

**THURSDAY AFTERNOON
FEBRUARY 26, 2004**



**California
Bar
Examination**

**Performance Test B
INSTRUCTIONS AND FILE**

IN RE PROGRESSIVE BUILDERS, INC.

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IN RE PROGRESSIVE BUILDERS, INC.

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States, and refers to the fictional State of Franklin, another one of the United States.
3. You will have two sets of materials with which to work: a **File** and a **Library**.
4. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the task you are to complete.
5. The **Library** contains the legal authorities needed to complete the task. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.
6. Your answer must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

**COYLE & COOPER, LLP
6620 DWIGHT PROMENADE
SPRING VALLEY, COLUMBIA 55510**

MEMORANDUM

To: Applicant
From: Vivian Coyle
Date: February 26, 2004
Subject: **In re Progressive Builders, Inc.**

We have been retained by John May, the owner of Progressive Builders, Inc. (PBI), a residential property construction company, to give ongoing legal advice.

In the course of my initial interview with Mr. May, a question arose about a form contract that PBI has used for the past several years outside of Columbia, and specifically about its provision for arbitration of disputes. Mr. May has tentatively agreed to build a house in Columbia for the restaurateur Pier Nittardi, and wants to use the arbitration provision here. I have made an appointment to discuss the matter with him tomorrow, and have told him that I will have a letter delivered to him beforehand to help guide our discussion.

Please prepare, for my signature, a pre-counseling letter for delivery to Mr. May, in which you do the following:

1. State your understanding of the goals that Mr. May seeks to achieve by using the arbitration provision.
2. In light of Mr. May's goals, discuss the likely consequences of keeping the arbitration provision as-is.

3. Identify and discuss possible steps that Mr. May might take when preparing to enter into any particular contractual relationship, such as that with Mr. Nittardi, in order to maximize the chances that the arbitration provision would be enforceable in Columbia as-is.

4. Identify and discuss possible changes Mr. May might make to the arbitration provision to most fully achieve his goals and to most likely render it enforceable in Columbia.

In preparing the pre-counseling letter, remember that Mr. May is a layperson. Although you must discuss the law, you should do so as clearly and concisely as possible, with a recognition that you are not writing to an attorney.

1 **TRANSCRIPT OF INTERVIEW OF JOHN MAY AND FRANK MAY**

2
3 **VIVIAN COYLE:** With your permission, I'll be tape-recording our conversation today?

4 **JOHN MAY:** Yes.

5 **FRANK MAY:** Of course.

6 **COYLE:** Let's back up and summarize how we got to where we are now. John, you were referred to our firm by Peter Padilla, of Padilla Construction Company, one of our clients.

7 **JOHN MAY:** That's right. I wanted to establish an ongoing relationship with a law firm in Columbia that had experience with the residential property construction industry. To avoid any legal problems in the first place, you understand, and then to avoid wasting time and money in educating some lawyer on an emergency basis in the event that some such problem should in fact arise.

8 **COYLE:** Prior to turning on the tape recorder, John, you and I executed the standard written retainer agreement provided by the Columbia State Bar.

9 **JOHN MAY:** Yes, we did.

10 **COYLE:** Why don't you state the gist of what you told me about PBI?

11 **JOHN MAY:** Sure. Frank and I started PBI here in Spring Valley in Columbia in the mid-1970's. We incorporated it here; we'd always been its sole shareholders, 50-50; I'd always been the President and he'd always been the Vice-President.

12 **COYLE:** And what does PBI do?

13 **JOHN MAY:** We're a construction company that does residential property. Earlier on, we did small repairs, a bit more complex than handyman work, but then we started to do remodels and eventually construction of new houses.

14 **FRANK MAY:** By the early 1980's, we had concentrated on major remodels and new construction. That's all we've done ever since.

15 **COYLE:** Just to clarify, you work only on residential property?

16 **FRANK MAY:** That's right. When we first started out, we took any job we could get, doing anything we could do, or thought we could do, whether it was residential or commercial or even industrial. But not since the early '80's.

17 **COYLE:** More clarification: You work on single-family residences or duplexes or apartments . . . ?

18 **FRANK MAY:** No, just single-family residences. Again, in the early days we did anything and everything. But since the early '80's, only residential, and only single-family.

19 **COYLE:** By the '90's, what had happened?

1 **JOHN MAY:** Politics were heating up here in Columbia and so were property values. Each of
2 us was married by then and had children. With the cost of housing, the only way we could
3 move up was to move out. And there was the State of Franklin right next door. It was
4 somewhat backward. But you could buy land for a song.
5 **COYLE:** And the politics?
6 **JOHN MAY:** Right. With the tightening of building requirements and environmental regulations
7 and assorted red tape, it took more time and money to get anything built. And that meant
8 that the business was becoming less profitable.
9 **FRANK MAY:** So, we both moved to Franklin with our families and moved the business there
10 too. Our first major jobs were building our own houses.
11 **COYLE:** Let me return to the politics. Didn't one of you mention something about what you
12 called the "litigation climate"?
13 **JOHN MAY:** I did. The "litigation atmosphere." When we started out in the mid-'70's, there
14 was relatively little suing and being sued. I'm not saying there were no disputes. In
15 construction, there're always disputes, especially when you're remodeling someone's house
16 or building him a new one. But we just worked things out, working with each other, the
17 builder and the owner. As the '90's rolled around, that had begun to change. At job sites
18 you'd hear, "See you in court," more often, I'll bet, than you hear it here at your law firm.
19 **COYLE:** Well . . .
20 **FRANK MAY:** John's exaggerating somewhat, but not much.
21 **COYLE:** But did you two have any bad experiences?
22 **JOHN MAY:** We didn't, but our friends in the business did, including Pete Padilla, who
23 recommended you to me. Look, our business is construction and not law. From what I've
24 heard, legal problems don't simply cost you a lot of money for lawyers. What's worse, they
25 can pull you away from work for a huge amount of time, and then distract you when you
26 finally get back to work and make you much less efficient.
27 **COYLE:** And so . . .
28 **JOHN MAY:** And so, we went to Franklin, where the atmosphere wasn't so sue-crazy, at
29 least not then.
30 **COYLE:** You went there in the early '90's?
31 **FRANK MAY:** That's right. Since then, we continued our concentration on major remodels
32 and new construction, but moved to the higher end as more and more wealthy people from
33 around the country have looked to Franklin for their second or third homes.
34 **COYLE:** What do you mean by "higher end"?
35 **JOHN MAY:** Contract prices of between \$450,000 and \$850,000 and up.

1 **COYLE:** Okay. Your work has been in Franklin exclusively?
2 **JOHN MAY:** Yes, except for a job or two now and again in Columbia, as a favor for a friend,
3 like the house we built two years ago for Pete Padilla's daughter Sophia, who is Frank's
4 goddaughter.
5 **COYLE:** What about your subcontractors, have you drawn them exclusively from Franklin?
6 **JOHN MAY:** Just about. We've always subcontracted as little work as possible. It's
7 sometimes been a pain to do a lot ourselves, but it's more of a pain to lose control of quality.
8 Of course, we still had to subcontract, particularly the specialty trades, like plasterers and
9 ornamental metal workers. Also foundation work, which demands heavy equipment and lots
10 of concrete and rebar. But all that's mostly local.
11 **COYLE:** But here you are in Columbia.
12 **JOHN MAY:** Right. Demand for our kind of high-end residential construction has been
13 heating up in this area in Columbia for quite some time. The rich folks who were flocking to
14 Franklin from around the country for their second or third homes have started flocking here
15 as well. Demand hasn't cooled down much in Franklin — but this business is cyclical. So I
16 decided to move back into the Columbia market.
17 **FRANK MAY:** Not me, though. John's moved back with his family. He's already set up an
18 office here in Spring Valley. I sold him my interest in PBI. With the money, I've started my
19 own business in Franklin, Frank May Construction, Inc.; I'm working out of our old office
20 there. Now PBI is all John's.
21 **COYLE:** That's about all of the background, isn't it? John, your move back led you to talk to
22 Pete Padilla, and Pete Padilla led you to our firm.
23 **JOHN MAY:** Right.
24 **COYLE:** And in the course of our conversation, you told me about some of your general
25 concerns.
26 **JOHN MAY:** Right again. I'm a builder, not a lawyer, and I need to avoid litigation and its
27 costs if I want to stay profitable. Even Franklin's become more sue-crazy. I just want to
28 make sure I don't make any missteps as I come back here.
29 **COYLE:** It was in this connection that you happened to mention your form contract and to
30 give me this copy of it. Right?
31 **JOHN MAY:** Yes. We've been lucky over the years. The contract's been part of our luck.
32 You might not believe it, but we've never been sued. The main reason is that we've done
33 very good work, and done it on time and within budget. We've also made sure that we fix
34 our own mistakes on our own initiative. We provide old-fashioned honest value, and that's

1 our reputation. Our contract is simple and uncluttered, and communicates the message of
2 honest value: It specifies what you pay and what we do. That's just about it.
3 **COYLE:** Plus arbitration.
4 **JOHN MAY:** Plus arbitration. That's important to me. I've just got to avoid the costs of
5 litigation, both the money costs and the time costs. I've seen how they've eaten up friends
6 of ours, builders whose businesses were more profitable than ours, until one or two big
7 lawsuits hit. What I also worry about are punitive damages. All the time I read about some
8 business that screws up a few thousand dollars' worth, and then has to pay a few million in
9 punitive damages. I couldn't survive that. You can't run a business with an open-ended risk
10 like that. You know I can't get insurance to cover that, don't you?
11 **COYLE:** Yes, I do. But let me ask you this question: Why do you specify arbitration by the
12 National Arbitration Organization ("NAO")?
13 **JOHN MAY:** Two reasons. One is that the NAO was founded in Columbia around the time
14 we started out in the mid-'70's, and we wanted to support a local business. The other is
15 that it focused on construction disputes.
16 **COYLE:** How much does the NAO charge for arbitration?
17 **JOHN MAY:** You know, I really don't know. Years ago, the first time I tinkered with the
18 arbitration provision and inserted the NAO clause, I think I had a list of charges. But we
19 never became involved in any arbitration with our clients. Whatever disputes arose, we
20 settled them ourselves, by give and take.
21 **COYLE:** Let me back up for a moment. You said you "tinkered" with the arbitration
22 provision. Did you actually draft the arbitration provision or any other part of the contract?
23 **JOHN MAY:** I wouldn't use the word "draft." Over the years, I've seen lots of contracts. I
24 just took shreds and patches and tried to sew them together to make a whole contract. And
25 I'd mend those pieces from time to time. Basically, over the years, I took out as many
26 words as I could, and simplified the ones that were left.
27 **COYLE:** Did you, or do you, negotiate with clients about the terms of the contract?
28 **JOHN MAY:** Well, there are all those blanks — you have to come to some agreement with
29 the client on the work to be done, the cost, the schedule, you know.
30 **COYLE:** I know. But in addition to filling in the blanks, do you negotiate with clients about the
31 terms of the contract?
32 **JOHN MAY:** Well, I don't know how to answer that. I can't remember anybody wanting to
33 change anything. If they get the work they want, at the price they want, on the schedule
34 they want, well, that's about it.
35 **COYLE:** What about the arbitration provision? It requires the client to arbitrate but not you.

1 **JOHN MAY:** No, I can't remember anybody wanting to change that either. I'd never thought
2 about whether I'd be required to arbitrate if I had a claim. The arbitration provision doesn't
3 say so, but I'd never thought about it.
4 **COYLE:** Before I forget, let me add that it's my understanding that your concerns about the
5 contract have not arisen in the abstract.
6 **JOHN MAY:** Sorry. That's right. I'm finalizing an agreement which I hope to wrap up in a
7 week or two, to build a house for Pier Nittardi in Bradfield, which is only a few miles away
8 from Spring Valley, here in Columbia.
9 **COYLE:** Nittardi is the chef and owner of *Il Pavone*, a restaurant there, isn't he?
10 **FRANK MAY:** Yes. John and I have known him for quite some time. He's remarrying his ex-
11 wife Jean.
12 **JOHN MAY:** This project will be bigger than any of the jobs Frank and I did together. It
13 couldn't be more important.
14 **COYLE:** And before you reduce it to contract, you want to know what contract to reduce it
15 to?
16 **JOHN MAY:** That's right.
17 **COYLE:** Fine. Before we conclude, let's sum up what you want to do, and what you want
18 me to do, with respect to the contract.
19 **JOHN MAY:** Basically, I want to use the contract in Columbia, just as we used it in Franklin,
20 and of course I want to use it for Pier's house.
21 **COYLE:** Without modification?
22 **JOHN MAY:** Yes, without modification, if possible. I want the contract to change only as
23 necessary. The important thing is for the contract to be understandable and to get the job
24 done.
25 **COYLE:** I understand. But Columbia's law is different from Franklin's. So even if it didn't
26 need any fixing there, it might need some fixing here. That will depend on all sorts of things.
27 For instance, will your subcontractors come from Columbia? What about your suppliers?
28 **JOHN MAY:** Who knows? As I said, in Franklin we used mostly Franklin subs. Also mostly
29 Franklin suppliers. It's conceivable I could use some of those Franklin folks in Columbia, but
30 it's 200 miles away, so I don't know how likely it is.
31 **COYLE:** Give me some time to research the issues. Can you come by again perhaps on
32 February 27th so that we can discuss the matter?
33 **JOHN MAY:** Sure. How about 2 o'clock?

1 **FRANK MAY:** There's no need for me to return. I'm the fifth wheel, since PBI is all John's
2 now. I just came today because John asked me, to help him with any background you might
3 need to know. Also, I've got to get back to a job in Franklin.
4 **COYLE:** Frank, that's fine with me. Thanks for coming. John, two o'clock is good for me
5 too. By noon on February 27th, I'll have a letter delivered to you to assist in focusing the
6 discussion.
7 **JOHN MAY:** That'll be fine. Thanks so much.
8 **COYLE:** You're welcome. Good-bye.
9 **FRANK MAY:** Good-bye.
10 **JOHN MAY:** 'Bye.

PROGRESSIVE BUILDERS, INC., CONTRACT

1. Parties to this Contract:

A. Contractor:

Progressive Builders, Inc.
4333 Skillman Avenue, Woodhaven, Franklin 65377
(656) 425-7900, (656) 425-7905 (fax)

B. Property Owner:

(Name)

(Address)

(Telephone and Fax Numbers)

2. Location of Work:

3. Completion Dates:

A. Estimated date of commencement: _____

B. Estimated date of completion: _____

4. Contract Price: \$_____

5. Method and Schedule of Payment:

_____ Note: The initial down
payment must equal at least one-third of the contract price.

6. Description of the Work:

7. Warranty: Contractor provides the following warranty to Property Owner, to the exclusion of all other warranties, express or implied: Contractor warrants that the work will be free from faulty materials; constructed according to the standards of the building code applicable to this location; and constructed in a skillful manner and fit for habitation.

8. Arbitration of Disputes: If a dispute arises concerning the provisions of this contract or its performance, Property Owner agrees: (1) to submit any such dispute to binding and final arbitration under the rules of the National Arbitration Organization (NAO); and (2) to limit any relief that may be awarded by the NAO to compensatory damages. Contractor and Property Owner agree to bear the costs of arbitration equally.

9. Additional Provisions:

A.

B.

C.

10. Contract Acceptance:

Signature of Contractor:

Date: _____

Signature of Property Owner:

Date: _____

**THURSDAY AFTERNOON
FEBRUARY 26, 2004**



**California
Bar
Examination**

**Performance Test B
LIBRARY**

IN RE PROGRESSIVE BUILDERS, INC.

SELECTED PROVISIONS OF THE FEDERAL ARBITRATION ACT

LIBRARY

Selected Provisions of the Federal Arbitration Act..... 1

Selected Provisions of the Columbia Codes..... 2

Doctor’s Associates, Inc. v. Casarotto (U.S. Supreme Ct. 1996) 4

Sisters of the Visitation v. Cochran Plastering Company (Colum. Ct. App. 1997)..... 6

Stirlen v. Supercuts, Inc. (Colum. Ct. App. 1997)..... 9

Myers v. Scamardo Termite Control (Colum. Ct. App. 1998)..... 12

Section 1. Definitions.

* * *

“Commerce,” as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

* * *

Section 2. Policy in Favor of Arbitration.

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 existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

* * * * *

*

SELECTED PROVISIONS OF THE COLUMBIA CODES

Section 3282 of the Columbia Civil Code. *Compensatory Damages.*

Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called compensatory damages.

* * * * *

Section 3294 of the Columbia Civil Code. *Punitive Damages.*

In an action sounding in tort, 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 compensatory damages, may recover punitive damages for the sake of example and by way of punishing the defendant.

* * * * *

Section 1281 of the Columbia Code of Civil Procedure. *Policy in Favor of Arbitration.*

A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract.

* * * * *

Section 7191 of the Columbia Business and Professions Code. *Arbitration and Residential Property Work and Construction.*

(a) If a contract for construction of, or work on, residential property with four or fewer units contains a provision for arbitration of a dispute between the parties, the provision shall be clearly titled "ARBITRATION OF DISPUTES," and shall be set out in capital letters.

(b) Immediately before the line or space provided for the parties to indicate their assent or nonassent to the arbitration provision described in subdivision (a), and immediately following that arbitration provision, the following shall appear, and shall be set out in capital letters:

"NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF

DISPUTES' PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY COLUMBIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY."

(c) Notwithstanding any law to the contrary, a provision for arbitration of a dispute between parties to a contract for construction of, or work on, any residential property with four or fewer units that does not comply with this section is not enforceable against any party other than the party performing the construction or work.

* * * * *

Section 7195 of the Columbia Business and Professions Code. *Residential Property Work and Construction and Treble Damages as Punitive Damages.*

In an action sounding in tort arising from construction of, or work on, residential property with four or fewer units, where it is proven by clear and convincing evidence that the person or entity performing the construction or work has been guilty of oppression, fraud, or malice, the person or entity for which the construction or work is performed, in addition to compensatory damages, may recover an additional amount up to three times the amount of compensatory damages as punitive damages for the sake of example and by way of punishing the person or entity performing the construction or work.

Doctor's Associates, Inc. v. Casarotto
United States Supreme Court (1996)

Reversed and remanded.

We granted certiorari in this case to settle an important issue relating to the Federal Arbitration Act.

A dispute arose between parties to a standard franchise contract for the operation of a Subway sandwich shop in Montana.

Paul Casarotto, the franchisee, sued Doctor's Associates, Inc. (DAI), the franchisor, in Montana state court.

The Montana trial court stayed the lawsuit pending arbitration pursuant to an arbitration provision set out in ordinary type on page nine of the franchise contract.

The Montana Supreme Court reversed, holding that the arbitration provision was unenforceable because it did not meet a requirement under section 27-5-114(4) of the Montana Code that "[n]otice that a contract is subject to arbitration" must be "set out in underlined capital letters on the first page of the contract." DAI argued, unpersuasively, that section 27-5-114(4) of the Montana Code was preempted by section 2 of the Federal Arbitration Act pursuant to the Supremacy Clause of Article VI of the United States Constitution, inasmuch as section 2 of the Federal Arbitration Act declares written provisions for arbitration "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Although DAI's argument failed to persuade the Montana Supreme Court, it succeeds in persuading us. Section 27-5-114(4) of the Montana Code with its special notice requirement, which governs not "any contract," but specifically and solely contracts "subject to arbitration," conflicts with, and is therefore displaced by, section 2 of the Federal Arbitration Act. Generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration provisions without contravening section 2 of the Federal Arbitration Act. But courts may not invalidate arbitration provisions under state laws applicable *only* to arbitration provisions — whether such laws cover arbitration provisions in *all* contracts *generally*, or merely touch arbitration provisions in *some* contracts or classes of contracts *specifically*. By enacting section 2 of the Federal Arbitration Act, Congress precluded states from singling out arbitration provisions for suspect status. Section 27-5-114(4) of the Montana Code directly conflicts with section 2 of the Federal Arbitration Act because the state law conditions the enforceability of arbitration provisions on compliance with a special notice requirement not applicable to contracts generally. In concluding to the contrary, the Montana Supreme Court erred prejudicially.

Sisters Of The Visitation v. Cochran Plastering Company

Columbia Court of Appeal (1997)

The Sisters of the Visitation (“The Sisters”) appeal from a judgment of the Superior Court of Mosswood County enjoining an arbitration proceeding initiated by them in a dispute with Cochran Plastering Company, Inc. (“Cochran”). The Sisters are a Roman Catholic religious order that owns and operates a monastery that is a registered landmark under the Columbia Registered Landmarks Act. The Sisters began a restoration project to repair and restore the monastery’s chapel. The Sisters engaged the services of Hall Baumhauer Architects, P.C., a Columbia company, and entered into contracts directly with contractors, from Columbia and several other states, within specific trades included in the scope of work for the project.

The Sisters entered into a contract with Cochran, a Columbia company, for Cochran to repair cracks in the plaster in the ceilings and wall of the chapel, to cast and install plaster moldings, and to pin up all loose moldings with screws and washers. This contract included an arbitration provision, pursuant to which the Sisters filed a demand for arbitration; in the demand for arbitration, the Sisters claimed that Cochran had negligently damaged decorative paintings on the surface of the chapel ceiling and walls and that Cochran had failed to complete its work. The Sisters claimed a total of \$525,000 for restoration of paintings they claimed Cochran had damaged and \$50,000 for the completion of the repair work.

Cochran filed an action in the Superior Court for an injunction to stop the arbitration proceeding. Cochran claimed as follows: The arbitration provision of its contract with the Sisters is unenforceable under the terms of the Columbia Registered Landmarks Act; Section 2 of the Federal Arbitration Act does not displace the Columbia Registered Landmarks Act through operation of the Supremacy Clause of Article VI of the United States Constitution because Section 2 of the Federal Arbitration Act is inapplicable inasmuch as the contract does not evidence a transaction involving interstate commerce. Accepting Cochran’s claim after a bench trial, the Superior Court rendered judgment in its favor. The Sisters appealed. We now affirm.

Section 2 of the Federal Arbitration Act states that “[a] written provision in a contract evidencing a transaction involving [interstate] commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and

enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

There is no dispute that, under the Columbia Registered Landmarks Act, the arbitration provision of the contract between the Sisters and Cochran would be unenforceable because the act expressly declares that all arbitration provisions of all contracts involving registered landmarks are unenforceable.

Neither is there any dispute that if Section 2 of the Federal Arbitration Act is applicable, the arbitration provision of the contract between the Sisters and Cochran would in fact be enforceable because there is no reason to refuse enforcement, such as unconscionability, based on contract law generally. Nor is there any dispute that if Section 2 of the Federal Arbitration Act is applicable, it would displace the Columbia Registered Landmarks Act, which is a state law that “touch[es] arbitration provisions in *some . . .* classes of contracts *specifically*” (*Doctor’s Associates, Inc. v. Casarotto* (U.S. Supreme Ct. 1996), italics in original).

As we shall explain, we believe that Section 2 of the Federal Arbitration Act is, in fact, inapplicable because the contract between the Sisters and Cochran does not evidence a transaction involving interstate commerce.

At the outset, we state what is now settled: A contract evidences a transaction involving interstate commerce only if it affects such commerce substantially. The presence or absence of substantial effect on interstate commerce depends on the totality of the circumstances — to which we now turn.

First, the Sisters and Cochran are both Columbia residents, and the contract was to be performed in Columbia. The only affiliation of either of the parties with any out-of-state person or entity is found in the relationship between the Sisters and the Roman Catholic Church. We are simply not prepared to recognize that relationship as involving interstate commerce. Hence, we discern no substantial effect on interstate commerce on that basis.

Second, although Cochran brought tools and equipment to the project site, it obtained them within Columbia. In connection with the project, a substantial contract for the rental of scaffolding was placed with an out-of-state party; *that* contract, however, did not involve Cochran but was let directly by the Sisters. No substantial effect on *interstate* commerce can be developed based on Cochran’s acquiring in *intrastate* commerce any tools and equipment to be used in the performance of its contract.

Third, Cochran employed only Columbia residents as workers. The contract apparently specified the use of plaster and washers that were required to be obtained from a materials company in Ohio, and it called for insurance, which was obtained from an

insurance company in New York. However, the record shows that little of the amount the Sisters paid Cochran is allocable to the cost of these materials and services. Hence, Cochran's contract does not substantially affect interstate commerce by reason of a dependence upon materials and services moving in interstate commerce.

Fourth, the object of the services provided by Cochran is incapable of subsequent movement across state lines. The Sisters contracted with Cochran to perform plaster work in the monastery chapel in Mosswood County, Columbia. Cochran's work becomes a part of the chapel's structure, and cannot be detached and moved across state lines. The fact that people from out of state might visit the site is too tenuous a connection with interstate commerce. Therefore, we conclude that Cochran's work will not have a substantial effect on interstate commerce on this basis.

Fifth and final, we note that the Sisters entered into a series of contracts for the restoration of the monastery chapel related to their contract with Cochran. But the fact that several of the related contracts might have a substantial effect on interstate commerce does not mean that the contract between the Sisters and Cochran itself has any such effect.

Therefore, we conclude that Section 2 of the Federal Arbitration Act is, in fact, inapplicable because the contract between the Sisters and Cochran does not evidence a transaction involving interstate commerce for, under the totality of the circumstances, it does not affect such commerce substantially.

It follows that under the Columbia Registered Landmarks Act — which is *not* displaced by Section 2 of the Federal Arbitration Act — the arbitration provision of the contract between the Sisters and Cochran is unenforceable because the Act expressly declares that all arbitration provisions of all contracts involving registered landmarks are unenforceable.

Affirmed.

Stirlen v. Supercuts, Inc.
Columbia Court of Appeal (1997)

The Superior Court of Santa Fe County denied a motion to compel arbitration pursuant to the arbitration provision of an employment contract on the ground that that provision was unenforceable because it was unconscionable. We find its order correct and affirm.

Defendant Supercuts, Inc. ("Supercuts"), a Delaware corporation that conducts a national hair care franchise business, appeals from an order, which is statutorily appealable in advance of judgment, by which the Superior Court denied its motion to compel arbitration of a dispute relating to its termination from employment of plaintiff William N. Stirlen, its Vice-President and Chief Financial Officer.

Stirlen commenced this action with a complaint that alleged causes of action based on various contract and tort theories, and that sought compensatory damages in contract and punitive as well as compensatory damages in tort.

Supercuts moved to compel arbitration under the arbitration provision of its employment contract with Stirlen. The Superior Court denied the motion, as we have said, on the ground that the arbitration provision was unenforceable as unconscionable. Supercuts timely appealed.

We shall assume, as have Stirlen and Supercuts, that the arbitration provision of Stirlen's employment contract with Supercuts is subject to the Federal Arbitration Act inasmuch as the employment contract itself evidences a transaction involving interstate commerce within the meaning of Section 2 of the Act.

But we note that, under the Federal Arbitration Act, the question whether, in the words of Section 2, a particular arbitration provision is "valid, irrevocable, and enforceable," or instead presents "grounds . . . for [its] revocation," is answered not by the act itself, but in the first instance by the law of the forum — which in the present case is Columbia.

The arbitration provision of Stirlen's employment contract with Supercuts — which Supercuts itself drafted in its entirety — states, in pertinent part, as follows: "In the event there is any dispute arising out of Executive's [i.e., Stirlen's] employment with Company [i.e., Supercuts], the termination of that employment, or the employment contract itself, whether such dispute gives rise or may give rise to a cause of action in contract or tort or based on any other theory or statute, Company and Executive agree that exclusive recourse for Executive shall be to submit any such dispute to final and binding arbitration and to obtain, if Executive prevails, compensatory damages only."

Under the law of Columbia, a contract, or a provision of a contract, is unenforceable if it is unconscionable. Unconscionability has both procedural and substantive aspects. The procedural aspect has to do with lack of freedom of assent, whereas the substantive aspect has to do with the imposition of harsh or oppressive terms. The view that prevails in Columbia is that both procedural and substantive aspects must be present, each at least in some degree, for unconscionability to be present.

The Superior Court determined that the arbitration provision of Stirlen's employment contract with Supercuts was procedurally unconscionable because the contract itself evidenced lack of freedom of assent because it was a contract of adhesion. We agree.

A contract of adhesion is a contract, usually with standard terms, that is drafted and imposed by a party of superior bargaining strength, and that allows a party of lesser bargaining strength only to take it or leave it.

Supercuts maintains that its employment contract with Stirlen is not a contract of adhesion because it did not have superior bargaining strength. Supercuts emphasizes that Stirlen was not a person desperately seeking employment, but a successful and sophisticated corporate executive. Supercuts sought him out and "hired" him "away" from a highly paid position with a major corporation "by offering him an annual salary of \$150,000, and then agreeing to remunerative 'extras' not included in the standard executive employment contract," such as generous stock options, a bonus plan, a supplemental retirement plan, and a \$10,000 "signing bonus."

We are not persuaded. Stirlen appears to have had no realistic ability to modify the terms of his employment contract with Supercuts. Undisputed evidence shows that the terms of the contract, which were cast in generic and gender-neutral language, were presented to him after he accepted employment and were described as standard provisions that were not negotiable. The only negotiating between Supercuts and Stirlen regarding the conditions of Stirlen's employment related to the stock options, bonus and retirement plans, and other "extras," but these matters were the subject of a separate letter agreement Stirlen executed more than a month before he signed the employment contract. Moreover, the letter agreement adverted to the "standard employment contract" Stirlen would be required to sign, noting that the terms of the letter agreement did not supplant but were "in addition to the standard provisions of the contract." Supercuts does not dispute Stirlen's assertions that the employment contract was presented to him on a "take-it-or-leave-it basis," and that every other corporate officer was required to sign, and did in fact sign, an identical agreement.

The Superior Court also determined that the arbitration provision of Stirlen's employment contract with Supercuts was substantively unconscionable because the provision itself was harsh and oppressive because it was unduly one-sided. Here too, we agree.

The arbitration provision of Stirlen's employment contract with Supercuts cannot be characterized other than as unduly one-sided. We shall overlook the fact that the provision expressly requires Stirlen to arbitrate any dispute that he may have with Supercuts, but impliedly allows Supercuts either to arbitrate or to litigate any dispute that it may have with Stirlen, as it chooses. Instead, we shall focus on this fact alone: The provision allows Supercuts — in effect, if not in terms — to engage in any and all "oppression" and "fraud" and "malice" against Stirlen, without running the risk of any award of even the most minimal punitive damages under Section 3294 of the Columbia Civil Code. Such a provision is unduly one-sided as a matter of law. It is settled in Columbia that any and all contracts or contractual provisions that exempt a contracting party from responsibility for its own oppressive, fraudulent, or malicious conduct are against the policy of the law.

In arguing to the contrary, Supercuts relies on several decisions of courts of sister states. Its reliance is misplaced. Each of those decisions involves the law of a state other than Columbia. More importantly, each deals with an arbitration provision that contains a mechanism for the award of treble damages, which are a species of punitive damages, inasmuch as by definition they amount to three times the compensatory damages in question, and are apparently given "for the sake of example and by way of punishing the defendant" (Colum. Civ. Code, § 3294). No such mechanism, however, is present here.

Lastly, we note that the Superior Court was not obligated to attempt to salvage any part of the arbitration provision of Stirlen's employment contract with Supercuts that might itself *not* be unconscionable. It has long been established that a court need not aid a party who has drafted an unconscionable contract, or contractual provision, by effectively redrafting what is objectionable into something unobjectionable. Indeed, we believe that a court *should* not provide any such aid even if it were otherwise minded to do so. A party who seeks the unmerited benefit of unconscionability must not be allowed to avoid its deserved burden.

For the reasons stated above, we conclude that the Superior Court correctly denied Supercuts' motion to compel arbitration because the arbitration provision of Supercuts' employment contract with Stirlen was unenforceable as unconscionable.

Affirmed.

Myers v. Scamardo Termite Control
Columbia Court of Appeal (1998)

In this action under the Columbia Consumer Sales Act, the Superior Court of Lucas County issued an order (1) granting a motion by the plaintiff for partial summary judgment declaring that an arbitration provision of a contract was unenforceable on the ground of unconscionability, and (2) denying a motion by the defendant to stay the action pending arbitration pursuant to that provision.

Under the Columbia Consumer Sales Act, an order determining the enforceability of an arbitration provision of a contract against a claim of unconscionability is appealable.

The defendant timely appealed the Superior Court's order.

For the reasons set out below, we shall affirm.

The plaintiff, Judith Myers, an elderly woman with limited resources, and defendant, Scamardo Termite Control (STC), entered into a contract: STC agreed to eradicate termites that had infested Myers' house; and, in exchange, Myers agreed to pay STC \$1,300. The contract contained an arbitration provision, which reads as follows: "The Consumer and STC agree that any controversy or claim between them arising out of or relating to this contract shall be settled exclusively by arbitration. Such arbitration shall be conducted in accordance with the rules and procedures of the National Arbitration Organization then in force."

Having become dissatisfied with STC's service when termites reinfested her house, Myers brought this action under the Columbia Consumer Sales Act seeking, among other relief, (1) an award of \$41,000 in compensatory damages, an award of \$123,000 in treble damages as authorized by the act itself, and an award of \$2,000,000 in punitive damages; and (2) a declaration that the arbitration provision of her contract with STC was unenforceable on the ground of unconscionability.

Thereupon, STC moved to stay the action pending arbitration pursuant to the arbitration provision of its contract with Myers, and Myers moved for partial summary judgment declaring that the provision was unenforceable on the ground of unconscionability. As noted, the Superior Court issued an order granting Myers' motion and denying STC's. It did so because it concluded that the arbitration provision was indeed unenforceable as unconscionable.

On appeal, both Myers and STC agree that the soundness of the Superior Court's order depends on the correctness of its conclusion on the unconscionability of the arbitration provision of their contract. To that question, we now turn.

The following facts are undisputed for present purposes: The arbitration provision of Myers' contract with STC requires that arbitration must be "conducted in accordance with the rules and procedures of the National Arbitration Organization [now] in force." A party seeking arbitration with the National Arbitration Organization must pay a filing fee — for example, \$2,000 for a claim between \$100,000 and \$250,000, and \$7,000 for a claim between \$1,000,000 and \$2,500,000. Because Myers is asserting a punitive damages claim in the amount of \$2,000,000, she would have to pay a \$7,000 filing fee. Even if Myers should choose to forgo her perhaps overly optimistic punitive damages claim, she still has a not unreasonable claim for treble damages under the Columbia Consumer Sales Act itself, in the amount of \$123,000 — for which she would have to pay a \$2,000 filing fee. A filing fee paid by Myers in the amount of \$2,000 would exceed the sum of \$1,300 that she paid on her contract with STC by a large percentage. Myers did not know at the time of contracting that she would be required to pay any filing fee whatsoever, less still one that would be so high. Although the National Arbitration Organization had, and still has, a published schedule of filing fees, none was attached to the contract or otherwise disclosed to Myers.

Under the law of Columbia, which Myers and STC agree applies here, a contract, or a provision of a contract, is unenforceable if it is unconscionable. As the court in *Stirlen v. Supercuts, Inc.* (Colum. Ct. App. 1997) recently held: "Unconscionability has both procedural and substantive aspects. The procedural aspect has to do with lack of freedom of assent, whereas the substantive aspect has to do with the imposition of harsh or oppressive terms. The view that prevails in Columbia is that both procedural and substantive aspects must be present, each at least in some degree, for unconscionability to be present."

In our judgment, unconscionability taints the arbitration provision of the contract between STC and Myers in both its procedural and substantive aspects.

As for procedural unconscionability, the contract between STC and Myers as a whole is plainly a contract of adhesion — that is to say, an instrument, usually with standard terms, drafted and imposed by a party of superior bargaining strength, allowing a party of lesser bargaining strength only to take it or leave it. Perhaps more significantly, the arbitration provision contains an unfair surprise — the undisclosed requirement that Myers would have to pay what must be characterized as arbitration fees that are exorbitant as to her. Such an unfair surprise could have been avoided by disclosure on the part of STC. But STC made no such disclosure.

As for substantive unconscionability, the arbitration provision of the contract between STC and Myers is harsh and oppressive because it effectively requires Myers to pay arbitration fees that are themselves harsh and oppressive because, as stated, they are

exorbitant as to her. We do not dwell in a fool's paradise, thinking that the National Arbitration Organization should provide arbitration without cost. Nor do we mean to suggest that its arbitration fees are out of line with the value of the services it provides. Rather, we conclude only that requiring a consumer in Myers' situation to pay such fees is harsh and oppressive. Harshness and oppressiveness could have been avoided by STC's agreement fee to pay such fees on Myers' behalf. But STC made no such agreement.

In sum, because the Superior Court was correct in its conclusion that the arbitration provision of the contract between STC and Myers is unconscionable, its order denying STC's motion to stay the action pending arbitration pursuant to that provision, and granting Myers' motion for partial summary judgment declaring that that provision was unenforceable on the ground of unconscionability, was altogether sound.

In this court, however, Myers seeks to obtain more than she received below, asking us to enjoin STC from attempting to enforce the arbitration provision here at issue against any consumer in the future. Her request comes too late. But even had it been timely, we would have rejected it. We would be reluctant to find the arbitration provision unconscionable, always and everywhere, and in the abstract, with respect to any and all consumers, no matter what their resources, with whom STC has contracted or may contract. First, and manifestly, unconscionability is in large part a judgment that arises from the unique facts of each individual case. Second, many, or at least some, consumers might in fact prefer arbitration over litigation — and might also prefer to avoid the premium that STC would presumably build into the contract price if it had to cover the risk of litigation and its costs.

For present purposes, however, all that we need do, and shall do, is to uphold the Superior Court's order denying STC's motion to stay the action pending arbitration and granting Myers' motion for partial summary judgment.

Affirmed.