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Low-Value &(and) Predictably Small: When Should Class-Arbitration Waivers be Invalidated as Unconscionable

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"Low-Value" & "Predictably Small": When Should Class-Arbitration Waivers be Invalidated as Unconscionable?

Muhammad v. County Bank of Rehoboth Beach[1]

I. INTRODUCTION

In *Muhammad v. County Bank of Rehoboth Beach*, the New Jersey Supreme Court chose the interests of consumers over liberally construed Federal Arbitration Act (FAA) policies in deciding that a no class-arbitration provision contained within a payday loan contract was unconscionable.[2] The court used state law contract principles to invalidate the clause, finding that the clause violated several state public policies.[3] Particularly important to the court was the fact that individual claims for damages would be nominal, and thus individual vindication of statutory rights would prove too costly to be practical.[4] In making this distinction, the court suggested a preference for protecting individuals who have entered into contracts of adhesion with little or no chance of protecting themselves outside of the availability of the class mechanism. The court's decision may serve as a guidepost for other jurisdictions attempting to shape the law in the undefined arena of class-arbitration waivers. The court signals that freedom to contract under the FAA is important, but not at the expense of protecting individual claimants and the statutory rights of consumers.

II. FACTS & HOLDING

Plaintiff Jaliyah Muhammad, at the time of suit, was a part-time college student in Paramus, New Jersey.[5] Defendant County Bank of Rehoboth Beach, Delaware (County Bank) is a federally insured lender.[6] Easy Cash and Telecash are registered trade names of County Bank, and Main Street Service Corp. (Main Street) is a loan servicer for County Bank.[7] In April, May, and June of 2003 Muhammad received three similar loans from County Bank.[8] Before receiving her first, Muhammad was required to complete a Loan Application.[9] Muhammad signed this standard form contract on April 28, 2003, and was not required to

1. 912 A.2d 88 (N.J. 2006).
2. *Id.*
3. *Id.* at 98-102.
4. *Id.* at 99-100.
5. *Id.* at 91.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

complete additional Loan Applications for the other loans.[10] She was required to sign an additional Loan Note and Disclosure form prior to receiving the second loan on May 23, 2003.[11]

The second loan, which was analyzed extensively by the court, was a $200, short-term, unsecured, single advance loan from County Bank.[12] According to the loan's terms, the principal and a finance charge of $60 were due on June 13, 2003.[13] The annual percentage rate on the loan was listed as 608.33%.[14] Muhammad twice extended this loan because she was unable to pay, incurring an additional $120 in finance charges.[15]

Both the Loan Application and the Loan Note and Disclosure forms contained arbitration agreements.[16] The Loan Application contained an Agreement to Arbitrate All Disputes.[17] This section contained a provision stating that "all claims, disputes, or controversies . . . shall be resolved by binding individual (and not class) arbitration. . . ."[18] Further, an additional notice emphasized that the applicant was indeed giving up the chance to litigate and was instead subject to binding arbitration.[19] The Loan Application also contained an Agreement Not To Bring, Join or Participate In Class Actions, which contained language explicitly forbidding any class action claims, but not individual arbitration claims.[20] Additionally, above the signature line the Loan Application contained language stating that by "signing below you agree to all the terms of this note, including the Agreement to Arbitrate All Disputes and the Agreement Not To Bring, Join or Participate In Class Actions."[21] The Loan Note and Disclosure form signed respecting the second loan contained similar provisions, including an Agreement to Arbitrate All Disputes and an Agreement Not To Bring, Join or Participate In Class Actions.[22]

"In February of 2004, Muhammad filed a putative class-action suit in New Jersey Superior Court against County Bank, Easy Cash, Telecash, and Main

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10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* The Annual Percentage Rate is "a measure of the cost of credit, expressed at a yearly rate." 12 C.F.R. § 226.14(a) (2007). This section, 226, is know as "Regulation Z" and implements the provisions of the Truth in Lending Act. 12 C.F.R. § 226.1(a) (2007) (Section 226.14 contains the formula that must be used for determining APR).
16. *Muhammad*, 912 A.2d at 92-93. The agreements stipulated that arbitration would be under the auspices of the National Arbitration Forum (NAF). *Id.*
17. *Id.* at 91.
18. *Id.* at 91-92.
19. *Id.* at 93. "Notice: You and we would have had a right or opportunity to litigate disputes through a court and have a judge or jury decide the disputes but have agreed instead to resolve disputes through binding arbitration." *Id.*
20. *Id.*

> Agreement Not To Bring, Join Or Participate In Class Actions: To the extent permitted by law, by signing below you agree that you will not bring, join or participate in a class action as to any claim, dispute or controversy you may have against us. . . . This agreement does not constitute a waiver of any of your rights and remedies to pursue a claim individually and not as a class action in binding arbitration as provided [in other sections of this contract].

Id.
21. *Id.*
22. *Id.*

Street."[23] Muhammad alleged that Easy Cash, Telecash, and Main Street violated the New Jersey Racketeer Influenced and Corrupt Organizations (RICO) statute,[24] the civil usury act,[25] and the Consumer Fraud Act,[26] by charging and conspiring to charge illegal interest rates.[27] The complaint further alleged that County Bank aided and abetted the other defendants' violative conduct by renting out the County Bank name without actually funding any of the loans.[28] Muhammad sought injunctive relief, damages, restitution, penalties, and costs.[29]

Defendants removed the action to federal court, but the case was remanded to state court.[30] Defendants then filed a motion to compel arbitration and stay the claim pending arbitration, as well as a motion requesting a protective order with respect to discovery.[31] Muhammad opposed each motion and filed a cross-motion concerning discovery.[32] Muhammad argued that "the arbitration agreement was unconscionable based on the class-action waiver, the costs of arbitration, discovery limitations in the National Arbitration Forum's (NAF) rules, and the inherent bias in choosing the NAF as a forum."[33]

The New Jersey trial court granted Defendants' motion to compel arbitration pursuant to the FAA and stayed the case pending arbitration.[34] The court granted Muhammad's motion for leave to appeal.[35] The New Jersey Appellate Division affirmed the trial court's decision, finding the arbitration agreement was not unconscionable.[36] Thereafter, Muhammad filed a motion for leave to appeal to the Supreme Court of New Jersey.[37] This motion was granted.[38] On August 9, 2006, the New Jersey Supreme Court held that the presence of the class-arbitration agreement rendered the agreement unconscionable and that the agreement should be severed and the remaining portions of the contracts enforced with respect to their terms.[39]

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23. *Id.*
24. N.J. REV. STAT. § 2C:41-1 (2005).
25. N.J. REV. STAT. § 31:1-1 (1998).
26. N.J. REV. STAT. § 56:8-2 (2001).
27. *Muhammad*, 912 A.2d at 93.
28. *Id.*
29. *Id.*
30. *Id.* The federal court determined the claim was not preempted by the Depository Institutions Deregulation and Monetary Control Act of 1980. *Id.* (citing 12 U.S.C. § 1831(d) (2000)).
31. *Id.*
32. *Id.* The cross-motion argued that because of a discovery limitation in National Arbitration Forum rules where the cost of discovery must be commensurate with the amount of the claim, Muhammad was precluded from obtaining relief. In other words, because the amount of damages is only $180, discovery would be limited to that amount, and that is insufficient in a complex claim. *Id.* at 93 n.1.
33. *Id.* at 93. In response to the cross-motion, the defendants offered to arbitrate Muhammad's claims in the American Arbitration Association, but this offer was rejected. *Id.* at 93-94.
34. *Id.* at 94.
35. *Id.*
36. Muhammad v. County Bank of Rehoboth Beach, 877 A.2d 340, 356 (N.J. Super. Ct. App. Div. 2005).
37. Muhammad v. County Bank of Rehoboth Beach, 883 A.2d 1054, 1054 (N.J. 2005).
38. *Id.*
39. *Muhammad*, 912 A.2d at 100, 103.

III. LEGAL BACKGROUND

The FAA attempts to promote certain goals of arbitration, including: speed, low-costs, party autonomy, privatization, arbitrator expertise, neutrality, finality, and fair hearings.[40] Parties are given significant freedom to contract for the ways in which particular disputes will be settled in arbitration.[41] Businesses, favoring the many benefits of arbitration, have resorted to mandatory binding arbitration clauses.[42] Clauses banning class-wide arbitration are a new feature to mandatory arbitration contracts and have quickly become popular among businesses.[43] Companies have chosen to use class-arbitration waivers to shield themselves from the possibility of class liability.[44]

A. Courts' Treatment of Class-Arbitration Clauses

The pro-arbitration policy of the FAA does not preclude an arbitration agreement or a particular clause therein, from being declared void upon judicial review. Section 2 of the FAA provides that arbitration agreements covered by the Act "shall be valid, irrevocable, and enforceable save upon grounds as exist at law or in equity for the revocation of any contract."[45] These grounds for revocation include state law contract principles such as unconscionability and public policy.[46] When a particular clause is attacked on these grounds, the question requires judicial resolution.[47] On the other hand, the arbitrator will decide questions pertaining to the interpretation of the arbitration agreement.[48] Further, if an arbitration agreement is silent on the issue of class-arbitration, the arbitrator will make a ruling in light of the contract language.[49]

Federal circuits are in disagreement as to whether arbitration clauses explicitly waiving the availability of class-arbitration are valid under the FAA.[50] State

40. *See* EDWARD BRUNET ET AL., ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 3 (2006).

41. *See* Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 478.

42. *See* Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 685 (2004).

43. Jean R. Sternlight & Elizabeth J. Jenson, *Mandatory Arbitration: Using Arbitration To Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75 (2004).

44. *Id.* at 75-76.

45. 9 U.S.C. § 2 (2006).

46. *See* Burton, *supra* note 41, at 485-86.

47. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452 (2003) (whether the parties have a valid arbitration agreement is a "gateway" issue that requires judicial resolution).

48. *See Id.* at 451-53.

49. *Id.* at 453.

50. Validating the clause: Livingston v. Assocs. Fin., Inc., 339 F.3d 553, 559 (7th Cir. 2003) ("The Arbitration Agreement at issue here explicitly precludes the [plaintiffs] from bringing class claims or pursuing 'class action arbitration,' so we are therefore 'obliged to enforce the type of arbitration to which these parties agreed, which does not include arbitration on a class basis.'"). Champ v. Siegel Trading Co., Inc., 55 F.3d 269, 277 (7th Cir. 1995); Metro E. Ctr. for Conditioning & Health v. Qwest Commc'ns Int'l, Inc., 294 F.3d 924, 927 (7th Cir. 2002). Invalidating the clause: Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006) (Class-arbitration waiver invalid as conflicting with the Federal Rules of Civil Procedure).

courts, including federal courts applying state law, are also divided on the validity of class-arbitration waivers, but all will make rulings based on state contract law.[51] Thus, courts will often validate or invalidate class-arbitration clauses based upon state law contract principles such as unconscionability and public policy.[52]

Both state and federal courts have looked to numerous factors when evaluating class-arbitration clauses.[53] Courts will often separate the factors amongst the two prongs present in most state unconscionability analyses.[54] The first prong, procedural unconscionability, will address whether the contract is a contract of adhesion and whether the contract is a product of predatory lending or bargaining practices.[55] Procedural unconscionability, although relevant, is not typically dispositive to the unconscionability analysis.[56] For instance, where a contract of adhesion is found, courts will often assume that some degree of procedural unconscionability exists and then invalidate the class-arbitration clause if they determine that a fatal degree of *substantive* unconscionability is present.[57]

When examining a clause for substantive unconscionability, many courts have looked for the existence of a statutory right, and whether or not the clause at issue makes it impossible to seek vindication of the right.[58] If a statutory right is involved the court may inquire as to whether or not the statute provides for attorney's fees or costs.[59] Many courts will look to the amount of damages that may be available to an individual claimant under the relevant statute, and these courts will generally disfavor class-arbitration clauses where only nominal individual damag-

51. Validating the clause: Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868, 877-78 (11th Cir. 2005) (applying Ga. Law); Snowden v. CheckPoint Check Cashing, 290 F.3d 631, 638 (4th Cir. 2002) (Applying Md. contract principles); Tillman v. Commercial Credit Loans, Inc., 629 S.E.2d 865, 873-74 (N.C. Ct. App. 2006); Rosen v. SCIL, LLC, 799 N.E.2d 488, 494 (Ill. App. Ct. 2003) (Arbitration clause not unconscionable even though it bars class-arbitration); Strand v. U.S. Bank Nat'l Ass'n ND, 693 N.W.2d 918, 926 (N.D. 2005) (Class-actions are a procedural right, and thus their waiver is not necessarily substantively unconscionable). Invalidating the clause: Wong v. T-Mobile USA, Inc., No. 05-73922, 2006 U.S. Dist. LEXIS 49444, at *12-*13 (E.D. Mich. July 20, 2006) (Applying Mich. law, the court found that the waiver prevented consumers from pursuing Mich. statutory rights); Leonard v. Terminix Int'l Co., 854 So. 2d 529, 538 (Ala. 2002); State *ex rel.* Dunlap v. Berger, 567 S.E.2d 265, 278-80 (W. Va. 2002) (arbitration agreement unconscionable as it waived class-arbitration and punitive damages); Powertel, Inc. v. Bexley, 743 So. 2d 570, 574, 576-77 (Fla. Dist. Ct. App. 1999) (arbitration clause unconscionable because it waived statutory rights and precluded class-arbitration).

52. *E.g.* Doctor's Assocs. v. Casarotto, 517 U.S. 681, 682, 687 (1996) ("Generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2. . . .").

53. *E.g.*, *Leonard* 854 So. 2d at 536-38.

54. *E.g.*, Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000) (The prevailing view is that both procedural and substantive unconscionability must be present to invalidate a clause as unconscionable.).

55. *E..g.*, Coady v. Cross Country Bank, Inc., 729 N.W. 2d 732, 441-47 (Wis. Ct. App. 2007).

56. *See, e.g.*, Delta Funding Corp. v. Harris, 912 A.2d 104, 111 (N.J. 2006).

57. *Id.*

58. *E.g.*, Skirchak v. Dynamics Research Corp., Inc., 432 F. Supp. 2d 175, 181 (D. Mass. 2006). *But see* Johnson v. West Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000) (clauses effective even though "they may render class actions to pursue statutory claims under the TILA or the EFTA unavailable").

59. *E.g.*, Winig v. Cingular Wireless LLC, No. C 06 4297 MMC, 2006 WL 2766007 at *5 (N.D. Cal. Sept. 27, 2006).

es are possible.[60] Other courts will look for evidence of fairness in the contract, including whether the clause is intended to protect the defendant from liability.[61]

In addition to examining factors under the relevant contract analysis, courts will often weigh pertinent public policies when deciding whether to validate a class-arbitration waiver.[62] Courts have noted the general policy favoring arbitration, the policies underlying the class-action mechanism, and policies relevant to the enactment of certain state or federal statutes.[63] Courts invalidating class waivers have expressed concern that individual claimants may go without redress, noting that the class-mechanism protects the rights of individuals whose sole possible remedy may lie in a class claim when the possibility of a sizeable recovery is minimal.[64] Further, class actions provide incentives to properly investigate claims that would be too time-consuming if the only prospect was a nominal, individual recovery.[65] Courts have also noted that class actions can benefit the judicial process by avoiding the expense, in terms of time and money, of re-litigating similar claims.[66] Class actions can also create "substantial funds" that provide for attorneys fees and contingency fees so that attorneys may take a case although there is a possibility of receiving no recovery.[67] Courts enforcing class-arbitration clauses have not attacked the policies behind class-actions or particular statutes, but have instead stated that the strong policy favoring arbitration agreements trumps other policies at issue.[68]

B. The California Cases

As class-arbitration waivers are relatively recent phenomena, in many jurisdictions there is little certainty as to how a court will rule on a particular clause. California courts, on the other hand, have developed a significant body of law regarding class-arbitration waivers.[69] California courts have ruled on class-

60. *E.g.*, Stern v. Cingular Wireless Corp., 453 F. Supp. 2d 1138, 1146, 1149 (C.D. Cal 2006) (waiver unconscionable as only a small amount of damages are possible); Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 267 (Ill. 2006) (waiver acts only to prevent customers from seeking redress for small amounts of money).

61. *E.g.*, Kristian v. Comcast Corp., 446 F.3d 25, 54 (1st Cir. 2006) The bar on class arbitration threatens the premise that arbitration can be "a fair and adequate mechanism for enforcing statutory rights." *Id.* (quoting Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 14 (1st Cir. 1999)).

62. *E.g. Kinkel*, 857 N.E.2d at 267-68.

63. *Id.* at 260.

64. Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 617 (1997); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338-39 (1980); Vasquez v. Super. Ct., 484 P.2d 964, 968 (Cal. 1971) ("Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action.").

65. *See, e.g.*, Varacallo v. Mass. Mut. Life Ins. Co., 226 F.R.D. 207, 234 (D.N.J. 2005).

66. Ortiz v. Fibreboard Corp., 527 U.S. 815, 860 (1999) (Class actions provide the "opportunity to save the enormous transaction costs of piecemeal litigation.").

67. *See Amchem*, 521 U.S. at 617. *See also* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974).

68. *E.g.*, Dale v. Comcast Corp., 453 F. Supp. 2d 1367, 1376-77 (N.D. Ga. 2006).

69. *See generally* Jack Wilson, *"No-Class-Action Arbitration Clauses," State-Law Unconscionability and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV. 737, 763-68 (2004).

arbitration waivers in a variety of contexts, and examining this line of cases is informative as to the development of analyses in a jurisdiction that will, in some circumstances, strike the clauses as unconscionable.

Ting v. AT&T[70] was a certified class-action suit brought by California AT&T customers.[71] The class sought relief from a new consumer contract AT&T was attempting to impose on eighteen million long-distance customers.[72] The new contract contained a binding arbitration clause, including a class-arbitration waiver.[73] The United States District Court for the Northern District of California, applying California law, found the Legal Remedies clause of the new contract void as it contained unconscionable features.[74] The court stated that the class-arbitration waiver acted as a means for AT&T to shield itself from liability under California law, and therefore the clause was unconscionable.[75] The court concluded by stating that the unconscionable provisions would make it impossible for customers to vindicate their rights, and thus the illegal provisions were to be enjoined.[76]

Szetela v. Discover Bank,[77] also decided in 2002, presents a similar set of facts.[78] The suit was brought as a putative class action, but Szetela's individual claim for damages amounted to only twenty-nine dollars.[79] The Fourth District California Court of Appeal found the amended credit-card contract, containing a class-arbitration waiver, to be both procedurally and substantively unconscionable.[80] The procedural unconscionability analysis was similar to that used for contracts of adhesion, focusing on the nature of the terms and whether the contract was offered on a "take it or leave it" basis.[81] The court found the contract to be substantively unconscionable, noting that it could envision no way in which the clause may harm Discover and many ways in which it may harm consumers.[82] For instance, consumers will often not seek redress for such small claims, and as such Discover had "sought to create for itself virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to its own rights."[83] The court stated further that the contract was inherently unfair as it allowed millions of customers to be overcharged without an effective

70. 182 F. Supp. 2d 902 (N.D. Cal. 2002), *aff'd in part, rev'd in part*, 319 F. 3d 1126 (9th Cir. 2003) (finding preemption of application of state law but still reaching a finding of unconscionability).

71. *Id.* at 906. One of the class parties was Consumer Action, a California non-profit group dedicated to consumer education and advocacy. *Id.*

72. *Id.* at 911-12. These eighteen million customers received a new contract with their bill, while another forty-two million AT&T customers received the new contract in a separate envelope stating, on the outside, "ATTENTION: Important Information concerning your AT&T service enclosed." *Id.* at 912.

73. *Id.* at 927.

74. *Id.* at 938-39.

75. *Id.* at 918.

76. *Id.* at 938-39.

77. 118 Cal.Rptr.2d 862 (Cal. Ct. App. 2002).

78. *Id.* at 864. Szetela received a new contract, containing a mandatory arbitration agreement, included with his Discover Card bill. *Id.*

79. *Id.* at 865.

80. *Id.* at 867-68.

81. *Id.* at 867.

82. *Id.* at 867-68.

83. *Id.* at 867.

method of redress.[84] Finally, the court addressed pertinent policy concerns, noting that the class-arbitration agreement violated a California policy discouraging unfair and unlawful business practices and also violated public policy by seeking to contract around procedures that allow the courts to operate in an efficient manner.[85]

After *Szetela*, the California Supreme Court made what was, at the time, the most conclusive statement regarding class-arbitration clauses as interpreted by California law.[86] In *Discover Bank v. Superior Court*, the California Supreme Court was afforded an opportunity to review and synthesize prior cases.[87] The court began its analysis by noting the importance of class action lawsuits under California law.[88] The court reiterated an endorsement of class-wide arbitration generally and then addressed the line of cases, including *Szetela*, that have discussed class-arbitration waivers.[89] Stating that the clause in *Szetela* was "virtually identical" to that in *Discover Bank*, the court moved on to an unconscionability analysis.[90] The court summarized the case law, and then noted the reasoning included in other California cases, stating that the court "do[es] not hold that all class action waivers are necessarily unconscionable."[91] The court continued to state that where a class action waiver is found in a consumer contract of adhesion, where a small amount of damages may be involved, and where it is shown that a party with superior bargaining power has perpetuated a scheme to "deliberately cheat" large numbers of consumers out of individually small sums of money, then in these circumstances, and under California law, the waiver should be unenforceable.[92]

In *Cohen v. DIRECTV, Inc.*,[93] the California Court of Appeal reexamined the principles laid out in *Discover Bank*, and finding them all relevant, applied a virtually unchanged analysis.[94] The court had to address the issue of when a claim is no longer low-value.[95] In answering this question, the court rejected an argument by DIRECTV that because some claims may reach up to one thousand dollars, the class-arbitration wavier did not involve "a setting where disputes between the contracting parties 'predictably involve small amounts of damages.'"[96] The court found the DIRECTV clause unconscionable, and concluded by reviewing several other California decisions that reach the same result.[97]

84. *Id.* at 868.
85. *Id.*
86. *See* Discover Bank v. Super. Ct., 113 P.3d 1100 (Cal. 2005).
87. *See id.* at 1106-10.
88. *Id.* at 1105-06.
89. *Id.* at 1106-08.
90. *Id.* at 1104.
91. *Id.* at 1106-10.
92. *Id.* at 1110.
93. 48 Cal. Rptr. 3d 813 (Cal. Ct. App. 2006).
94. *See id.* at 816-23.
95. *See id.* at 820.
96. *Id.* at 820 (quoting Discover Bank v. Super. Ct., 113 P.3d 1100 (Cal. 2005)).
97. *See id.* at 820-23.

C. New Jersey Law

New Jersey recognizes several common law contract principles.[98] Specifically, courts may declare contracts void as unconscionable or violative of public policy.[99] Further, New Jersey has adopted, by statute, the Uniform Commercial Code provision recognizing the doctrine of unconscionability.[100] The standard for evaluating specific contract provisions for unconscionability has been developed by the courts.[101]

In *Rudbart v. North Jersey District Water Supply Commission*,[102] the New Jersey Supreme Court opined the analysis that would be used when evaluating contract provisions for unconscionability.[103] There the court explained that the initial inquiry is to determine whether the contract at issue is a contract of adhesion.[104] The court noted that the essential features of a contract of adhesion are that the contract is presented on a take-it-or-leave it basis, on a standardized form, and without the opportunity to negotiate on the terms by the adhering party.[105] The court stated that, if a contract is one of adhesion, then some indicia of procedural unconscionability will necessarily be involved.[106] Thus, according to the court, once a contract of adhesion is found, a court must move on to apply a fact-sensitive analysis of substantive unconscionability.[107] The substantive test consists of four factors which involve an inquiry into: "(1) the subject matter of the contract, (2) the parties' relative bargaining positions, (3) the degree of compulsion motivating the "adhering" party, and (4) the public interests affected by the contract."[108] These factors are used to specifically analyze facts on a case-by-case basis when evaluating claims of unconscionability.[109]

The New Jersey Appellate Division first ruled on the issue of class-arbitration waivers in *Gras v. Associates First Capital Corp.*[110] There the plaintiffs had entered into a series of five secured loan transactions with defendants where the principal amount of each loan was between $27,000 and $68,000.[111] The plaintiffs were required to sign a contract which included a binding arbitration clause and a class-arbitration waiver.[112] The plaintiffs brought suit alleging, among other things, a violation of the New Jersey Consumer Fraud Act.[113] The court applied a

98. *See, e.g.*, Saxon Constr. & Mgmt. Corp. v. Masterclean of N.C., Inc., 641 A.2d 1056, 1059 (N.J. Super. Ct. App. Div. 1994).
99. *See, e.g.*, Vasquez v. Glassboro Serv. Ass'n, 415 A.2d 1156, 1162, 1165-66 (N.J. 1980).
100. N.J. REV. STAT. ANN. § 12A:2-302 (West 2004).
101. *See, e.g.*, Rudbart v. N. Jersey Dist. Water Supply Comm'n., 605 A.2d 681, 685-87 (N.J. 1992).
102. *Id.*
103. *Id.* at 685-89.
104. *Id.* at 686.
105. *Id.* at 685 (citing Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1176 (1983)).
106. *See id.* at 685-86.
107. *Id.* at 687.
108. *Id.*
109. Delta Funding Corp. v. Harris, 912 A.2d 104, 111 (2006).
110. 786 A.2d 886 (N.J. Super. Ct. App. Div. 2001).
111. *Id.* at 887-88.
112. *Id.* at 888. The clause noted specifically that "any claim or dispute based on a federal or state statute" was also subject to individual, not class, arbitration. *Id.*
113. *Id.* at 887.

Rudbart analysis and concluded the no class-action provision was a contract of adhesion, but this alone did not render the contract unenforceable.[114] The court stated that claimants could still seek vindication of their statutory rights individually through arbitration and that the loan agreements were clear enough to adequately notify the plaintiffs as to a limitation of their rights.[115] The court found unpersuasive the cases plaintiffs focused on where courts found class-arbitration agreements to be detrimental to consumer rights.[116] The court also held the CFA was not at odds with arbitration; no public policy favoring class action could have led the court to conclude that the arbitration agreements were unenforceable.[117]

The appellate division had not changed its mindset by the time it ruled in *Muhammad*.[118] The Superior Court began its analysis of the facts by noting that New Jersey has a strong policy favoring arbitration and requires liberal construction of contracts in favor of arbitration.[119] The court noted that the language of the arbitration agreement was plain and that the plaintiff was not bargaining away her ability to assert her rights, but was only "agreeing to have the opportunity to vindicate those rights in the arbitra[l] [forum]. . . ."[120] When specifically assessing the validity of the class-arbitration waiver, the court noted its reluctance to depart from the *Gras* holding.[121] The court reiterated the *Gras* reasoning, by noting that the court must balance the Consumer Fraud Act's policy of protecting consumers, and the policy favoring arbitration agreements.[122] The court did not balance the two considerations but instead noted that "the absence of a legislative mandate or overriding public policy in favor of class actions leads us to conclude that the arbitration provision here is enforceable."[123] The court concludes by distinguishing the New Jersey Law Division case, *Discover Bank v. Shea*.[124] The Superior Court stated that in *Discover Bank* the plaintiff had received a "bill stuffer" that did not give proper notice of a waiver of rights, whereas Ms. Muhammad was "clearly notified that she waived her right to file a class action."[125]

The Superior Court, when applying the *Rudbart* test, based much of its analysis on the state policy favoring arbitration.[126] The court also distinguished precedent by focusing on procedural unconscionability, determining that the *Discover Bank* contract of adhesion did not pass muster as it was sent in the mail with a bill, and the loan contract in the instant case was acceptable as the plaintiff was clearly notified of her waiver of rights.[127] This substantial deference toward arbitration agreements and reliance on distinctions in the level of procedural unconscionability would not prove to be as dispositive to the Supreme Court.

114. *Id.* at 889.
115. *Id.* at 888.
116. *Id.* at 891.
117. *Id.* at 892-93.
118. Muhammad v. County Bank of Rehoboth Beach, 877 A.2d 340 (N.J. Super. Ct. App. Div. 2005).
119. *Id.* at 347 (citing Caruso v. Ravenswood Developers, Inc. 767 A.2d 979 (N.J. Super. Ct. App. Div. 2001)).
120. *Id.* at 350.
121. *Id.* at 353.
122. *Id.* at 354.
123. *Id.*
124. 827 A.2d 358 (N.J. Super. Ct. Law Div. 2001).
125. *Muhammad*, 877 A.2d at 355.
126. *Id.* at 351-55.
127. *Id.* at 355.

IV. INSTANT DECISION

In *Muhammad v. County Bank of Rehoboth Beach*,[128] the New Jersey Supreme Court first examined general principles of arbitration as enacted in the FAA and otherwise.[129] The court noted that Section 2 of the FAA declares a national policy favoring arbitration but explained that this policy does not preclude a judicial examination into whether an arbitration agreement is unconscionable under state law.[130] The court continued by citing precedent establishing that the "gateway" question of whether the parties have a valid arbitration agreement requires judicial resolution.[131] The court then stated that, in particular, arbitration agreements that are "silent" or "ambiguous" about the availability of class-wide arbitration must be interpreted by an arbitrator.[132] The court distinguished the instant case by noting that the relevant agreements are not silent or ambiguous as to class-wide arbitration, as each agreement explicitly states that class-action arbitration shall be waived.[133] The court stated that because arbitration agreements are severable from the remainder of a contract, a challenge to the contract as a whole is a question for an arbitrator to decide.[134] As justification for its authority in the instant case, the court stated that where there are distinct class-arbitration waivers within the arbitration agreement, as there are in the instant agreement, a court may examine the validity of the class-arbitration waiver as part of the arbitration agreement and not part of the contract as a whole.[135]

Having established its jurisdictional authority, the court continued its analysis in light of New Jersey contract law.[136] The court noted that New Jersey recognizes the doctrine of unconscionability, and courts "may refuse to enforce contracts that are unconscionable."[137] The court stated that *Rudbart*[138] is controlling when determining whether a specific provision of a contract is unenforceable based on unconscionability.[139] Having stated the proper test, the court addressed the merits of the class-action procedure generally.[140] The court cited New Jersey precedent stating that the rule favoring class actions should be construed liberally in cases involving consumer fraud[141] and that class actions are a "superior method of adjudication of consumer fraud claims."[142]

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128. 912 A.2d 88 (N.J. 2006).
129. *Id.* at 94.
130. *Id.*
131. *Id.* at 95 (citing Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452 (2003) (plurality opinion)).
132. *Id.* at 95.
133. *Id.*
134. *Id.* at 96 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); and Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006)).
135. *Id.*
136. *Id.*
137. *Id.* at 97 (quoting Saxon Constr. & Mgmt. Corp. v. Masterclean of N.C., Inc., 273 N.J. Super. 231, 236 (1994)).
138. Rudbart v. North Jersey Dist. Water Supply Comm'n, 605 A.2d 681 (N.J. 1992), *cert. denied*, 506 U.S. 871(1992).
139. *Muhammad*, 912 A.2d at 96.
140. *Id.*
141. *In re* Cadillac V8-6-4 Class Action, 461 A.2d 736, 747-48 (1983).
142. Strawn v. Canuso, 657 A.2d 420, 433 (1995).

After the laudatory review of class actions generally, the court moved on to an inquiry into "whether New Jersey contract law principles permit enforcement of the class-arbitration agreements found in the instant arbitration agreements."[143] After noting that the contract is clearly one of adhesion, the court applied the substantive portion of the *Rudbart* four-factor test.[144] The court stated that the first three factors of the test require only brief attention and that the fourth factor, regarding the public interests affected by the contract, will prove dispositive.[145] The court explained that the fourth factor requires the court to decide whether the class-arbitration waiver is intended to prevent plaintiffs from pursuing their statutory rights and thus to shield defendants from compliance with New Jersey law.[146]

The court noted that in New Jersey, waivers that seek a release from statutorily imposed rights are considered void as against public policy.[147] The court distinguished the class-arbitration clauses in the instant case by noting that they do not act strictly as exculpatory clauses, as they do not prohibit Muhammad from filing an individual claim to arbitrate.[148] However, in the instant case, where a small amount of damages is involved, the court explained that the enforcement of Muhammad's individual rights and the rights of fellow-consumers becomes "difficult if not impossible."[149] Thus, according to the court, the class-action clause may have been effectively acting as an exculpatory clause.[150]

The court continued by noting that most cases involving a small amount of damages will not be pursued by "rational" consumers because it will not be worth the time prosecuting the case, even if counsel is willing to pursue the matter.[151] The court then stated that without a class-action mechanism, many victims of consumer fraud may remain ignorant to the fact they have been wronged.[152] Aside from the harm done to individual litigants, the court observed that class action waivers may reduce the possibility that competent counsel will take a case, thus functionally exculpating the fraudulent activity.[153] The court also noted that class-action waivers can "prevent aggregate recovery that can serve as a source of contingency fees for prospective attorneys."[154] The court continued by stating that while the defendants were not required to provide counsel for the plaintiff, they may not take action that impedes "ordinary citizens' access to representation to vindicate their rights."[155] The court then addressed the Defendants' argument that attorney's fees are available under the CFA but found that this point was not dispositive due to the small amount of damages that Muhammad sought.[156] The

143. *Muhammad*, 912 A.2d at 98.
144. *Id.*
145. *Id.* at 98-99. The first three factors are: "(1) the subject matter of the contract; (2) the parties' relative bargaining positions; (3) the degree of . . . compulsion motivating the "adhering" party." *Id.* at 97.
146. *Id.* at 99.
147. *Id.* (citing McCarthy v. NASCAR, Inc., 226 A.2d 713, 714 (1967)).
148. *Id.* at 99.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 100.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*

court explained that the availability of attorney's fees is illusory if it is unlikely that counsel would pursue the particular claim.[157] The court noted that here, even with the damage multipliers provided by the CFA, Muhammad's claim for damages could not amount to more than six hundred dollars.[158] The court found that no reasonable attorney would be willing to take a complex consumer fraud action for such a small incentive.[159] The court then reasoned that class-arbitration waivers are no less objectionable when a plaintiff sues under a statute without damage multipliers or provisions for attorney's fees, and would, if treated as less objectionable, lead to under-enforcement of statutes that the New Jersey Legislature has marked for strenuous enforcement.[160]

Thus, the court held that the class-arbitration waivers, as they appeared in Muhammad's consumer arbitration agreements, were unconscionable.[161] The court moved on to address policy considerations underlying its holding.[162] The court stated that the public interest in protecting Muhammad's and other consumers' right to effectively pursue their statutory rights overrides the defendants' right to seek enforcement of the class-arbitration clauses.[163] The court stated that New Jersey's public policy favoring arbitration is not determinative of whether a particular class-arbitration clause is unenforceable.[164] The court then noted that class-arbitration waivers do not promote arbitration policies, as they do not help in creating a more efficient forum for adjudicating disputes.[165] After recognizing the argument that these waivers are more efficient as they would likely lead to fewer consumers seeking redress, the court explained that the purpose of arbitration is not to dissuade consumers from seeking vindication of their rights.[166] The court further noted that the same criticisms of class-action procedures in the courts may apply to class-arbitration, and the arbitration procedures may be no more efficient than those litigated in court.[167] The court suggested that these inadequacies, in the class-arbitration context may be alleviated by parties and arbitration forums fashioning procedural rules.[168] Concluding this reasoning, the court noted that class arbitration "is in its infancy and may provide a fertile ground for establishing flexible class-action procedures."[169]

The court continued to clarify its position by stating that the instant holding is based on a fact-sensitive public interest assessment under the *Rudbart* test and is

157. *Id.* The finance charge was $60, and rolled over twice, amounting to $180 in compensatory damages. *Id.* The possibility of treble damages could bring the claim to a maximum of less than $600. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at 101.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* (citing Ting v. A T & T, 182 F. Supp. 2d 902, 931 n.16 (N.D. Cal. 2002)).
167. *Id.* (citing Jean R. Sternlight, *As Mandatory Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 44-53 (2000); Jack Wilson, *No-Class-Action Arbitration Clauses, State Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV. 737, 773-80 (2004)).
168. *Id.*
169. *Id.* (citing Discover Bank v. Super. Ct., 113 P.3d 1100, 1116 (Cal. 2005).

not a declaration that the arbitral forum cannot provide a means of vindicating the rights of consumers in fraud cases.[170] The court stated that its analysis does not pertain only to Muhammad's ability to individually assert her statutory rights.[171] The court explained that the holding also addresses the public interests affected by the contract and includes a broader inquiry into how class-action waivers affect the interests protected by the CFA.[172]

In conclusion, the court addressed the issue of severability.[173] The court stated that although the class-arbitration clauses in the instant case are unconscionable, they are still severable.[174] The court noted that, under New Jersey law, a court may enforce the remaining valid portion of the contract after the severable portions have been excised.[175] The court noted that the class-action waivers in the instant contracts are explicitly severable as they include the language "[t]o the extent permitted by law."[176] Thus, the court found that the contracts reflect an intention that the arbitration agreement should be enforced even if a particular provision is severed.[177]

V. COMMENT

A. The Companion Case

On August 9, 2006, the New Jersey Supreme Court also decided *Delta Funding Corp. v. Harris*, a companion case to *Muhammad*.[178] The court was asked, in response to a certification by the United States Court of Appeals for the Third Circuit, whether an arbitration agreement in a consumer loan contract was unconscionable, in whole or in part, under New Jersey law.[179] The court determined that the arbitration agreement's ambiguous provisions would need to be interpreted by the arbitrator before final resolution but held that several of the clauses in the arbitration agreement may be declared unenforceable based on unconscionability if the arbitrator interpreted the clauses unfavorably as to the consumer.[180] Nevertheless, the provision waiving class-arbitration was held to be enforceable.[181]

The defendant, Alberta Harris, was a seventy-eight year old woman at the time of decision, with "only a sixth-grade education and little financial sophistication."[182] She had received a sub-prime loan from plaintiff Delta Funding Corp., which was secured by a mortgage on her home.[183] The loan contract included an

170. *Id.* at 102.
171. *Id.*
172. *Id.*
173. *Id.* at 103.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. 912 A.2d 104 (N.J. 2006).
179. *Id.* at 108.
180. *Id.* at 108.
181. *Id.* at 115.
182. *Id.*
183. *Id.*

arbitration agreement that contained, amongst other provisions, a waiver of class-arbitrations.[184] The court, as in *Muhammad*, determined that the contract was a consumer contract of adhesion containing some degree of procedural unconscionability and thus proceeded to apply the *Rudbart* factors.[185]

After finding certain provisions of the arbitration agreement unconscionable, the court addressed the class-arbitration clause, even though Harris was not seeking to bring a class claim.[186] The court stated that class-arbitration waivers are not unconscionable per se, and that *Muhammad* is distinguishable from the instant case.[187] The court noted that in *Muhammad* the potential damages totaled less than six hundred dollars, whereas Ms. Harris was seeking more than one hundred thousand dollars.[188] The court stated that this is not the type of "low-value" suit that would only be litigated in the presence of the class mechanism.[189] The court noted that because damages are substantial and her home is at stake in a foreclosure proceeding, Ms. Harris is likely to contact an attorney.[190] In contrast, the court stated that in low-value claims there is little incentive to seek an attorney.[191] The court also found irrelevant the fact that all the statutes under which Ms. Harris seeks redress provide for attorney's fees and costs to plaintiffs prevailing on their claims.[192] The court concluded by stating that the combination of statutory remedies and the possibility of substantial damages amounted to an enforceable class-arbitration waiver.[193]

In light of the *Delta* opinion, the *Muhammad* holding seems increasingly narrow. The court in *Delta* emphasized the fact that statutory provisions accounted for attorney's fees and costs, and that Ms. Harris sought a "substantial" amount of damages. The *Delta* opinion stated that one hundred thousand dollars in possible damages is a substantial amount, but neither opinion made a precise ruling as to what amount will certainly warrant substantiality. Thus, as *Delta* distinguished *Muhammad* by noting that *Muhammad* pertains only to low-value suits, *Muhammad* can only be read as applying to suits where the possibility of damages is six hundred dollars or less. The court has left a great deal of room for litigation over what amounts to a low-value suit.[194]

It also remains unclear whether the court would have struck the class-arbitration clause in *Delta* if it had a chance to rule on the alleged facts as they favored Ms. Harris.[195] The court upheld the class-arbitration waiver on facts that pertained to substantive unconscionability, but declined to address the facts rele-

184. *Id.* at 109.
185. *Id.* at 111.
186. *Id.* at 115.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. "At some point, an amount of damages will be high enough to attract counsel if attorney's fees are available, even though no counsel would take the same case if no attorney's fees were available." Muhammad v. County Bank of Rehoboth Beach, 912 A.2d 88, 100 n.5 (N.J. 2006).
195. The dissent notes, among other facts, that Ms. Harris was "rushed" into signing papers at 10 p.m. because the loan representative told her that he was "running late." *Delta*, 912 A.2d at 118 (Zazzali, J., dissenting).

vant to procedural unconscionability. The court stated that further inquiry into procedural unconscionability would be left to the arbitrator as the pertinent facts were in dispute. Thus the court did not have a chance to determine whether the alleged predatory practices and unfair bargaining were severe enough to render the contract void based primarily on procedural unconscionability.[196]

B. A minor victory for consumers

The Supreme Court's holding in *Muhammad* will protect some consumers from a certain type of unconscionable arbitration provision contained within contracts of adhesion. The holding is fact specific, as required by *Rudbart*, and thus *Muhammad* will only protect, with certainty, those consumers with similar factual scenarios. In other words, the holding will protect those consumers who have entered into contracts of adhesion and have low-value claims.[197] Thus, the ruling seems to support the policies behind the Consumer Fraud Act, but in practical terms, the *Muhammad* holding has little reach.

The court had a chance to take a harder line on class-arbitration waivers, but declined to do so. By taking a conservative judicial approach, the court has left a substantial amount of grey area in which to decide whether a class-arbitration waiver is unconscionable. The holding will not curtail litigation over the validity of similar arbitration agreements. Neither will the ruling improve the position of consumers in regards to class-arbitration waivers, except where the waiver is contained in a "bill stuffer" or something of similar import, and a predictably small amount of damages is at stake.

Although the ruling did leave questions unanswered, *Muhammad* may be seen as a victory for supporters of consumers' rights, as it does protect a certain class of consumers, particularly those who have entered into payday agreements for low-value loans. The holding could have been extended to protect the rights of more consumers, though, had the court chosen to focus less on the dollar value of an individual's claim, and more on other factors affecting the consumer's chance of vindicating her rights in a dispute. Judging whether rights may be vindicated by the possible amount of an individual claim becomes difficult as the dollar value of the claim increases. Whether an individual may find an attorney to litigate a claim does not depend solely on the amount of the claim at issue. For instance, many attorneys would be reluctant to take a case against a sophisticated party with experienced attorneys. Attorney experience and the amount of time it may take litigating a claim will be as important as potential claim-value when deciding whether or not to take a case.[198] Further, claims rising just above the low-value level may not prove substantial enough, in the absence of the class mechanism, to provide notice to consumers similarly situated. Thus, the potential value of a particular claim should be viewed along with other factors, as it is not the only incentive that

196. "Courts generally have applied a sliding-scale approach to determine overall unconscionability, considering the relative levels of both procedural and substantive unconscionability." *Id.* at 111 (citing Sitogum Holdings, Inc. v. Ropes, 800 A.2d 915, 921-22 (N.J. Super. Ct. Ch. Div. 2002)).

197. The low-value factor is in-line with California's "predictably . . . small" approach. *See* Discover Bank v. Super Ct., 113 P.3d 1100, 1110 (Cal. 2005).

198. "[C]lass actions equalize adversaries and provide a procedure to remedy a wrong that might otherwise go unredressed." *In re* Cadillac V8-6-4 Class Action, 461 A.2d 736, 741 (N.J. 1983).

consumers have for bringing claims and is not a way to speculate, with certainty, whether a claim will be brought.

In protecting consumer rights, the court apparently had to choose policies behind statutory rights over the general policy favoring arbitration agreements. This is not necessarily so. As arbitration agreements stand for freedom to bargain for the way in which disputes will be settled, class-arbitration waivers stand for unequal bargaining power, as there are no reasons for consumers to agree to these clauses. In fact, the procedurally unconscionable practices by which these clauses are forced on consumers are antithetical to arbitration, as they do not suggest that people are actually agreeing on the ways in which future disputes will be settled.

On the other hand, persuasive arguments may be made in favor of these clauses. Businesses and commentators have pointed to the expense of class-actions, the fear of "rogue" arbitrators, and the fact that there will be less litigation as fewer consumers will seek redress.[199] Further, as Judge Posner has noted, one benefit of having parties litigate individually is that the fate of a company would not have to be staked on one dispute.[200] Additionally, opponents of judicial severance of class-arbitration waivers may respond that the economic benefits received by precluding class-actions will be passed on to consumers. The *Muhammad* court responded to these efficiency arguments by noting that arbitration should not be used to dissuade consumers from seeking vindication of their rights for efficiency's sake.[201]

Indeed, *Muhammad* may suggest a trend toward greater scrutiny of class-arbitration waivers. This is far from clear, though, as many jurisdictions continue down the "majority" path, and at least one state has recently validated class-arbitration waivers by statute.[202] Alternatively, arbitral organizations such as JAMS and the AAA have publicly criticized, and are now refusing to arbitrate, such claims.[203] Implicit in this refusal is the organizations' belief that the policy favoring arbitration can still be furthered without the class-arbitration waivers.

VI. CONCLUSION

In the instant case, the New Jersey Supreme Court signaled that they will make a priority of protecting consumers from business schemes designed to cheat customers out of small sums. The court could have protected consumers to a greater degree, though, by focusing less on the proposition that low-value claims are difficult to litigate and more on other factors that contribute to the vindication of consumers' rights. Indeed, the holding does not amount to a per se invalidation of class-arbitration clauses, and class-arbitration waivers will still be valid in many circumstances under New Jersey contract law.

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199. *See, e.g.*, Muhammad v. County Bank of Rehoboth Beach, 912 A.2d 88, 101-02 (N.J. 2006).
200. *See In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299-1300 (7th Cir. 1995).
201. *Muhammad*, 912 A.2d at 101-02.
202. UTAH CODE ANN. § 70C-4-105 (Supp. 2007).
203. AAA Policy on Class Arbitrations, http:// www. adr. org/ sp. asp? id= 25967 (last visited Sept. 25, 2007).