

JULY 2011



California
Bar
Examination

Performance Test B

INSTRUCTIONS AND FILE

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DAVID v. SOVEREIGN AUTO STORE, 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.
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 tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. 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 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. You should concentrate on the materials provided, but you should also bring to bear on the problem 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 preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

The Law Firm of Rogers and Snider
7533 Morningside Drive
Shepard, Columbia

DATE: July 28, 2011
TO: Applicant
FROM: Martin Snider, Partner
RE: David v. Sovereign Auto Store, Inc.

We represent Joe David, a low-income client whose case we have taken pro bono, in an action against a car dealership that charged him more than twice the retail value of a used car. He was unable to afford the payments and the car was repossessed. The dealership has not yet taken legal action to collect on the balance of the loan. Because the dealership cheated him, we filed an action against it.

After serving the Complaint, I got a letter from opposing counsel demanding that we submit the claim to arbitration. I find a number of problems with the arbitration clause and want to refuse to arbitrate and to oppose the motion she intends to file.

Please draft a memorandum of points and authorities opposing counsel's expected motion to compel arbitration. Follow the firm's guidelines for persuasive memos that is attached.

The Purchase Agreement contains boilerplate language but we are only concerned here with the arbitration provisions in paragraphs 4 and 5. Don't spend your time now on any other issues. I want your help only with the issue of whether the mandatory arbitration clause is enforceable.

The Law Firm of Rogers and Snider
7533 Morningside Drive
Shepard, Columbia

MEMORANDUM

TO: Attorneys
FROM: Martin Snider
RE: **Persuasive Briefs and Memoranda**

To clarify the expectations of the office and to provide guidance to attorneys, all persuasive briefs or memoranda, such as memoranda of points and authorities to be filed in court, shall conform to the following guidelines.

All of these documents shall contain a Statement of Facts. Select carefully the facts that are pertinent to the legal arguments. The facts must be stated briefly, cogently, and accurately, although emphasis is not improper. The aim of the Statement of Facts is to persuade the tribunal that the facts support our client's position.

Following the Statement of Facts, the argument should begin. This firm follows the practice of writing carefully crafted subject headings that illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, **IMPROPER:** DEFENDANT HAD SUFFICIENT MINIMUM CONTACTS TO ESTABLISH PERSONAL JURISDICTION. **PROPER:** A RADIO STATION LOCATED IN THE STATE OF FRANKLIN THAT BROADCASTS INTO THE STATE OF COLUMBIA, RECEIVES REVENUE FROM ADVERTISERS LOCATED IN THE STATE OF COLUMBIA, AND HOLDS ITS ANNUAL MEETING IN THE STATE OF COLUMBIA HAS SUFFICIENT MINIMUM CONTACTS TO ALLOW COLUMBIA COURTS TO ASSERT PERSONAL JURISDICTION.

The body of each argument should analyze applicable legal authority and

persuasively argue how the facts support our position. Authority supportive of our client's position should be emphasized, but contrary authority should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefs.

Finally, there should be a short conclusion stating why our client should prevail.

Attorneys should not prepare a table of contents, a table of cases, or the index. These will be prepared after the draft is approved.

Memo to File

Notes from interview with Joe David, May 30, 2011

Client Joe David was referred to us from The State Bar of Columbia Pro Bono Project for consumer debt problem regarding an automobile repossession. Client is a 25 year-old single father of three children (ages 1, 3 and 11). He drives a school bus for the Bryant Board of Education.

He bought a used car, a 2005 Mazda Tribute, at Sovereign Auto Store (SAS). He went to SAS because they advertise heavily on TV about good reliable used cars for low monthly payments. He also drives by the dealership while driving to work in the morning. His old car was having mechanical problems plus he wanted an SUV. In July 2009, his car wouldn't start and he had to get a jump start. That day he drove to SAS and was greeted by a saleswoman, "Ann." He said she was very likeable and she asked him what he was looking for. He said that he wanted to buy an SUV and that the most he could afford was \$200 a month. Ann asked if he had a copy of his paystub and he gave her his last two and she said she would check with the credit department. She came back about 15 minutes later and told him she had "good news." She said that he qualified for a loan of \$389 a month and that she had a perfect car for him at that price.

Client remembers repeating that he could only afford \$200 but the saleswoman said that they had run the numbers and he could afford more and that he at least ought to look at what that amount of money would buy. She led him into the showroom at the back of the building and the Mazda was sitting there, "clean and shiny." He said that he liked everything about it and that he testdrove it with her seated next to him the whole way. He told her that he wanted to buy the car. He doesn't remember her saying the total price until she brought the papers to him to sign.

I asked him if he tried to negotiate the price of the car. He said that he didn't know that you were supposed to do that. He seemed embarrassed by the question and said that he trusted Ann to give him the right price. I asked him if he had ever bought a car before and he said that his first car was his uncle's car and that he gave it to him about 7 years ago. He traded it in when he bought this car.

I asked him if he read the contract before signing it and he said that it was full of tiny print so he did not and the saleswoman told him that this was the paper that everyone had to sign to buy a car. He thinks they gave him a copy but he left it in the glove compartment of the car and now the car has been repossessed.

The letter he brought in from the bank that financed the car said that they charged him \$19,955 for the car. Mr. David made all of the payments until he could no longer work because his doctor advised him to temporarily stop working, due to an unrelated health issue.

It is unclear how many months Mr. David eventually fell behind. He attempted to pay his house payment one month and the car payment the next. Mr. David believes he was only two months behind when he was contacted about his delinquency. Mr. David then attempted to refinance the car because the payments were too high. His credit union informed him that they could not refinance the car because its value was only \$8,800. SAS has demanded more than \$13,000 from him to repay the loan.

I researched the Kelly Blue Book value for the 2005 Mazda Tribute at the time that Mr. David purchased the car — it was \$9,775. I think they really took advantage of him.

His current finances are as follows:

Income:

Monthly take home pay	\$1,725
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Expenses:

Mortgage Payment per month	\$715
Utilities (average)	\$250
Daycare	\$295
Food (varies)	\$200
Transportation	\$100
Cell phone	<u>\$55</u>

Total: \$1,615

**IN THE SUPERIOR COURT OF BRYANT
CIVIL DIVISION**

JOE DAVID,)	
Plaintiff)	
v.)	Civil Case No. 2011-12073
)	
SOVEREIGN AUTO STORE, INC.,)	<u>COMPLAINT</u>
Defendant)	
)	
_____)	

Plaintiff, Joe David, respectfully states:

STATEMENT OF THE CASE

Defendant Sovereign Auto Store, Inc. (SAS) took advantage of Plaintiff Joe David, an unsophisticated consumer, by fraudulently selling him a car for more than twice its fair market value.

PARTIES

1. Plaintiff Joe David resides at 502 Maple Street, Bryant, Columbia. Plaintiff purchased a used car from Defendant SAS.
2. Defendant SAS is a Columbia corporation, located at 1105 Albemarle Road, Bryant, Columbia.

FACTUAL ALLEGATIONS

3. On or about July 28, 2009, Plaintiff went to the SAS in Bryant, Columbia with the intent to purchase a used car.
4. Plaintiff told the SAS salesperson he could only afford a vehicle with payments of \$200 per month or less based on his then-current income and expenses.
5. Plaintiff showed the SAS salesperson his pay stubs demonstrating his current income.
6. The SAS salesperson then calculated the total loan amount he was eligible to borrow.
7. Based upon Plaintiff's desire to purchase an SUV, the SAS salesperson showed him a 2005 Mazda Tribute.

8. The SAS salesperson knew the actual fair market value of the car but withheld that information from Plaintiff.
9. Instead, the SAS salesperson told him the price was \$389 per month, for a total of \$19,955.00, which was at least twice the value of the car.
10. In 2005, the base price for a brand new top model 2005 Mazda Tribute was \$23,025.00.
11. Plaintiff, an unsophisticated consumer, is a high-school educated public school bus driver.
12. Plaintiff trusted the SAS salesperson and was led to believe that the car was equivalent in value to its purchase price and thus relied on the representation by SAS. Plaintiff would not have purchased the car had he known that its value was less than half of the SAS sales price.
13. Plaintiff purchased the car sold by SAS, a used 2005 Mazda Tribute, for the purchase price of \$19,955.00.
14. Plaintiff financed the car through SAS or its agents. The terms of the loan required the Plaintiff to pay monthly installments of \$389 for 72 months.
15. Between September 2009 and July 2010, Plaintiff made regular loan payments in accordance with the aforesaid loan agreement.
16. Unable to afford the high monthly payments on his limited income, Plaintiff fell behind in one payment for the months of July through November 2010. Plaintiff was unable to make regular payments after November 2010.
17. Defendant repossessed Plaintiff's car in December 2010. Defendant allegedly sold the car at auction for \$6,125 and subsequently demanded payment of \$13,368.95 in a letter dated May 15, 2011.
18. As a result of Defendants' actions, Plaintiff suffered loss of money and diminished credit rating.

FIRST CAUSE OF ACTION

UNLAWFUL TRADE PRACTICES

19. Defendants violated Columbia Consumer Protection Procedures Act (CCPPA), specifically the Unfair Trade Practices Act, by charging an unconscionable price and by knowingly taking advantage of Plaintiff's

inability to reasonably protect his interests. Specifically, Defendants charged an exorbitant price far exceeding the car's retail value.

20. Plaintiff suffered damages as a result, as iterated in paragraph 18.

SECOND CAUSE OF ACTION

FRAUDULENT MISREPRESENTATION

21. Defendant committed the common law tort of fraudulent misrepresentation under the law of the State of Columbia. Defendant SAS made a false representation to Plaintiff by knowingly withholding the fair market value of the car from Plaintiff and led Plaintiff to believe the price charged was reasonably proportionate to the car's value.

22. This was a misrepresentation of a material fact that Defendant knew and intentionally did not disclose.

23. Plaintiff relied on the misrepresentation to his detriment, suffering injury as a result, as iterated in paragraph 18.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court find Defendant SAS liable for violation of Columbia consumer protection statutes, and fraud or misrepresentation.

Plaintiff requests the following:

1. The original sales installment contract for the purchase of the car be deemed as null and void and all remaining alleged debt relating to the car be released.
2. The Defendant be required to pay the Plaintiff compensatory damages of \$5,483, a sum equal to a refund of payments made, plus other expenses associated with repair and repossession.
3. The Defendant be required to pay Plaintiff treble damages pursuant to the Columbia Consumer Protection Code.
4. The Defendant be required to pay court costs.
5. The Defendant be required to pay punitive damages.
6. That the court grant costs, attorney fees and any further relief as it may deem to be necessary and proper.

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JURY TRIAL DEMAND

Plaintiff demands a trial by jury.

Dated: July 8, 2011

Martin Snider

Martin Snider, Attorney
7533 Morningside Drive
Shepard, Columbia

Burke and Rice
Attorneys-at-Law
1201 Diego Road
Bryant, Columbia
(555)274-4141

July 26, 2011

Mr. Martin Snider, Esq.
The Law Firm of Rogers and Snider
7533 Morningside Drive
Shepard, Columbia

RE: David v. Sovereign Auto Store, Inc.;
Superior Court of Bryant Case No.: CA 2011-12073

Dear Mr. Snider:

On behalf of my client, Sovereign Auto Store, Inc. (SAS), I seek your consent to submit this case to arbitration, as required by the contract between the parties. If you do not agree, it is my intention to file a Motion to Dismiss and Compel Arbitration with the court. As you know, I am required by court rule to seek your consent prior to filing any motion and thus will inform the court if you do not do so.

Your client's Complaint arises from his purchase of a 2005 Mazda Tribute from SAS's dealership located here in Bryant. The Purchase Agreement contains a mandatory arbitration clause that covers the situation alleged in your Complaint. In essence, this action involves belated claims by a disgruntled purchaser of a used car. Your client concedes that after discussions with the salesperson, he voluntarily agreed to purchase the vehicle, yet now claims that SAS committed fraud, engaged in unlawful trade practices and violated the common law by entering into an unconscionable contract because the negotiated purchase price he agreed to pay for the vehicle was too high and the salesperson "knew the actual fair market value of the car but withheld that information from him." This is precisely the kind of claim that is subject to arbitration under the terms of the contract.

In case you do not have it, I have attached a copy of the Purchase Agreement entered into some two years ago. As you will note, it is a standard contract that my client uses for every used car sale. I call your attention to Paragraph 5 for the terms of

the arbitration agreement, which is located above your client's signature. Paragraph 5 states:

“5. YOU ACKNOWLEDGE THAT THIS PURCHASE AGREEMENT CONTAINS AN AGREEMENT TO ARBITRATE DISPUTES, AND THAT YOU HAVE READ THE ARBITRATION PROVISION, AND THAT YOU AGREE TO ITS TERMS.”

I am sure you will agree that this clause is unambiguous. In my experience, arbitration is an expeditious way of resolving disputes. As his share of the costs of arbitration, your client will have to pay a \$250 filing fee to initiate arbitration and a minimum deposit of \$1,500 covering two days of proceedings at \$750 per day. Please let me know within three (3) days whether you will agree to submit this case to arbitration and I will move quickly to propose an arbitrator to you.

Sincerely,

Paula Burke

Paula Burke
Attorney-at-Law

Purchase Agreement for Used Car

July 28, 2009

Date

Sovereign Auto Store, Inc.
1105 Albemarle Road
Bryant, Columbia 90000
Tel: (555)555-1701

Joe David
Purchaser
502 Maple Street
Address
Bryant, Columbia 90002
City, State, Zip Code
(555)871-2629
Phone numbers

Mileage: 68,333

Please enter my order for the following used vehicle:

2005 Mazda Tribute LX 4 DR SUV, Tan Serial 4F2CUP18ZHR2566KM52057

Salesperson: Ann Anthony

Cash Delivered Price of Vehicle:	\$19,955.00
Used Car Trade-In Value:	\$200.00
Subtotal:	\$19,775.00
Sales Tax:	\$1,186.50
Tags and Registration Fee:	\$145.00
Total:	<u>\$21,086.50</u>

1. This purchase agreement (Agreement) contains the full and final agreement between the parties concerning the purchase of the Vehicle and supersedes and replaces all prior or contemporaneous agreement between the parties.
2. If any provision of the Agreement, or the application of such provision to any person or circumstance, shall be held to be invalid, the remainder of this Agreement shall not be affected.
3. Warranty Limitations - DEALER HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.
4. Arbitration Terms - The parties agree that all disputes, claims or controversies arising from or relating to the Purchaser's purchase of the Vehicle, including all Disputes arising under case law, statutory law, and all other laws, shall be resolved by binding arbitration by one arbitrator located in the State of Columbia selected by the Dealer

with the consent of the Purchaser. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through a Court, but that they prefer to resolve their disputes through arbitration, except that the Dealer may proceed with Court action in the event the Purchaser fails to pay any sums due under the Agreement. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO JURY TRIAL EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO COURT ACTION. The parties agree that the cost of arbitration shall be borne equally between the parties provided, however, that the arbitrator may, in the interests of justice, order that the losing party pay the prevailing party's costs. A Dispute is any allegation concerning a violation of state or federal statute that may be the subject of binding arbitration, any purely monetary claim greater than \$1,000.00 in the aggregate. Provided, however, that your failure to provide consideration to be paid by you (including your failure to pay a note, a dishonored check, or failure to provide a trade title) as well as our right to retake possession of the vehicle pursuant to this Purchase Agreement shall not be considered a Dispute and shall not be subject to arbitration. The parties agree that to the extent damages are awarded, they shall be limited to the total amount paid by the Purchaser for the Vehicle plus other provable economic loss as determined in the sole discretion of the arbitrator.

5. YOU ACKNOWLEDGE THAT THIS PURCHASE AGREEMENT CONTAINS AN AGREEMENT TO ARBITRATE DISPUTES, AND THAT YOU HAVE READ THE ARBITRATION PROVISION, AND YOU AGREE TO ITS TERMS.

Date: July 28, 2009

Joe David

Purchaser

Date: July 28, 2009

Ann Anthony

Dealer's Representative

JULY 2011



*California
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Performance Test B

LIBRARY

DAVID v. SOVEREIGN AUTO STORE, INC.

LIBRARY

Medina, et al. v. Core Healthcare Services (Supreme Court of Columbia, 2000)..... 3

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Selected Provisions of Unfair Trade Practices Act..... 16

Selected Provisions of Columbia Arbitration Act..... 18

Medina, et al. v. Core Healthcare Services
Supreme Court of Columbia (2000)

Mary Medina and Bonita Orate (the employees) filed a complaint for wrongful termination against their former employer, Core Healthcare Services (the employer). We consider the validity of an agreement imposed on a prospective or current employee as a condition of employment to arbitrate wrongful termination or employment discrimination claims rather than file suit in court. We conclude that antidiscrimination claims brought under the Columbia Fair Employment Act (CFEA) are arbitrable only if the arbitration permits an employee to vindicate his or her statutory rights. We also find the mandatory arbitration clause's limitation on damages and its unilateral obligation to arbitrate contrary to public policy unconscionable. The trial court refused to enforce the arbitration agreement, but the Court of Appeal enforced the agreement minus the provision it found unconscionable. We conclude that the arbitration agreement is unenforceable and reverse the Court of Appeal's judgment.

Both employees had signed employment application forms including an arbitration clause pertaining to any future claim of wrongful termination. The clause states in full:

"I agree that, as a condition of my employment, in the event my employment is terminated and I contend that such termination was wrongful or otherwise in violation of the conditions of employment or was in violation of any express or implied condition, term or covenant of employment, whether founded in fact or in law, I will submit any such matter to binding arbitration. I further agree that, in any such arbitration, my exclusive remedies for violation of the terms, conditions or covenants of employment shall be limited to a sum equal to the wages I would have earned from the date of any discharge until the date of the arbitration award. I understand that I shall not be entitled to any other remedy, at law or in equity, including but not limited to reinstatement and/or injunctive relief."

The Columbia Arbitration Act (CAA), like federal law, favors enforcement of valid arbitration agreements, including agreements to arbitrate statutory rights. Arbitration agreements are valid, irrevocable, and enforceable and may be invalidated only for the same reasons as other contracts. The CAA contains no exemption for employment contracts.

The inquiry under the CAA is: Do general contract law principles provide reasons for refusing to enforce the present arbitration agreement? The answer turns on whether and to what extent the arbitration agreement is contrary to public policy or unconscionable.

Arbitration of CFEA Claims

Litigants, in arbitrating a statutory claim, do not forgo the substantive rights afforded by the statute but only submit them to resolution through arbitration; thus, arbitration agreements and practices that compel claimants to forfeit certain statutory rights are unenforceable. While some statutory rights can be waived, arbitration agreements that encompass *unwaivable* statutory rights require great scrutiny based on two principles of public policy. First, contracts exempting anyone from responsibility for fraud or willful injury to another, or from violation of law, are against public policy and may not be enforced. Second, anyone may waive the advantage of a law intended solely for his benefit, but a law established for a public reason cannot be contravened by a private agreement.

The statutory rights of the CFEA serve important public purposes: safeguarding the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, sexual orientation, marital status, sex or age. The public policy against sex discrimination and sexual harassment in employment inures to the benefit of the public, not just a particular employer or employee. An employment contract that requires employees to waive their rights under the CFEA to redress sexual harassment or discrimination is contrary to public policy and unlawful. An arbitration agreement cannot serve as a vehicle for the waiver of statutory rights created by the CFEA.

In determining whether arbitration is an adequate forum for securing rights under CFEA, we note the differences involved in arbitrating employees' statutory rights and disputes arising from collective bargaining agreements. The fundamental distinction between contractual rights which are created, defined, and subject to modification by the parties, and statutory rights which are created, defined, and subject to modification only by the legislature and the courts, suggests the need for a public rather than private

mechanism of enforcement. The beneficiaries of public statutes are entitled to the rights and protections provided by the law.

We identify three minimum requirements for the arbitration of such rights pursuant to a mandatory employment arbitration agreement. It must provide for: (1) neutral arbitrators; (2) all types of relief available in court; and (3) it must not require employees to pay arbitrator's fees or expenses that make a forum inaccessible. The only issue in this case is the limitation on remedies.

Limitation of Remedies

An arbitration agreement may not limit statutorily imposed remedies such as punitive damages and attorney fees. This arbitration agreement imposes exclusive remedies limited to wages earned from the discharge date until the date of the arbitration award. The agreement compels arbitration of statutory claims without affording the full range of statutory remedies, including punitive damages and attorney fees. This damages limitation is contrary to public policy and unlawful.

Unconscionability of the Arbitration Agreement

1. General Principles of Unconscionability

We now consider objections to mandatory arbitration that apply to any type of claim. These objections fall under the rubric of unconscionability. Unconscionability has both procedural and substantive elements, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results. For a court to refuse to enforce a contract or clause, both procedural and substantive unconscionability must be present, but not in the same degree. The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required and vice versa.

Because unconscionability applies to contracts generally, a court can refuse to enforce an arbitration agreement under the CAA, which provides that arbitration agreements are "valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."

2. Unconscionability and Mandatory Employment Arbitration

We find that this arbitration agreement is procedurally unconscionable. It was imposed as a condition of employment and the employees had no opportunity to negotiate.

Arbitration is favored in Columbia as a voluntary means of resolving disputes, and this voluntariness is its bedrock justification. Given the lack of choice and the disadvantages of even a fair arbitration system for employees, we are particularly vigilant when employers with superior bargaining power impose one-sided, substantively unconscionable terms in the arbitration clause.

The agreement is also substantively unconscionable because it requires only employees but not the employer to arbitrate claims. The party required to submit claims to arbitration forgoes many rights and benefits associated with a judicial forum, while the party requiring waiver retains all the benefits and protections. The unilateral obligation is so one-sided as to be substantively unconscionable.

3. Severability of Unconscionable Provisions

When a court finds unconscionability, it may refuse to enforce the contract or enforce the remainder of the contract without the unconscionable clause, or it may limit the application of any unconscionable clause to avoid an unconscionable result. The former course is appropriate when an agreement is permeated by unconscionability. Two reasons favor severing or restricting unconscionable terms. The first is to prevent parties from gaining undeserved benefit or suffering undeserved detriment from voiding the agreement. Second, severance attempts to conserve a contractual relationship if to do so does not condone an illegal scheme. The overarching inquiry is whether severance furthers the interests of justice.

In this case, two factors weigh against severance of the unlawful provisions in the arbitration agreement. First, the arbitration agreement contains more than one unlawful provision -- an unlawful damages provision and an unconscionable unilateral arbitration clause. Multiple defects indicate a systematic effort to impose arbitration not as an alternative to litigation but to gain advantage. Second, permeation appears from the fact that there is no single provision a court can strike or restrict to remove the unconscionable taint from the arbitration agreement. The court would have to reform the contract by

substituting terms. When a court is unable to cure unconscionability through severance or restriction, voiding the arbitration agreement may serve the interests of justice. Here, the various provisions that are unconscionable and contrary to public policy make the mandatory arbitration agreement unenforceable as a whole.

The approach described above is consistent with our case of *Marshall v. Fermy* (1981) Col. Sup. Ct., in which we found an arbitration agreement unconscionable because it provided for an arbitrator likely to be biased in favor of the party imposing the agreement. Relying on the methods for appointing an arbitrator provided in the CAA when the arbitration agreement does not provide a method for appointing an arbitrator, the court remanded and instructed the trial court to follow the procedures of the CAA. Thus, an arbitration clause providing for a less-than-neutral arbitration forum is severable because the arbitration statute itself gave the court the power to reform the agreement. No comparable provision in the arbitration statute enables the court to reform the defects here.

Reversed and remanded to the Court of Appeal with directions to affirm the judgment of the trial court.

Fillman v. Cornado Homes, Inc.
State of Columbia, Court of Appeal (2001)

Heidi Fillman (Fillman), proceeding *in forma pauperis*, brings this action against Cornado Homes, Inc. (Cornado) for damages arising out of Fillman's purchase of a manufactured home under a retail installment contract. Fillman alleges violations of the Truth in Lending Act (TILA), Columbia's Uniform Commercial Code, and common law trespass. Cornado filed a motion to compel arbitration. Finding that the contract's arbitration clause precludes Fillman from vindicating her statutory rights under the TILA because the arbitral forum is financially inaccessible, the court denies Cornado's motion.

Fillman executed a retail installment contract, effective March 31, 2000, with Cornado for the installment purchase of a manufactured home for herself and her three young children. The contract was a pre-printed form provided by Cornado and contained an arbitration clause that provides, in pertinent part, as follows:

ARBITRATION OF DISPUTES AND WAIVER OF JURY TRIAL: Any controversy or claim between you and me or our assignees arising out of or relating to the contract or any agreements or instruments relating to or delivered in connection with this contract, including any claim based on or arising from an alleged tort, shall, if requested by either you or me, be determined by arbitration. **YOU AND I AGREE AND UNDERSTAND THAT WE ARE GIVING UP THE RIGHT TO TRIAL BY JURY, THERE SHALL BE NO JURY AND THE CONTROVERSY OR CLAIM WILL BE DECIDED BY ARBITRATION.**

The arbitration clause does not mention the costs of arbitration or which party is responsible for paying them. However, the contract provides that "the Commercial Rules of the American Arbitration Association . . . apply" to any arbitration arising from the contract.

Fillman brought this suit on March 28, 2001. On the same day, the court granted Fillman's application to proceed *in forma pauperis*, thereby exempting her from the court's \$150 filing fee. On May 25, 2001, Cornado moved to compel arbitration, which Fillman opposed arguing, in part, that the arbitration provision interferes with vindication

of her statutory rights under the TILA and is unconscionable because the fees associated with the arbitration prohibit her access to the arbitral forum.

The parties stipulate to the following facts: According to the Commercial Arbitration Rules of the American Arbitration Association (AAA), a party initiating a claim the size of Fillman's (between \$75,000 and \$150,000) must pay an initial filing fee of \$1,250, and, after a scheduling conference, a case fee of \$750. If the initiating party ultimately prevails, the arbitrator may award those fees to her in the final disposition of the case. The initiating party may apply for a waiver, reduction, or deferral (complete or partial) of these fees due to extreme hardship. The AAA's accounting department determines which claimants receive extreme hardship status. No formal standards govern the accounting department's determination. In practice, the complete waiver of a fee is extremely rare; partial deferral is the usual response. The arbitrator may assess the losing party the deferred fee as part of the final award.

After a party initiates a claim with the AAA, the parties may not proceed until they pay the arbitrator's fee and expenses. Each party is responsible for half those costs. The arbitrator selected by the parties sets the arbitration fee, which typically ranges between \$100 and \$300 per hour, for a minimum of one full day for hearings, plus the arbitrator's additional preparation and research time before and after the hearing. Arbitrators customarily charge their hourly rate for travel time. Thus, the arbitration will not proceed until both parties pay their half of the arbitrator's fees. Fillman suggests that the total amount of an arbitrator's fees will likely range between \$1,200 (assuming \$100 hourly fees for one hearing plus time for preparation and resolution without travel or other expenses) and \$8000 (assuming \$300 hourly fees for 24 hours of hearings, preparation, resolution, and travel, plus accommodation expenses).

On July 26, 2001, Fillman filed a declaration of her financial condition, stating that she provides sole support for herself and her three children. Though entitled to child support amounting to \$600 per year, she rarely is able to collect payments. Fillman works as a waitress at a local restaurant where she earns an average weekly income, including tips, of \$300 and attends Community College part-time. She owes \$14,125 in old student loans which have been deferred until she finishes school. Due to her limited

income, her family shares a house with another family. Her share of those expenses consists of the following monthly amounts: electricity, including heat and well pump, \$60-75; telephone, \$20; food, \$430. She is solely responsible for the following monthly expenses: daughter's drug prescriptions, \$40; car payments, \$260; car insurance, \$128; gasoline, \$100; and occasional expenses for clothes and other needs. She expects to spend about \$300 for back-to-school clothes and supplies for her young children, for whom she shops at thrift stores. Fillman cannot afford health insurance, and she currently owes Community Hospital \$445. Fillman declares that she cannot afford to pay costs associated with the adjudication of her dispute.

To decide whether statutory claims may be arbitrated, a court must resolve a threshold issue. The court must determine whether the parties agreed to submit their claims to arbitration. The court finds that the parties agreed to arbitrate the claims. Fillman voluntarily signed the contract. She alleges that Cornado did not provide her an opportunity to read the contract before signing it. The failure to provide such an opportunity is of no consequence. A party to a written contract is responsible for informing herself of its contents before executing it, and in the absence of fraud or overreaching she cannot impeach the effect of the instrument by showing that she was ignorant of its contents or failed to read it.

However, in *Medina*, the Supreme Court held that a mandatory arbitration agreement may not require employees to pay arbitrators fees or expenses that make the forum inaccessible. Therefore, the court must determine whether Fillman has demonstrated that the arbitration clause at issue prevents her from vindicating her rights under the TILA because the costs of arbitration make that forum inaccessible.

The court finds that Fillman has adequately demonstrated that the arbitral forum provided for in the contract is financially inaccessible to her; and therefore, fails to ensure that she can vindicate her statutory rights under the TILA. Here, Fillman has presented substantial evidence that the costs of arbitrating her claims would preclude her from vindicating her statutory rights.

The arbitration clause does not indicate directly which party will be responsible for the costs of initiating arbitration. Under the Commercial Rules of the AAA, Fillman

must pay an initial filing fee of \$1,250 and a \$750 case fee shortly thereafter. Fillman could not recover those fees, unless she ultimately prevailed on her claim. Even if she prevailed, Fillman does not have \$2,000 to pay the fees in the first place, and she has no collateral with which to obtain a sufficient loan. Though Fillman may apply for fee deferral or reduction due to "extreme hardship," waiver of fees is extremely rare. The AAA does not provide standards for granting hardship, an issue determined by its accounting department.

Even if the initial \$2000 in administrative fees were waived or deferred, Fillman has demonstrated that the additional costs of the arbitration process amount to an insurmountable financial barrier. To proceed, Fillman would be responsible for paying one-half of the anticipated fee and expenses of the arbitrator stated above. These fees are not subject to waiver or deferral for extreme hardship. In acknowledgment of Fillman's strained financial condition, this court found her unable to pay the \$150 filing fee normally required to initiate the claim it now considers. In view of these facts, the court finds that Fillman's limited income affords no margin for expenses of the magnitude required to pay an arbitrator to consider her claim.

Fillman has demonstrated that the arbitration clause precludes her from vindicating the rights afforded by the TILA because the arbitral forum is financially inaccessible. The court concludes that the arbitration clause is unenforceable and denies Cornado's motion.

Marshall v. Fermby
Supreme Court of Columbia (1981)

Bill Marshall appeals from a judgment confirming an award by an arbitrator. We reverse and direct the trial court to vacate its order compelling arbitration.

Marshall is an experienced promoter and producer of musical concerts. Leon Fermby is a successful performer and recording artist. He is also a member of the American Federation of Musicians (AFM). Early in 1973, Fermby requested Marshall, who had promoted a number of Fermby concerts, to structure a tour. Four contracts were prepared. Marshall signed all four contracts; Fermby signed only those relating to the Windsor and Beachland concerts, which were to occur on July 29 and August 5, 1973.

The four contracts were all prepared on an identical form known in the industry as an AFM form B contract. Aside from matters such as date and time, they differed from one another in only two areas -- the hours of employment and wage. The latter provided payment of 85% percent of the gross receipts after expenses and taxes.

The contracts did not state who would bear any eventual net losses. The forms also provided: "In accordance with the Rules and Regulations of the AFM, the parties will submit every claim, dispute, or controversy involving the musical services arising out of or connected with this contract and the engagement covered thereby for determination by the International Executive Board of the AFM or a similar board of an appropriate local thereof and such determination shall be conclusive, final and binding upon the parties."

The Windsor concert occurred as scheduled and had gross receipts of \$173,000 with expenses of \$236,000, resulting in a net loss of \$63,000. The Beachland concert resulted in a net profit of \$98,000. Following this concert, a dispute arose over who was to bear the loss sustained in the Windsor concert and whether that loss could be offset against the profits of the Beachland concert. Fermby said that under the contract Marshall was to bear all losses from any concert without offset. Marshall urged that, under standard industry practice and custom relating to 85/15 contracts, such losses

should accrue to Fermby without offset. With this dispute unresolved, Fermby declined to execute the contracts for the Long Island and Philadelphia concerts.

In October 1973, Marshall filed an action for breach of contract, declaratory relief, and rescission against Fermby. Fermby responded with a petition to compel arbitration. After ordering arbitration, the trial court granted reconsideration to permit discovery limited to the issues of whether an agreement to arbitrate was entered into and whether grounds existed to rescind such agreement.¹ Following discovery, including depositions, the court granted the petition and ordered arbitration.

On October 29, 1976, a hearing was held at the union's western office before a referee appointed by the union president. The referee was a former executive officer and a long-time member of the union who had been a hearing officer in previous union matters. Marshall produced considerable evidence that, under common custom and practice in the industry, the promoter under an 85/15 contract was understood to bear no risk of loss because his share of the profits was considerably smaller than under the normal contract, under which the promoter takes a larger percentage of the profits but is understood to bear the risk of loss. Fermby offered no contrary evidence.

In his report to the union's international executive board, the referee recommended that Marshall be ordered to pay Fermby the amount he claimed (some \$53,000) at the arbitration. On February 22, 1977, the union's international executive board made its award in conformity with the recommendation of the referee.

The superior court denied Marshall's petition to vacate the award. Marshall appeals.

Marshall contends that the order was in error because, insofar as the underlying agreement required arbitration of disputes before the AFM, it was unenforceable because of unconscionability. Two separate questions are thus presented: (1) Is this procedurally unconscionable? (2) Is it substantively unconscionable?

¹ The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate. Col. Arbitration Act § 2(b).

Procedural unconscionability signifies a standard contract, which, when imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to or reject the contract. While not lacking in social advantages, they bear the danger of oppression and overreaching. With this tension between social advantage and the danger of oppression, courts and legislatures have sometimes acted to prevent abuses.

The contract in question, in light of all of the circumstances, is procedurally unconscionable. Although Fermby insists that Marshall's prominence and success in the promotion of popular music concerts afforded him considerable bargaining strength, the record establishes that he, for all his stature in the industry, was reduced to the humble role of adherent. Marshall, whatever his asserted prominence in the industry, was required by the realities of his business to sign AFM form contracts with *any* concert artist and that he, wishing to promote the Fermby concerts, had the nonnegotiable option to accept the contracts on an 85/15 basis or not at all.

The Columbia Arbitration Act seems to contemplate complete contractual autonomy in the choice of an arbitrator. The Columbia Arbitration Act (CAA) § 29(a) provides that "if the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method shall be followed, unless the method fails."

The CAA does not preclude parties from designating as arbitrator an entity or person who, by reason of relationship to a party, can be expected not to adopt a "neutral" stance. However, when as here the contract is adhesive, the possibility of overreaching looms large; we scrutinize contracts concluded in such circumstances to insure that the party of lesser bargaining power has a realistic and fair opportunity to prevail. Contracts must operate within a minimum level of integrity.

Courts must determine on a case-by-case basis this minimum level of integrity. Arbitration requires a *tribunal*, an entity or body that hears and decides disputes. An entity that is incapable of deciding based on what it has heard cannot act as a tribunal; one of the principal parties to the contract does not qualify.

The contract we here consider, insofar as it requires the arbitration of all disputes before the AFM, is substantively unconscionable. The minimum level of integrity

required for a contractual arrangement for the nonjudicial resolution of disputes is not achieved when the agreement designates the union of one of the parties as the arbitrator of disputes.

A contract provision designating a contractual party to serve as arbitrator is substantively unconscionable. The same result follows, and for the same reasons, when one whose interests are so allied with those of the party that, for all practical purposes, he is subject to the same disabilities. A contract is substantively unconscionable if it is overly harsh and one-sided.

We conclude that a contract provision designating the union of one of the parties as the arbitrator of disputes arising thereunder does not achieve the minimum level of integrity required of a contractually structured substitute for judicial proceedings. However, in light of the strong public policy of this state favoring resolving disputes by arbitration, the parties should not be precluded from using nonjudicial means of settling their differences. The parties have agreed to arbitrate but have named as arbitrator an entity that we cannot permit to serve in that capacity. In these circumstances, the parties should not be precluded from attempting to agree on an arbitrator. Upon remand, the trial court should afford the parties the opportunity to agree on a suitable arbitrator pursuant to § 29(a). In the absence of an agreement or petition to appoint, the court should proceed to a judicial determination.

We reverse and remand.

**Unfair Trade Practices Act
Columbia Consumer Protection Code**

§ 1. Purposes.

(a) The purposes of this chapter are to:

- (1) assure that a just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices;
- (2) promote, through effective enforcement, fair business practices throughout the community; and
- (3) educate consumers to demand high standards and seek proper redress of grievances.

(b) This chapter shall be construed and applied liberally to promote its purposes.

* * * *

§ 4. Unlawful trade practices.

It shall be a violation of this chapter, whether or not any consumer is in fact misled, deceived or damaged thereby, for any person to:

- (a) misrepresent as to a material fact that has a tendency to mislead;
- (b) fail to state a material fact if such failure tends to mislead;
- (c) make or enforce unconscionable terms or provisions of sales or leases;

* * * *

§ 7. Remedies.

(a) The remedies provided in this section may not be waived.

(b) A person, whether acting for the interests of itself, its members, or the general public, may bring an action under this chapter in the Superior Court of the State of Columbia seeking relief from the use by any person of a trade practice in violation of a law of Columbia.

(c) A person may recover or obtain the following remedies:

- (1) treble damages, or \$ 1,500 per violation, whichever is greater, payable to the consumer;
- (2) reasonable attorney's fees;

- (3) punitive damages;
- (4) an injunction against the use of the unlawful trade practice;
- (5) in representative actions, additional relief as may be necessary to restore to the consumer money or property, real or personal, which may have been acquired by means of the unlawful trade practice; or
- (6) any other relief which the court deems proper.

Columbia Arbitration Act

§ 26. Validity of agreement to arbitrate.

(a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.

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

* * * *

§ 28. Motion to compel or stay arbitration.

(a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

* * * *

(2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

§ 29. Appointment of arbitrator; service as a neutral arbitrator.

(a) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method shall be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.