer as listed on the purchase orders, and (3) indicating in a letter to the seller only that new management had acquired the predecessor which would continue to operate the existing company. *Daisy Mfg. Co., Inc. v. NCR Corp.*, 29 F.3d 389, R.I.C.O. Bus. Disp. Guide (CCH) ¶ 8630 (8th Cir. 1994).

In a case where a broker, as the introducing broker was agent to both a trader and the clearing broker, the agreement between the customer and the clearing broker called for arbitration. The arbitration agreement was applicable to the dispute arising between the customer and introducing broker even though the latter had not signed the agreement containing the arbitration clause. *Okcuoglu v. Hess, Grant & Co., Inc.*, 580 F. Supp. 749 (E.D. Pa. 1984).

tion as beneficiaries,⁵ or as parties whose liability might be affected by the arbitration.⁶

The following theories have been recognized by courts seeking to bind a nonsignatory to an arbitration agreement: (1) agency, (2) incorporation by reference, (3) veil-piercing/alter ego, (4) assumption or implied conduct,⁷ (5) estoppel, (6) successor in interest, and (7) third-party beneficiary.⁸

⁵Ex parte Dyess, 709 So. 2d 447 (Ala. 1997).

An employee signed an agreement which incorporated by reference the arbitration provisions of the National Association of Securities Dealers (NASD). The NASD provisions require that any grievance between an employee and any member of the NASD be arbitrated. The employee brought suit against a corporation that was a member of the NASD but was not a party to its signed agreement. The corporation could compel arbitration, even though it was not a party to the agreement, because it was intended to be a third party beneficiary of the arbitration provisions. In re Prudential Ins. Co. of America Sales Practice Litigation All Agent Actions, 133 F.3d 225, 13 I.E.R. Cas. (BNA) 1029 (3d Cir. 1998).

The parties bringing the action were owners of containerized cargo equipment who leased the equipment to a shipping line; the shipping line insured the equipment with the insurance company and the insurance contract contained an arbitration clause. The owners of the equipment were not signatories to the contract. The court held the equipment owners to be bound by the terms of the conditions of the insurance contract, including the arbitration clause, since they wished to assume the benefits of the contract as third party beneficiaries. The court appeared to rely on the rule that parties to contracts may be bound by their provisions even if they have not signed them. Interpool Ltd. v. Through Transport Mut. Ins. Ass'n Ltd., 635 F. Supp. 1503, 1986 A.M.C. 1150 (S.D. Fla. 1985).

⁶A charterer moved for summary indemnification from the stevedore for amounts the charterer was obligated to pay the cargo owner pursuant to an arbitration award, based on a contract of indemnity with the charterer. The common-law practice of voucher has been replaced by modern impleader in most cases, but remains valid in circumstances that were present in the case. This common-law practice of voucher in litigation was held to be equally operative in the arbitration context. The court considered that stevedores in general are aware of charter parties. In view of the fact that the stevedore had been notified of the pending arbitration and that its interests were adequately represented at the arbitration hearing, the stevedore validly could be vouched into the arbitration proceedings without its consent. The stevedore was precluded from relitigating issues already determined by the arbitrator. SCAC Transport (USA) Inc. v. S.S. Danaos, 845 F.2d 1157, 1988 A.M.C. 1827 (2d Cir. 1988).

⁷Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773 (2d Cir. 1995).

⁸Britton v. Co-op Banking Group, 4 F.3d 742, Fed. Sec. L. Rep. (CCH) ¶ 97752 (9th Cir. 1993); Recold, S.A. de C.V. v. Monfort of Colorado, Inc., 893 F.2d 195, 10 U.C.C. Rep. Serv. 2d 753 (8th Cir. 1990).

The Second Circuit recognizes five theories for binding nonsignatories to arbitration: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil piercing/alter ego; and (5) estoppel. American Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 1999 A.M.C. 1858 (2d Cir. 1999).

§ 22:2 Compelling arbitration

Where there is an arbitration contract in effect,¹ and in particular, where the arbitration clause is broad, the court will compel arbitration.² Of course, in order to compel arbitration under the FAA, a federal court must have an independent jurisdictional basis.³

A motion for a stay of court proceedings pending arbitration was interpreted by the court as a motion to compel arbitration under N.Y. Civ. Prac. L. & R. § 7503, since a stay is not specifically authorized. *E. F. Hutton & Co. v. Bokelmann*, 56 Misc. 2d 910, 290 N.Y.S.2d 415 (Sup 1968). Before an arbitration agreement can be enforced, it must meet certain requirements. First, there must be

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¹In an action by an automobile buyer against the dealer, the dealer's motion to compel arbitration was denied because the arbitration clause in the second retail buyer's order form used in connection with the purchase of the used car was not enforceable since the buyer did not specifically sign on the signature line for the arbitration clause, although he signed on other lines similarly indicating agreement to specific terms. *Crown Pontiac, Inc. v. McCarrell*, 695 So. 2d 615 (Ala. 1997).

When the contracts of a buyer and seller provided for separate arbitration clauses—under the Hong Kong Code of Civil Procedure and AAA Rules in New York—the court concluded that “since the arbitration clauses are in hopeless conflict . . . no contract to arbitrate was made.” *Lea Tai Textile Co., Ltd. v. Manning Fabrics, Inc.*, 411 F. Supp. 1404, 19 U.C.C. Rep. Serv. 1080 (S.D. N.Y. 1975).

²*Phillips v. Parker*, 106 Nev. 415, 794 P.2d 716, R.I.C.O. Bus. Disp. Guide (CCH) ¶ 7583 (Nev. 1990). The FAA section authorizing a party to petition for an order to compel arbitration in manner provided for in arbitration agreement does not overturn the well-pleaded complaint rule. *Westmoreland Capital Corp. v. Findlay*, 100 F.3d 263 (2d Cir. 1996).

An action to compel arbitration under the FAA accrues when a party unequivocally refuses to arbitrate, evidenced by noncompliance with a demand to arbitrate, or other unambiguous manifestation of intent not to arbitrate. *PaineWebber Inc. v. Faragalli*, 61 F.3d 1063 (3d Cir. 1995).

While the purpose of the FAA is to foster arbitration, the court must do so by enforcing a valid arbitration agreement according to the terms of the agreement. The fact that an arbitration agreement allows the court to entertain petitions for certain injunctive orders does not give the court broad discretion to fashion other injunctive orders to aid arbitration where the agreement did not provide for such relief. Thus, where a court ordered expedited arbitration, relief not provided for in the parties' agreement, the order could be vacated, even though there was no specific showing of prejudice to any party. *Salvano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 85 N.Y.2d 173, 623 N.Y.S.2d 790, 647 N.E.2d 1298, 10 I.E.R. Cas. (BNA) 524 (1995).

See *Sonderby, Commercial Arbitration: Enforcement of an Agreement To Arbitrate Future Disputes*, 5 J. Marshall J. 72 (1971).

³*PaineWebber Inc. v. Faragalli*, 61 F.3d 1063 (3d Cir. 1995).

a binding arbitration agreement in writing.⁴ Second, the issue in

⁴Webb v. Investacorp, Inc., 89 F.3d 252, 30 U.C.C. Rep. Serv. 2d 756 (5th Cir. 1996); Brown v. KFC National Management Co., 82 Haw. 226, 921 P.2d 146, 12 I.E.R. Cas. (BNA) 1021 (1996); Lee v. Heftel, 81 Haw. 1, 911 P.2d 721 (1996); Bullis v. Bear, Stearns & Co., Inc., 553 N.W.2d 599 (Iowa 1996).

A district court's first task in evaluating a motion to compel arbitration is to determine whether the parties agreed to arbitrate the dispute. Folse v. Richard Wolf Medical Instruments Corp., 56 F.3d 603, 131 Lab. Cas. (CCH) ¶ 58057 (5th Cir. 1995).

Court must initially evaluate whether an individual is bound by a contractual duty to arbitrate before compelling arbitration. ARW Exploration Corp. v. Aguirre, 45 F.3d 1455 (10th Cir. 1995).

New York law provides that a court considering a motion to compel arbitration must consider: (1) whether the parties made a valid agreement to arbitrate; (2) if so, whether the agreement has been complied with; and (3) whether the claim to be arbitrated would be time barred if asserted in state court. Smith Barney, Harris Upham & Co., Inc. v. Luckie, 85 N.Y.2d 193, 623 N.Y.S.2d 800, 647 N.E.2d 1308, Fed. Sec. L. Rep. (CCH) ¶ 98,785, 1996 A.M.C. 1213 (1995).

In an action over a lease's dispute resolution clause where arbitration was one of three possible dispute resolution procedures, the parties could not be compelled to submit their controversy to arbitration where they have not manifested in writing a contractual intent to be bound to do so. State of the Arts, Inc. v. Congress Property Management Corp., 1997 ME 18, 688 A.2d 926 (Me. 1997).

Pennzoil Exploration and Production Co. v. Ramco Energy Ltd., 139 F.3d 1061 (5th Cir. 1998); Continental Group, Inc. v. NPS Communications, Inc., 873 F.2d 613 (2d Cir. 1989); 99 Commercial Street, Inc. v. Goldberg, 811 F. Supp. 900, Fed. Sec. L. Rep. (CCH) ¶ 97338 (S.D. N.Y. 1993).

dispute should be covered by the arbitration agreement.⁵ Thirdly, no statute or policy must have rendered the claims nonarbitrable.⁶

Consideration by the court of the triable issues of whether a valid contract was made and whether the other party complied with the agreement are discussed in an earlier chapter.⁷ The matter of default is discussed in a later section of this chapter.⁸ If there is a valid contract to arbitrate, the dispute falls within the scope of the agreement, and the demand for arbitration was timely made, the court must order the parties to arbitrate the dispute. Under the language of modern arbitration statutes, the court has

⁵ConnTech Development Co. v. University of Connecticut Educ. Properties, Inc., 102 F.3d 677, 114 Ed. Law Rep. 1031, 36 Fed. R. Serv. 3d 844 (2d Cir. 1996); Webb v. Investacorp, Inc., 89 F.3d 252, 30 U.C.C. Rep. Serv. 2d 756 (5th Cir. 1996); Brown v. KFC National Management Co., 82 Haw. 226, 921 P.2d 146, 12 I.E.R. Cas. (BNA) 1021 (1996); Lee v. Heftel, 81 Haw. 1, 911 P.2d 721 (1996).

Intent of parties to termite protection plan that any controversy or claim arising out of or relating to interpretation, performance, or breach of any provision of the contract be submitted to arbitration did not include submitting to arbitration claims based upon clearance letter provided to prospective purchaser on behalf of home vendors pursuant to the sale of the house, even though the clearance letter was issued free of charge as the vendors were covered by the termite protection plan. While the clearance letter involved parties to the plan and involved termites, it was not related to or otherwise connected with any provision of the plan, and arbitration clause, by its express terms, was limited in application to controversies related to some provision of the termite protection plan. Allied-Bruce Terminix Companies, Inc. v. Dobson, 684 So. 2d 102 (Ala. 1995).

Pennzoil Exploration and Production Co. v. Ramco Energy Ltd., 139 F.3d 1061 (5th Cir. 1998); Houlihan v. Offerman & Co., Inc., 31 F.3d 692, Fed. Sec. L. Rep. (CCH) ¶ 98351 (8th Cir. 1994); Daisy Mfg. Co., Inc. v. NCR Corp., 29 F.3d 389, R.I. C.O. Bus. Disp. Guide (CCH) ¶ 8630 (8th Cir. 1994); Amoco Pipeline Co. v. Dave Kolb Grading, Inc., 815 F. Supp. 314 (E.D. Mo. 1993) (option contract and general warranty operated to establish agreement to arbitrate).

⁶R.M. Perez & Associates, Inc. v. Welch, 960 F.2d 534, Blue Sky L. Rep. (CCH) ¶ 73624, Fed. Sec. L. Rep. (CCH) ¶ 96841 (5th Cir. 1992).

⁷See § 21:3.

⁸See § 22:4.

no discretionary power in this respect.⁹ The same is true under the Federal Arbitration Act (FAA).¹⁰

To state a claim to compel arbitration under the FAA, the plaintiff must allege: (1) the existence of a dispute between the parties; (2) a written agreement that includes an arbitration provision which purports to cover the dispute; (3) the relationship of the transaction (evidenced by the agreement) to interstate or foreign commerce; and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute.¹¹

If bound by an arbitration agreement, a party must demonstrate prejudice before it can defeat efforts to resolve a dispute through arbitration.¹²

⁹A condominium association sued the developers for alleged defects in the construction and design of the condominiums. When the developers filed a third-party complaint against the architect, the architect sought to enforce its arbitration agreement against the developers. The court held that once a valid arbitration agreement exists, the court must compel arbitration even when the principal litigation involves parties that are not signatories to the arbitration agreement. Further, the court held that judicial economy is an insufficient basis for denying a motion to compel arbitration. *Board of Managers of Courtyards at Woodlands Condominium Ass'n v. IKO Chicago, Inc.*, 183 Ill. 2d 66, 231 Ill. Dec. 942, 697 N.E.2d 727 (1998); *Amdahl v. Green Giant Co.*, 497 N.W.2d 319 (Minn. Ct. App. 1993).

Where an arbitration agreement is unambiguous and the right to arbitrate is not in dispute, allowing the parties to proceed to litigation instead of arbitration would depart from the essential requirements of law. *North American Van Lines v. Collyer*, 616 So. 2d 177 (Fla. Dist. Ct. App. 5th Dist. 1993).

¹⁰*Cantella & Co., Inc. v. Goodwin*, 924 S.W.2d 943 (Tex. 1996); *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20 (2d Cir. 1995).

Under the FAA, the court cannot compel arbitration of any dispute at any time. The act confers only a right to obtain an order mandating that arbitration proceed in the manner provided for in the parties' agreement. *Smith Barney, Harris Upham & Co., Inc. v. Luckie*, 85 N.Y.2d 193, 623 N.Y.S.2d 800, 647 N.E.2d 1308, Fed. Sec. L. Rep. (CCH) ¶ 98,785, 1996 A.M.C. 1213 (1995); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158, Blue Sky L. Rep. (CCH) ¶ 72172, Fed. Sec. L. Rep. (CCH) ¶ 91953 (1985); *Stander v. Financial Clearing & Services Corp.*, 730 F. Supp. 1282, Fed. Sec. L. Rep. (CCH) ¶ 94947 (S.D. N.Y. 1990).

Once the district court determines that a dispute falls within the scope of a valid arbitration agreement, the court must stay court proceedings and order the parties to proceed to arbitration. *Houlihan v. Offerman & Co., Inc.*, 31 F.3d 692, Fed. Sec. L. Rep. (CCH) ¶ 98351 (8th Cir. 1994).

¹¹*Whiteside v. Teltech Corp.*, 940 F.2d 99 (4th Cir. 1991).

¹²*Graphic Scanning Corp. v. Yampol*, 850 F.2d 131 (2d Cir. 1988); *Stander v. Financial Clearing & Services Corp.*, 730 F. Supp. 1282, Fed. Sec. L. Rep. (CCH) ¶ 94947 (S.D. N.Y. 1990).

The decision of the courts to compel arbitration, after the taking of the appropriate appeals,¹³ is res judicata for the parties and may not be grounds for further action.¹⁴

Appeals from orders compelling or denying arbitration are discussed in later sections.¹⁵

§ 22:3 —Foreign countries

In cases involving international trade where foreign countries or its agencies are parties, the issue will arise of whether the foreign representative acting on behalf of the foreign country has the authority to bind the country to arbitration. Normally, the court will decide this issue on a motion to compel arbitration.¹ In responding to the motion to compel arbitration, the foreign country can assert the defense of “sovereign immunity.”² Looking at various factors, the court will have to decide whether the parties agreed to subject their contract to private law by inserting an arbitration clause in the contract.³

Under the restrictive common law theory of sovereign immunity, immunity is limited to cases arising from “public” or “governmental” acts. If the activity sued upon is not governmental but “com-

¹³See § § 22:8 et seq.

¹⁴The decision by the United States Supreme Court compelling arbitration of antitrust claims in *Mitsubishi v. Soler* was res judicata and barred Soler (the automobile dealer) from raising the issue of its financial inability to arbitrate abroad as grounds for opposing the other party’s motion for relief from a stay of arbitration granted by the courts and overturned by the Supreme Court. Soler should have raised the financial inability to arbitrate issue in his appeal before the Supreme Court. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 814 F.2d 844 (1st Cir. 1987).

¹⁵See § § 22:10 et seq.

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¹*Moseley v. Electronic & Missile Facilities, Inc.*, 374 U.S. 167, 83 S. Ct. 1815, 10 L. Ed. 2d 818 (1963) (overruling on other grounds recognized by, *Hayes Children Leasing Co. v. NCR Corp.*, 37 Cal. App. 4th 775, 43 Cal. Rptr. 2d 650 (1st Dist. 1995)).

²The International Tin Council (ITC) was not considered to enjoy sovereign immunity from jurisdiction. The court stated that “[s]ince immunity from suit is in derogation of the normal exercise of jurisdiction by the courts, it should be accorded only in clear cases.” The basis for asserting sovereign immunity, the enjoyment of immunity in the United Kingdom where the ITC was headquartered, was not accepted by the court. *International Tin Council v. Amalgamet Inc.*, 138 Misc. 2d 383, 524 N.Y.S.2d 971, 5 U.C.C. Rep. Serv. 2d 330 (Sup 1988), order aff’d, 140 A.D.2d 1014, 529 N.Y.S.2d 983 (1st Dep’t 1988).

³*Comisaria General De Abastecimientos Y Transportes v. Victory Transport Inc.*, 381 U.S. 934, 85 S. Ct. 1763, 14 L. Ed. 2d 698 (1965).

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JAN 30 PM 4:01

DONIA TOWNSEND and BOB PEREZ, individually, on behalf of their marital community, and as class representatives; PAUL YSTEBOE and JO ANN YSTEBOE, 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 and LAUREN; JON SIGAFOOS and CHRISTA SIGAFOOS, individually, on behalf of their marital community and on behalf of their minor children, COLTON and HANNAH,

Plaintiffs /
Respondents,

vs.

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

Defendants /
Appellants.

NO. 62700-7
King County Superior Court
Cause No. 07-2-39341-2
SEA

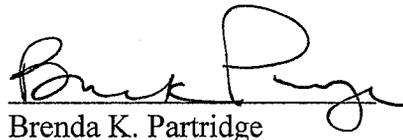
**CERTIFICATE OF
SERVICE**

I, Brenda K. Partridge, am a legal assistant for the law firm of Hillis Clark Martin & Peterson, P.S., 500 Galland Building, 1221 Second Avenue, Seattle, WA 98101. I hereby certify that on the 30th day of January, 2009, I caused to be served via legal messenger true and correct copies of the *Brief of Appellants*; and this *Certificate of Service* on the following:

Lory R. Lybeck
Katherine L. Felton
Benjamin R. Justus
Lybeck Murphy LLP
7525 SE 24th Street, Ste. 500
Mercer Island, WA 98040

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of January, 2009 at Seattle, Washington.


Brenda K. Partridge

ND: 18900.004 4822-0930-5347v1 1/30/09