

Not Reported in Cal.Rptr.3d, 2007 WL 2381545 (Cal.App. 6 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2007 WL 2381545 (Cal.App. 6 Dist.))



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Court of Appeal, Sixth District, California.
 Paul McGUIRE, et al., Plaintiffs and Respondents,

v.

COOLBRANDS SMOOTHIES FRANCHISE, LLC., et al., Defendants and Appellants.

No. H030202.

(Santa Clara County Super. Ct. No. 105CV054130).

Aug. 22, 2007.

Peter Clark Lagarias, The Legal Solutions Group, San Rafael, CA, Plaintiffs and Respondents.

Gabriela Magda Ruiz, Farella Braun & Martel LLP, San Francisco, CA, Defendants and Appellants.

ELIA, J.

***1** This action involves a franchise agreement to operate a CoolBrands Smoothie franchise in San Jose, California. After a lawsuit was filed against the franchisor and others, the court denied a motion to stay the litigation and compel arbitration in New York pursuant to the agreement's arbitration provisions. The question before us is whether the agreement to arbitrate, which is subject to the Federal Arbitration Act (FAA) (9 U.S.C., § 1 et seq.), is valid and enforceable as claimed on appeal or

unconscionable as implicitly found by the trial court.

A. Procedural History

Respondents Paul McGuire, McGuire Ventures, LLC (a California limited liability company) and Silicon Valley Smoothies, LLC (a California limited liability company) brought an action against appellants CoolBrands Smoothies Franchise, LLC, ("CoolBrands") and CoolBrands Franchise, LLC and several named individuals, Joseph Arancio, Stephen Boud, David Stein, alleged to be vice presidents of those two companies. The complaint alleged breach of contract, fraud and deceit, negligent misrepresentation, violations of the California Franchise Investment Law (Corp.Code, § 31000 et seq.), and unfair trade practices (Bus. & Prof.Code, § 17200). It sought damages for breach of the franchise agreement or, alternatively, rescission of the agreement, restitution, and "ancillary damages." The complaint also requested, among other things, punitive damages, costs, and attorney fees.

On February 17, 2006, appellants filed a petition to compel arbitration based on the contract's arbitration provisions. The Coolbrands franchise agreement identified the contracting parties as Coolbrands Smoothies, LLC, a Delaware limited liability company with its principal office in New York and McGuire Ventures, Inc. with its principal office in California. The franchise agreement, which was over 50 pages, contained, beginning on page 39, an agreement to arbitrate "all controversies, disputes or claims" arising out of or related to the parties' relationship, the franchise agreement or any related agreement, or "any

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specification, standard or operating procedure relating to the establishment or operation” of the retail store for which the franchise was granted.

Arbitration was required “to be administered by the Suffolk County, New York office of the American Arbitration Association (‘AAA’), on demand of either party.” The agreement provided that arbitration proceedings would be “conducted in Suffolk County, New York before a panel of three (3) arbitrators” and generally “conducted in accordance with the then-current commercial arbitration rules of the AAA.” The provisions stated that the Federal Arbitration Act governed all matters within its scope “unless otherwise provided in this Section.” Under the franchise agreement’s arbitration provisions, each party was permitted to appoint one arbitrator and the two appointed arbitrators selected the third arbitrator.

Under the arbitration provisions, the arbitrators were given discretion to award relief but were forbidden from awarding exemplary or punitive damages. Those provisions also prohibited arbitration on “a class-wide basis” and consolidation of arbitration proceedings. The parties were required to “submit or file any claim which would constitute a compulsory counterclaim as defined by Rule 13 of the United States Rules of Civil Procedure within the same proceeding as the claim to which it relates” and barred any claim not in compliance with this requirement.

*2 Elsewhere in the franchise agreement was a one-sided reimbursement provision making the franchisee liable for costs and legal fees incurred by Coolbrands. Under this provision, McGuire Ventures was obligated to reimburse Coolbrands for its “costs and expenses,” which were broadly

described,^{FN1} if Coolbrands was “required to enforce” the franchise agreement “in a judicial or *arbitration proceeding*” or if it was “required to engage legal counsel in connection with any failure by [McGuire Ventures] to comply with this Agreement....” (Italics added.)

FN1. Those costs and expenses included “without limitation reasonable accountants’, attorneys’, attorney assistants’, arbitrators’ and expert witness fees, costs of investigation and proof of facts, court costs, other litigation expenses and travel and living expenses whether incurred prior to, in preparation for or in contemplation of the filing of any such [judicial or arbitration] proceeding.”

The franchise agreement contained a separate provision whereby the parties waived punitive damages and jury trial and limited recovery to “actual damages sustained.” In a one-sided provision concerning injunctive relief, the franchisee waived the posting of a bond by the franchisor to obtain injunctive relief and waived “[a]ll claims for damages by reason of the wrongful issuance” of an injunction against the franchisee. The provision imposed on the franchisee the obligation to pay the franchisor all its costs in obtaining an injunction or order for specific performance and damages for “breach of any such provision” but contained no reciprocal term.

Another provision restricted the time period for bringing actions. It provided that any claim “arising out of or relating to” the franchise agreement or the parties’ relationship was “barred unless an action or proceeding is commenced within one (1) year from the date on which” a party “knew or should have known in the exercise of reas-

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onable diligence of the facts giving rise to such claims.”

The franchise agreement also contained a choice of law provision. It established that the state law governing the agreement and the relationship between the parties was “the internal laws of the State of New York *without regard to its conflicts of law principles.*” (Italics added.) The same provision further stated: “*No New York law regulating the sale of franchises or governing the franchise relationship including the New York Franchises Law ... and the regulations thereunder shall apply unless its jurisdictional requirements are met independently without reference to this Section.*” (Italics added.)

In addition to the arbitral forum selection provision, the agreement also had a separate judicial forum selection provision. It provided: “You agree that You *shall* institute any action and that We *may* institute any action against You which is not required to be arbitrated hereunder in any state or federal court of general jurisdiction in the County of Suffolk, New York, or the state court of general jurisdiction or the Federal District Court nearest Our executive office at the time such action is filed. You irrevocably submit to the jurisdiction of such courts and waive any objection ... to either the jurisdiction or venue of such courts .” (Italics added.)

A “California Appendix” to the franchise agreement (exhibit G) set forth a page of caveats. Regarding arbitration, the appendix provided: “The Franchise Agreement requires binding arbitration, the site of which is Suffolk County, New York, with each party bearing its own costs. These provisions may not be enforceable under California law.” It also stated: “The franchise agreement requires binding arbit-

ration. The arbitration will occur in New York with the costs being borne by the franchisee and franchisor. Prospective franchisees are encouraged to consult private legal counsel to determine the applicability of California and federal laws ... to any provisions of a franchise agreement restricting venue to a forum outside the State of California.”

*3 The “California Appendix” specified certain contract provisions that “may not be enforceable under California law,” including the provision requiring binding arbitration in Suffolk County, New York and the choice of law provision requiring application of New York law. The appendix stated that [California Business and Professions Code sections 20000 through 20043](#) (California Franchise Relations Act), governing termination and nonrenewal of a franchise, controlled over any inconsistent contract provisions.

The “California Appendix” explicitly stated: “[California Corporation\[s\] Code 31512](#) voids a waiver of your rights under the Franchise Investment Law ([California Corporations Code 31000 through 31516](#)). [Business and Professions Code 20010](#) voids a waiver of your rights under the Franchise Relations Act ([Business and Professions Code 20000 through 20043](#)).”

Respondent McGuire signed the franchise agreement on behalf of McGuire Ventures. He also signed a Guaranty and Assumption of Obligations (exhibit E to the agreement) that made him a “primary obligor.”

Respondents opposed arbitration on the grounds that the arbitration clause was unconscionable, both procedurally and substantively, and sought to circumvent the California Franchise Investment Law ([Corp.Code, § 31000 et seq.](#)). In opposition

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to the motion to compel arbitration, respondents filed the declaration of respondent Paul McGuire. McGuire stated that he “received some marketing material and a Uniform Franchise Offering Circular (‘UFOC’) from defendant Coolbrands Smoothies Franchise, LLC on or about April of 2004.” According to McGuire’s declaration, the offering circular stated that “New York law and venue provisions may be superseded by state laws,” “California franchise laws would supersede the franchise agreement,” and state law would control. McGuire’s expectation based on the offering circular was that any dispute would be resolved in California, none of the defendants informed him that “they would insist on any disputes being heard in New York,” and his understanding was that he “had not agreed to have any claim heard in New York.”

The offering circular, attached as an exhibit to McGuire’s declaration, contained a special page “FOR USE ONLY IN THE STATE OF CALIFORNIA.” It specified several risk factors in bold print, including the following: “1. THE FRANCHISE AGREEMENT PERMITS THE FRANCHISEE TO SUE OR ARBITRATE WITH U.S. ONLY IN NEW YORK. OUT OF STATE ARBITRATION AND/OR LITIGATION MAY FORCE YOU TO ACCEPT A LESS FAVORABLE SETTLEMENT FOR DISPUTES. IT MAY ALSO COST MORE TO SUE AND/OR ARBITRATE WITH U.S. IN NEW YORK THAN IN YOUR HOME STATE. THIS PROVISION MAY BE SUPERSEDED BY CERTAIN STATE LAWS. [¶] 2. THE FRANCHISE AGREEMENT STATES THAT NEW YORK STATE LAW GOVERNS THE AGREEMENT. THIS LAW MAY NOT PROVIDE THE SAME PROTECTIONS AND BENEFITS AS LOCAL

LAW. YOU MAY WANT TO COMPARE THESE LAWS. THIS PROVISION MAY BE SUPERSEDED BY CERTAIN STATE LAWS.”

*4 In his declaration, McGuire further indicated that he purchased a franchise from Coolbrands on or about January 20, 2005, and the franchise was to be operated in the Oakridge Mall in San Jose, California. He stated that the franchise agreement was “presented to [him] as a form agreement which [he] had to sign as is in order to become a Coolbrands Smoothies franchisee.” He had “no prior experience in the ice cream or smoothies business.”

On February 21, 2006, the United States Supreme Court decided *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440 [126 S.Ct. 1204], which held that challenges to the validity of a contract as a whole, as opposed to challenges directed at only the validity of an arbitration provision, are issues to be resolved in arbitration where a contract subject to the FAA contains a valid and enforceable agreement to arbitrate.

On April 6, 2006, the court denied the petition to compel arbitration without explaining the basis for its decision.

B. *The Federal Arbitration Act*

The FAA requires enforcement of arbitration provisions in contracts involving interstate commerce. Section 2 of the Act provides: “A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an exist-

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ing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” (9 U.S.C., § 2.)

“Section 2 is the primary substantive provision of the Act ... and is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.” (*Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.* (1983) 460 U.S. 1, 24 [103 S.Ct. 927].) “The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.” (*Ibid.*) “The rule of enforceability established by section 2 of the USAA preempts any contrary state law and is binding on state courts as well as federal. (*Southland Corp. v. Keating* (1984) 465 U.S. 1, 10-16....)” (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 405.)

In *Southland Corp. v. Keating* (1984) 465 U.S. 1, 10 [104 S.Ct. 852], the United States Supreme Court concluded that Corporations Code section 31512, a provision of California's Franchise Investment law that the California Supreme Court had interpreted as rendering unenforceable arbitration provisions in a franchise agreement, impermissibly conflicted with section of 2 of the FAA in violation of the federal Constitution's supremacy clause. The United States Supreme Court stated: “We agree, of course, that a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement. We conclude, however, that the defense to arbitration found in the California

Franchise Investment Law is not a ground that exists at law or in equity ‘for the revocation of *any* contract’ but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law.” (*Id.* at p. 16.) It rejected the idea that states could select areas of special protection that would not be subject to the FAA. (*Ibid.*)

FN2. Corporations Code section 31512 states: “Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void.”

*5 Subsequently, in another case, the United States Supreme Court explained: “[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. See *Prima Paint, supra*, 388 U.S., at 404, 87 S.Ct., at 1806; *Southland Corp. v. Keating*, 465 U.S., at 16-17, n. 11, 104 S.Ct., at 861, n. 11. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable....” (*Perry v. Thomas* (1987) 482 U.S. 483, 492, fn. 9 [107 S.Ct. 2520].)

Under the FAA, courts retain the authority to decide limited “gateway” issues unless the parties provide otherwise. (See *Green*

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Tree Financial Corp. v. Bazzle (2003) 539 U.S. 444, 452-453 [123 S.Ct. 2402].) Examples of “gateway” matters are whether “parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy. [Citations.]” (*Id.* at p. 452.) “The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the ‘question of arbitrability,’ is ‘an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.’ *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (emphasis added); *First Options, supra*, at 944, 115 S.Ct. 1920.” (*Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 83 [123 S.Ct. 588].)

Issues related to contract interpretation, however, are ordinarily to be decided by an arbitrator where the parties clearly agree to arbitrate and issues fall within the scope of the arbitration agreement. Thus, in *Green Tree Financial Corp. v. Bazzle, supra*, 539 U.S. 444, which involved loan contracts containing arbitration clauses that were silent as to the permissibility of class arbitration, the United States Supreme Court concluded that state courts had overstepped because “[u]nder the terms of the parties’ contracts, the question-whether the agreement forbids class arbitration [was] for the arbitrator to decide.” (*Id.* at p. 451.) It explained that “the relevant question here is what *kind of arbitration proceeding* the parties agreed to” (*id.* at p. 452), and that question “concerns contract interpretation and arbitration procedures,” which “[a]rbitrators are well situated to answer....” (*Id.* at p. 453.) The United States Supreme Court vacated the judgment of the state high court, which had held the contracts permitted class arbitration (*id.* at p.

447), and remanded to allow the arbitrators to “decide the question of contract interpretation-thereby enforcing the parties’ arbitration agreements according to their terms. 9 U.S.C. § 2; *Volt, supra*, at 478-479, 109 S.Ct. 1248.” (*Id.* at p. 454.)

*6 Recently, in *Buckeye Check Cashing, Inc. v. Cardegna, supra*, 126 S.Ct. 1204 (*Buckeye*), the Supreme Court clarified its much earlier decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395 [87 S.Ct. 1801] (*Prima Paint*). In *Prima Paint*, the court had determined that federal courts may not delay the granting of a request for a stay of court action to allow arbitration under section 3 of the FAA for the purpose of adjudicating a claim of fraud in the inducement of the contract generally. (*Id.* at pp. 403-404, 406-407.) The federal courts may adjudicate only a claim of fraud in the inducement of the arbitration clause itself. (*Id.* at pp. 403-404.) The court held in *Prima Paint* that “in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.” (*Id.* at p. 404.)

In *Buckeye*, the Supreme Court stated that its *Prima Paint* holding was not limited to federal courts and was more than a federal court rule of procedure. (*Buckeye, supra*, 126 S.Ct. at pp. 1209-1210.) *Buckeye* was a state class action. (*Id.* at p. 1207.) Borrowers had argued that contracts, which included an arbitration provision, were invalid because they contained a usurious finance charge. (*Ibid.*) The court declared that “regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.” (*Id.*

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at p. 1210.) Challenges to the validity of a control as a whole include challenges “either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract’s provisions renders the whole contract invalid.” (*Id.* at p. 1208.)

The *Buckeye* holding was based on three principles applicable under the Federal Arbitration Act: “First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts.” (*Buckeye, supra*, 126 S.Ct. at p. 1209.)

C. Unconscionability

Appellants maintain that respondents failed to demonstrate any unconscionability with respect to the franchise agreement’s arbitration provisions and the arbitrators must decide the validity and scope of nonarbitral provisions of the franchise agreement. Respondents contend that the trial court’s order denying enforcement of the arbitration provisions are both procedurally and substantively unconscionable. We conclude that the trial court did not abuse its discretion in refusing to compel arbitration.

1. General Principles of Unconscionability

*7 “Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion. ([*Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807,] 817-819.) ... If the contract is adhesive, the court must

then determine whether ‘other factors are present which, under established legal rules-legislative or judicial-operate to render it [unenforceable].’ (*Scissor-Tail, supra*, at p. 820, fn. omitted.) ‘Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or “adhering” party will not be enforced against him. [Citations.] The second-a principle of equity applicable to all contracts generally-is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or “unconscionable.” ‘ (*Ibid.*)” (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113.)

“An unconscionable contract ordinarily involves both a procedural and a substantive element: (1) oppression or surprise due to unequal bargaining power, and (2) overly harsh or one-sided results. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114....)” (*Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 291.) “ ‘The prevailing view is that [procedural and substantive unconscionability] must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability .’ (*Stirlen v. Supercuts, Inc., supra*, 51 Cal.App.4th at p. 1533 (*Stirlen*).) But they need not be present in the same degree. ‘Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.’ (15 Williston on Contracts

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(3d ed. 1972) § 1763A, pp. 226-227; see also *A & M Produce Co.*, *supra*, 135 Cal.App.3d at p. 487.) In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.” (*Armendariz v. Foundation Health Psychcare Services, Inc.*, *supra*, 24 Cal.4th at p. 114.)

Civil Code section 1670.5 “codified the principle that a court can refuse to enforce an unconscionable provision in a contract. (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 925....)” (*Armendariz v. Foundation Health Psychcare Services, Inc.*, *supra*, 24 Cal.4th at p. 114.) Civil Code section 1670.5 provides: “(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. [¶] (b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.” Civil Code section section 1670.5, subdivision (b), reflects “legislative recognition that a claim of unconscionability often cannot be determined merely by examining the face of the contract, but will require inquiry into its setting, purpose, and effect.” (*Perdue v. Crocker National Bank*, *supra*, 38 Cal.3d at p. 926; see Legis. Com. com.-Assem.1979 Addition foll. 9 West’s Civil Code (1985 ed.) § 1670.5, p. 493 [“Subdivision (b) makes it clear that it is

proper for the court to hear evidence upon these questions”]; see also *Rest.2d Contracts*, § 208, com. a, p. 107 [“The determination that a contract or term is or is not unconscionable is made in light of its setting, purpose, effect”], com. f, p. 111 [“A determination that a contract or term is unconscionable is made by the court in the light of all the material facts”].)

*8 “Where, as here, the trial court rules on the question of unconscionability based on declarations that contain no meaningful factual disputes, we review the trial court’s ruling de novo. (*Flores v. Transamerica HomeFirst, Inc.*, [93 Cal.App.4th] at p. 851; *Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 1670 ...; *CPI Builders, Inc. v. Impco Technologies, Inc.* (2001) 94 Cal.App.4th 1167, 1171-1172....)” (*Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238, 1250, fn. omitted; see *Rest.2d Contracts*, § 208, com. f., p. 111 [“Incidental findings of fact are made by the court rather than by a jury, but are accorded the usual weight given to such findings of fact in appellate review. An appellate court will also consider whether proper standards were applied”].)

2. Procedural Unconscionability

“The procedural element of an unconscionable contract generally takes the form of a contract of adhesion....” (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071.) “The term contract of adhesion ‘signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.’ (*Neal v. State Farm Ins. Co.* (1961) 188 Cal.App.2d 690, 694 ...; *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 817....)” (*Perdue v.*

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Crocker National Bank, supra, 38 Cal.3d at pp. 924-925.)

The adhesive nature of a contract or contractual term will not alone, however, render it unenforceable as unconscionable. (See *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 819-820.) For example, the California Supreme Court determined that an arbitration clause in an adhesive franchise agreement was not unenforceable on the ground it was part of an adhesion contract because “provision for arbitration in a commercial context is quite common, and reasonably to be anticipated.” (*Keating v. Superior Court* (1982) 31 Cal.3d 584, 595, overruled on other grounds in *Southland Corp. v. Keating, supra*, 465 U.S. at p. 17.) The California Supreme Court also explained in *Keating, supra*, 31 Cal.3d at page 595: “In the absence of some special element of unfair advantage, ... arbitration is generally considered to be a mutually advantageous process, providing for resolution of disputes in a presumptively less costly, more expeditious, and more private manner by an impartial person or persons typically selected by the parties themselves. [Citation.] For these reasons, the fact that provision for arbitration is contained in a contract of adhesion will not, of itself, render the provision unenforceable. (*Graham v. Scissor-Tail, Inc., supra*, 28 Cal.3d at pp. 819-820.)” (*Ibid.*)

Another aspect of procedural unconscionability is unfair surprise. “ ‘Surprise’ involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms. [Citations.]” (*A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486.) “[U]se of fine print or incomprehensible legalese may reflect procedural unfairness in

that it takes advantage of or surprises the victim of the clause....” (8 *Williston on Contracts* (4th ed.) § 18:10.) “Procedural unconscionability refers to the process by which an agreement is reached and the form of the agreement, including use in the agreement of fine print or boilerplate or inconspicuous language, or the use of convoluted or unclear wording....” (21 *Williston on Contracts* (4th ed.) § 57:15.)

*9 In the present case, there is no real dispute the franchise agreement as a whole, including its arbitration provisions, was an adhesion contract. The franchise agreement was a form agreement, which respondent McGuire had to sign “as is” to become a franchisee. Appellants concede on appeal that the agreement was “a standard form contract offered to all franchisees....” The circumstances suggest that McGuire had little or no bargaining power and no meaningful choice regarding the contract's provisions if he wished to become a Coolbrands franchisee.

Although “courts may enforce reasonable and fair arbitration provisions contained in contracts of adhesion” (*Dryer v. Los Angeles Rams* (1985) 40 Cal.3d 406, 416, fn. 9), “a contract or provision which does not fall within the reasonable expectations of the weaker or ‘adhering’ party will not be enforced against him. [Citations.]” (*Graham v. Scissor-Tail, Inc., supra*, 28 Cal.3d at p. 820.) The caveats in the offering circular's special California page and the franchise agreement's California Appendix could reasonably be construed by a franchisee as suggesting that certain terms of the agreement, including the agreement to arbitrate in New York, would not be enforced against California franchisees. Respondent McGuire indicated that his expectation, based on what he read, was that

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any arbitration would take place in California and defendants had never indicated otherwise. Under these circumstances, it appears that judicial enforcement of arbitration in a New York forum would produce unfair surprise. (Cf. *Nagrampa v. Mail-Coups, Inc.* (9th Cir.2006) 469 F.3d 1257, 1291-1292 [California franchisee “had no reasonable expectation that arbitration would take place in Boston” where the offering circular stated that forum selection provision “may not be enforceable under California law” and there was no evidence that the franchisor ever indicated that it would insist upon an out-of-state forum at the time franchise agreement was entered]; cf. also *Alphagraphics Franchising, Inc. v. Whaler Graphics, Inc.* (D.Ariz.1993) 840 F.Supp. 708, 709, 711 [federal district court refused to enforce arbitration forum selection clause requiring arbitration in Arizona where franchisor notified the prospective franchisees, in accordance with Michigan Franchise Investment Law, that any provision in the franchise documents requiring that arbitration or litigation be conducted outside Michigan was void and unenforceable but franchisor did not inform prospective franchisees that it intended to insist on enforcement of the forum selection clause and rely on a preemption defense].)

3. *Substantive Unconscionability*

“Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided.” (*Little v. Auto Stiegler, Inc.*, *supra*, 29 Cal.4th at p. 1071.) “One such form, as in *Armendariz*, is the arbitration agreement's lack of a “modicum of bilaterality,” “wherein the employee's claims against the employer, but not the employer's claims against the employee, are subject to arbitration. (*Ar-*

منداريز, supra, 24 Cal.4th at p. 119.) Another kind of substantively unconscionable provision occurs when the party imposing arbitration mandates a post-arbitration proceeding, either judicial or arbitral, wholly or largely to its benefit at the expense of the party on which the arbitration is imposed.” (*Id.* at pp. 1071-1072.)

*10 The arbitration provisions at issue in this case are ostensibly bilateral, although the same cannot be said of all the contract's provisions. In our view, the question of facial bilaterality of adhesive arbitration provisions, however, is only the beginning of an unconscionability analysis. Courts should also scrutinize whether adhesive arbitration provisions, which are seemingly bilateral, actually operate one-sidedly against the weaker party.

a. *Clause Precluding Arbitration Award of Exemplary or Punitive Damages*

Generally, “punitive or exemplary damages, which are designed to punish and deter statutorily defined types of wrongful conduct, are available only in actions ‘for breach of an obligation *not* arising from contract.’ (Civ.Code, § 3294, subd. (a)...)” In the absence of an independent tort, punitive damages may not be awarded for breach of contract ‘even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious.’ [Citations.]” (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 516; cf. *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 43 [“tort remedies are available for a breach of the covenant [of good faith and fair dealing] in cases involving insurance policies”].) Lawsuits brought by franchisors against franchisees are “more likely to sound in the damages-limited field of

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contract than in tort.” (*Woodside Homes of Cal., Inc. v. Superior Court* (2003) 107 Cal.App.4th 723, 734, fn. 16; but cf. Civ.Code, § 3426.3 [California's Uniform Trade Secrets Act provides for a limited award of exemplary damages for willful and malicious misappropriation of trade secrets].)

Exemplary or punitive damages are ordinarily recoverable where a party is fraudulently induced to enter a contract. (See *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1238-1239; *Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 996.) Civil Code section 3294 establishes: “In an action for *the breach of an obligation not arising from contract*, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.” (Civ.Code, § 3294, subd. (a), italics added.) Under California law, franchisees would be able to recover exemplary or punitive damages in a fraud action against a franchisor that made material misrepresentations inducing them to enter a franchise agreement on a proper showing of oppression, fraud, or malice. (Civ.Code, § 3294; cf. *Hartman v. Shell Oil Co.* (1977) 68 Cal.App.3d 240 [punitive damage award where gas station operator “induced to purchase his station and enter a dealership agreement by the false representations of an oil company employee that the company would expand his premises or move him into a nearby larger station”].)

*11 The California Legislature has recognized the widespread problem of fran-

chisors selling franchises without providing “full and complete information” to prospective franchisees and enacted the California's Franchise Investment Law to prevent fraud. (See Corp.Code, § 31001.) California's Franchise Investment Law (Corp.Code, § 31000, et seq.) creates a statutory right to damages for certain violations of provisions intended to protect California franchisees.

Corporations Code section 31300 states: “Any person who offers or sells a franchise in violation of Section 31101 [requirements for exemption of franchisor from statutory provisions], 31110 [necessity for registration], 31119 [delivery of offering circular and proposed agreements to franchisee], 31200 [material misrepresentation or omission of fact in document filed with commissioner], or 31202 [material misrepresentation or omission of fact in disclosures to prospective franchisees required for exemption], or in violation of any provision of this division that provides an exemption from the provisions of Chapter 2 (commencing with Section 31110) of Part 2 or any portions of Part 2, shall be liable to the franchisee or subfranchisor, who may sue for damages caused thereby, and if the violation is willful, the franchisee may also sue for rescission, unless, in the case of a violation of Section 31200 or 31202, the defendant proves that the plaintiff knew the facts concerning the untruth or omission, or that the defendant exercised reasonable care and did not know, or, if he or she had exercised reasonable care, would not have known, of the untruth or omission.”

Corporations Code section 31201 further provides: “It is unlawful for any person to offer or sell a franchise in this state by means of any written or oral communica-

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tion not enumerated in Section 31200 which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.” [Corporations Code section 31301](#) provides: “Any person who violates [Section 31201](#) shall be liable to any person (not knowing or having cause to believe that such statement was false or misleading) who, while relying upon such statement shall have purchased a franchise, for damages, unless the defendant proves that the plaintiff knew the facts concerning the untruth or omission or that the defendant exercised reasonable care and did not know, (or if he had exercised reasonable care would not have known) of the untruth or omission.” Nothing in the Franchise Investment Act expressly restricts damages recoverable for fraudulent inducement to compensatory damages. (Cf. [Spahn v. Guild Industries Corp.](#) (1979) 94 Cal.App.3d 143, 159 [punitive damages award upheld in action for fraud and violation of Franchise Investment Law in case involving fraudulent sale of franchises and liability under [Corporations Code section 31301](#)].)

***12** The statutory obligations established by the Franchise Investment Act rest upon franchisors, not franchisees. While the franchise agreement's arbitration provision precluding the arbitrators from awarding exemplary or punitive damages is seemingly bilateral on its face, it is likely to operate to the one-sided benefit of the franchisor and insulate it from full liability for fraudulent inducement of contract and violation of [Corporations Code section 31201](#) of California's Franchise Investment Law.

b. *Ban on Class and Consolidated Arbitra-*

tion

The United States Supreme Court has recognized that class or consolidated arbitration can be consistent with the FAA but concluded that arbitrators, not the courts, decide whether a particular arbitration agreement allows class arbitration. ([Green Tree Financial Corp. v. Bazzle](#), *supra*, 539 U.S. at p. 451.) The Coolbrands franchise agreement's arbitration provisions unambiguously forbid arbitration on a class-wide basis and consolidation of arbitration proceedings. Thus, unless determined to be unconscionable by this court, the restriction certainly would be enforced in arbitration. Although “this case does not involve a class or consolidated action,” respondents argue that the ban is “evidence of CoolBrands imposing arbitration on the franchisee as an inferior forum.”

The California Supreme Court has acknowledged that all class action waivers are not necessarily unconscionable but may be in a consumer contract of adhesion. ([Discover Bank v. Superior Court](#) (2005) 36 Cal.4th 148, 162.) The Supreme Court stated: “[W]hen the [class action] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party ‘from responsibility for [its] own fraud, or willful injury to the person or property of another.’ (Civ.Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law

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and should not be enforced.” (*Id.* at pp. 162-163.) The California Supreme Court reversed the judgment of the appellate court, which had held that the FAA “preempts the state law rule that class arbitration waivers are unconscionable.” (*Id.* at pp. 153, 174.)

In *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, an appellate court found that a “no class action” provision in an agreement to arbitrate disputes arising from Discover credit card accounts was one-sided even though “styled as a mutual prohibition on representative or class actions....” (*Id.* at p. 1101.) The court reasoned: “[I]t is difficult to envision the circumstances under which the provision might negatively impact Discover, because credit card companies typically do not sue their customers in class action lawsuits. This provision is clearly meant to prevent customers, such as Szetela and those he seeks to represent, from seeking redress for relatively small amounts of money, such as the \$29 sought by Szetela. Fully aware that few customers will go to the time and trouble of suing in small claims court, Discover has instead sought to create for itself virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to its own rights.” (*Ibid.*) The appellate court ordered the trial court to vacate its order directing Szetela to arbitrate his claim on an individual basis and “to enter a new order striking the provision prohibiting representative or class actions from the arbitration clause.” (*Id.* at pp. 1097, 1102.)

*13 In *Ting v. AT & T* (9th Cir.2003) 319 F.3d 1126, the Ninth Circuit Court of Appeal considered a provision in AT & T's consumer services agreement provided to its residential, long-distance customers that

banned all class-wide dispute resolution. (*Id.* at pp. 1133-1134, fn. omitted.) Citing *Szetela*, the court upheld “the district court's conclusion that the class-action ban violates California's unconscionability law.” (*Id.* at p. 1150, fn. omitted.) The court observed: “It is not only difficult to imagine AT & T bringing a class action against its own customers, but AT & T fails to allege that it has ever or would ever do so.” (*Ibid.*) In *Ingle v. Circuit City Stores, Inc.* (9th Cir.2003) 328 F.3d 1165, 1175-1176, the Ninth Circuit, citing *Szetela*, concluded that a provision of the arbitration agreement between Circuit City and an employee that prohibited consolidated and class arbitration was substantively unconscionable because it “operate[d] solely to the advantage of Circuit City” and insulated Circuit City “from class proceedings while conferring no corresponding benefit to its employees in return.”

In *Independent Ass'n of Mailbox Center Owners, Inc. v. Superior Court* (2005) 133 Cal.App.4th 396, a California appellate court concluded that bans on group arbitration in the franchise agreements under consideration were unconscionable. (*Id.* at pp. 410-411.) It concluded that “franchise agreements, in some cases, have the same qualities of adhesion contracts as do certain consumer contracts, such as were discussed in *Discover Bank, supra*, 36 Cal.4th 148, with regard to the availability of group arbitration.” (*Id.* at p. 410.) The appellate court noted that the “franchise agreements also resemble employment agreements to the extent that the franchisees' livelihoods are involved....” (*Ibid.*) The court ordered the superior court to, among other things, vacate its order denying the franchisees' motion to consolidate the arbitrations, to strike “as unconscionable those provisions of the subject franchise agreements' arbit-

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ration clauses ... that prohibit representative or class actions from being handled in the arbitration forum,” and to grant the motion to consolidate. (*Id.* at p. 417.)

We agree that a prohibition against consolidated or class proceedings in an adhesive franchise agreement is inherently one-sided for the reason that any collective proceeding would involve multiple franchisees joining together against a single franchisor and not vice versa. As the California Supreme Court has recognized: “Controversies involving widely used contracts of adhesion present ideal cases for class adjudication; the contracts are uniform, the same principles of interpretation apply to each contract, and all members of the class will share a common interest in the interpretation of an agreement to which each is a party.” (*La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 877 .) “Denial of a class action in cases where it is appropriate may have the effect of allowing an unscrupulous wrongdoer to ‘retain[] the benefits of its wrongful conduct.’” (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 808....)” (*Keating v. Superior Court*, *supra*, 31 Cal.3d at p. 609, fn. omitted.)

*14 We conclude that in the context of adhesive contract involving franchisees, a vulnerable group widely recognized as needing protection,^{FN3} an inherently one-sided provision barring class or consolidated proceedings, whether in arbitration or in the courts, is unconscionable under California law in the absence of evidence establishing otherwise. This state-law principle is not predicated on the fact that a contract to arbitrate is at issue.

FN3. “Franchising involves the unequal bargaining power of franchisors and franchisees and therefore carries within itself the seeds

of abuse. Before the relationship is established, abuse is threatened by the franchisor’s use of contracts of adhesion presented on a take-it-or-leave-it basis. [Citations.] Indeed such contracts are sometimes so one-sided, with all the obligations on the franchisee and none on the franchisor, as not to be legally enforceable. [Citation.]” (*E.S. Bills, Inc. v. Tzucanow* (1985) 38 Cal.3d 824, 835-836, conc. opn. of Mosk, J.) The California Legislature had recognized the need to protect California franchisees. (See *Corp.Code*, § 31000 *et seq.* [Franchise Investment Law]; *Bus. & Prof.Code*, § 20000 [California Franchise Relations Act].)

c. Forum Selection

California generally upholds a contractually selected forum. In *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, the California Supreme Court, after recognizing the modern trend favoring enforceability of forum selection clauses, stated: “No satisfying reason of public policy has been suggested why enforcement should be denied a forum selection clause appearing in a contract entered into freely and voluntarily by parties who have negotiated at arm’s length. For the foregoing reasons, we conclude that forum selection clauses are valid and may be given effect, in the court’s discretion and in the absence of a showing that enforcement of such a clause would be unreasonable.” (*Id.* at pp. 495-496.)

The United States Supreme Court has observed that “[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that

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posits not only the situs of suit but also the procedure to be used in resolving the dispute.” (*Scherk v. Alberto-Culver Co.* (1974) 417 U.S. 506, 519 [94 S.Ct. 2449].) In light of the supremacy clause of the federal Constitution (U.S. Const., art. VI, cl.2), the FAA presumably precludes California from conditioning enforcement of arbitration agreements subject to the Act on the designation of California as the arbitral forum. (See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* (1989) 489 U.S. 468, 478 [109 S.Ct. 1248] [FAA “requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms”]; cf. *Bradley v. Harris Research, Inc.* (9th Cir.2001) 275 F.3d 884 [holding that FAA preempts Business and Professions Code section 20040.5, which voids provision in a franchise agreement restricting venue to a forum outside this state]; *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 684, 688 [116 S.Ct. 1652] [FAA preempted Montana law that invalidated an arbitration provision unless the first page of the contract contained a notice stating, in typed underlined capital letters, that the contract was subject to arbitration].)

Respondents nevertheless argue that the arbitral forum selection clause is substantively unconscionable because CoolBrands “seeks to negate the California Franchise Investment Law, an unwaivable statute, via tandem New York forum selection and choice of law provisions.” While we agree that the choice of law provision appears to be part of a concerted effort to circumvent protective California law, *Buckeye* has made clear that “as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.” (*Buckeye, supra*, 126 S.Ct. at p.

1209.) Under United States Supreme Court decisions any challenge to the general validity of the contract or contract terms other than those concerning arbitration, regardless whether meritorious, must go first to the arbitrator if the arbitration provisions themselves are valid and enforceable. (See *Buckeye, supra*, 126 S.Ct. at p. 1210.)

*15 The two California cases cited by respondents in regard to enforcement of the arbitral forum selection clause, *America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, and *Hall v. Superior Court* (1983) 150 Cal.App.3d 411, predate *Buckeye*. Moreover, although the appellate courts in those cases refused to enforce contractual forum selection clauses selecting out-of-state forums after considering the joint unconscionable effect of those clauses and separate contractual choice of law provisions, neither case involved an agreement to arbitrate subject to the FAA or its principle of severability.

Nagrampa v. MailCoups, Inc., supra, 469 F.3d 1257, another case cited by respondents, however, is relevant here. In that case, the Ninth Circuit Court of Appeals understood that if “the challenge is not to the arbitration provision itself but, rather, to the validity of the entire contract, then the issue of the contract's validity should be considered by an arbitrator in the first instance. *Buckeye*, 126 S.Ct. at 1208-09.” (*Id.* at p. 1277.) The Ninth Circuit concluded that the forum selection clause in the arbitration provision was procedurally unconscionable because of misleading language in the franchisor's offering circular (*id.* at pp. 1290-1292). It further determined that the arbitral forum selection clause was substantively unconscionable because the adhesive “MailCoups contract would require a one-woman franchisee who oper-

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ates from her home to fly across the country to arbitrate a contract signed and performed in California” even though such a trip was “prohibitively costly” and precluded her “participating in the proceeding.” (*Id.* at pp. 1289-1290.) While no specific evidence of cost was adduced in this case, it is plainly more expensive, time-consuming, and inconvenient for respondent McGuire, a California franchisee, to travel across the country to New York to resolve disputes concerning a California franchise than to resolve them in California and the added burdens may operate as a deterrent to his pursuit of legitimate claims.

The Ninth Circuit in *Nagrampa* also voiced concern that the forum selection clause in the arbitration provision could force the franchisee to forgo public rights provided by statute “by imposing unreasonable costs to arbitrate her claims in Massachusetts” (*id.* at p. 1292) and “may contravene California public policy to the extent that they impede the exercise of Nagrampa’s unwaivable statutory rights.” (*Id.* at p. 1293.) As the Restatement Second of Contracts recognizes, the policy against unconscionable contracts or terms “overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy.” (*Rest.2d Contracts*, § 208, com. a, p. 107.) As the California Supreme Court observed in *Discover Bank v. Superior Court*, *supra*, 36 Cal.4th at page 161, class action waivers found in adhesive contracts may “be substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy.”

***16** The public policy considerations prompting the enactment of [Business and Professions Code section 20040.5](#) inform our unconscionability analysis even if its

blanket language is preempted by the FAA.

FN4 The underlying purpose of the section was to “ensure that California franchisees are not unfairly forced to litigate claims arising out of their franchise agreement in an out-of-state court at considerable expense, inconvenience, and possible prejudice to the California franchisee.” (Sen. Floor Analysis of Assem. Bill No.1920 (1993-1994 Reg. Sess.) as amended Aug. 12, 1994.) The legislative history indicates that the bill was considered “necessary” by its author “to ensure that California franchisees are permitted to bring legal actions against a franchisor in the jurisdiction where the franchise currently is located” because “many franchise contracts contain clauses requiring franchisees to travel outside the jurisdiction where the franchise is located in order resolve disputes” and such forum provisions “put the California franchisee at a great disadvantage in pursuing meritorious actions against a franchisor.” (Assem.3d reading analysis of Assem. Bill No.1920 (1993-1994 Reg. Sess.) as amended Jan. 3, 1994.)

FN4. [Business and Professions Code section 20040.5](#) provides: “A provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state.” The Ninth Circuit has held that this section is preempted by the FAA. (*Bradley v. Harris Research Inc.*, *supra*, 275 F.3d at pp. 889-890, 892; *OPE Intern. LP v. Chet Morrison Contractors, Inc.* (5th Cir.2001) 258 F.3d 443, 447-448 [similar Louisiana statute preempted]; *KKW Enterprises, Inc. v. Gloria Jean's Gourmet Coffees*

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Franchising Corp. (1st Cir.1999)
184 F.3d 42, 49-52 [similar Rhode
Island statute preempted].)

In this particular case, we conclude that the adhesive arbitral forum selection clause is unconscionable given the franchisee's showing of procedural oppression and unfair surprise coupled with the implicit burdens of arbitrating claims concerning a California franchise in New York.

d. Provisions Not Concerning Arbitration

We agree with appellants that, under *Buckeye*, challenges to the validity of the contract as whole and, impliedly, to contractual provisions not concerning arbitration must be resolved in arbitration if there is a valid and enforceable agreement to arbitrate. (See *Buckeye*, *supra*, 126 S.Ct. at p. 1209.) Our concern is whether the arbitration provisions are unconscionable.

4. No Severance of Unconscionable Clauses

We have concluded that several aspects of the arbitration agreement embedded in the franchise agreement were unconscionable. The final question is whether the trial court should have severed the unconscionable portions and enforced the arbitration agreement without the offending clauses. (See *Civ.Code*, § 1670.5.) We recognize that the strong federal policy requiring enforcement of arbitration agreements “in accordance with their terms” (See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, *supra*, 489 U.S. at p. 478) is a significant factor weighing in favor of the severance approach. We also are cognizant that, under California law, “an arbitration agreement permeated by unconscionability” properly

may be found to be unenforceable in its entirety. (*Armendariz v. Foundation Health Psychcare Services, Inc.*, *supra*, 24 Cal.4th at pp. 126-127.)

The decision whether to sever unconscionable clauses and enforce the remaining arbitration agreement or to find the arbitration agreement unenforceable rests within the sound discretion of the trial court. (See *Armendariz v. Foundation Health Psychcare Services, Inc.*, *supra*, 24 Cal.4th at p. 122.) “The overarching inquiry is whether “ ‘the interests of justice ... would be furthered” ‘ by severance. [Citation.]” (*Armendariz v. Foundation Health Psychcare Services, Inc.*, *supra*, 24 Cal.4th at p. 124.) “Although precise definition is difficult, it is generally accepted that the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered. [Citations.]” (*In re Marriage of Connolly* (1979) 23 Cal.3d 590, 598.)

*17 In *Armendariz v. Foundation Health Psychcare Services, Inc.*, *supra*, 24 Cal.4th 83, the California Supreme Court concluded that “two factors weigh [ed] against severance of the unlawful provisions” in a mandatory employment arbitration agreement and enforcement of the remaining agreement. (*Id.* at p. 124.) It explained: “First, the arbitration agreement contains more than one unlawful provision; it has both an unlawful damages provision and an unconscionably unilateral arbitration clause. Such multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage. In other words, given the multiple unlawful provisions, the trial court did not abuse its discretion in concluding that the arbitration

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agreement is permeated by an unlawful purpose. [Citations.]” (*Id.* at p. 124, fn. omitted.) The court declared that “an arbitration agreement permeated by unconscionability, or one that contains unconscionable aspects that cannot be cured by severance, restriction, or duly authorized reformation, should not be enforced.” (*Id.* at p. 126 .)

In this case, the arbitration provisions did not merely substitute an arbitral forum for a judicial forum for resolution of claims. There were “multiple defects,” including a ban on any arbitral award of punitive damages that we find particularly onerous. The trial court could reasonably conclude that the arbitration provisions were permeated by unconscionability warranting nonenforcement. This view would be only reinforced if the larger agreement were considered since the arbitration provisions appear part of a concerted effort by the franchisor to prospectively eliminate substantive rights under California law as indicated by the oppressive choice of law provision, the one-sided judicial forum selection and cost reimbursement provisions, and other provisions. Under these circumstances, the trial court did not abuse its discretion in implicitly concluding that justice would not be served by severing the unconscionable clauses in the arbitration provisions and enforcing the remainder.

FN5. In their brief, respondents request an award of attorney fees and costs on appeal. [California Rules of Court, rule 8.276](#) governs costs. [California Rules of Court, rule 3.1702](#) sets forth the procedure for claiming attorney's fees. Their request is premature.

The order denying the motion to compel arbitration is affirmed.

WE CONCUR: [RUSHING](#), P.J., and [PREMO](#), J.

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