No. S117735
IN THE SUPREME COURT OF CALIFORNIA

ANTONE BOGHOS,

Plaintiff and Appellee,

vs.

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON
(sued and served as "LLOYD'S OF LONDON");
INTERNATIONAL RISK MANAGEMENT GROUP;
PETERSEN INTERNATIONAL UNDERWRITERS,

Defendants and Appellants.

AFTER APPEAL FROM THE COURT OF APPEAL,
SIXTH DISTRICT, CASE NO. H024481

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STATEMENT OF ISSUES

1. Whether an insurer's mandatory arbitration clause that requires a personal disability claimant to pay half the costs of arbitrating his claims for coverage benefits and bad faith insurance damages is unenforceable either because:

(a) it violates public policy by imposing forum costs far in excess of court costs against a claimant asserting unwaivable claims that vindicate public interests, in contravention of Civil Code Sections 1668 and 3513, as construed and applied in *Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal. 4th 83 and *Little v. Auto Stiegler, Inc.* 29 Cal. 4th 1064, *cert. denied*, 124 S. Ct. 83 (2003); or

(b) it is unconscionable under a case-specific inquiry because it is a non-negotiable adhesion contract whose terms were demonstrated to have harsh and one-sided effects in imposing thousands of dollars in arbitration fees and travel expenses against an out-of-work disability claimant.

(Yes.)

2. Whether, as a matter of California contract law, a disability insurance claimant may litigate claims for coverage benefits and bad faith damages in court when his insurer drafted his policy to include both an arbitration clause and a service of suit clause stating that the insurer consents to a court's jurisdiction over claims for failure to provide policy coverage.

(Yes.)

INTRODUCTION AND STATEMENT OF THE CASE

This is an appeal from two lower court orders denying a motion by several insurance underwriters to compel an injured policyholder to arbitrate his claims for disability coverage and bad faith damages. The Court of Appeal below denied the motion to compel arbitration after finding that the underwriters consented to a court's jurisdiction over these claims in their policy's service of suit clause that specifically addressed claims for failure to pay benefits, and that the policy's arbitration clause was unconscionable because it forced the policyholder to pay excessive arbitration costs to vindicate his claims for policy benefits and bad faith damages.

This appeal raises questions of California public policy and contract law concerning the circumstances under which insurance companies can force individual policyholders to give up their right of access to the civil justice system in favor of private arbitration. The first question addresses the burdens such as excessive forum costs that some corporations try to impose against individual litigants through non-negotiable arbitration clauses, and the role that state law public policy and unconscionability principles play in policing these burdens. The second question concerns the relationship between arbitration clauses and ordinary contract law, specifically whether these clauses are governed by the same state law rules that apply to the construction and enforcement of all other contract and insurance policy terms, or rather by their own unique rules designed specially to effectuate the goal of

forcing parties out of court and into arbitration. Since the correct application of *any* of these bodies of California law would bar enforcement of the arbitration clause in this case, the judgments of the two lower courts denying the motion to compel arbitration should be affirmed.

A. Statement of Facts

Before May 2000, Antone "Tony" Boghos was self-employed as executive of his own plumbing business, Atlas Plumbing and Sewer Services, Inc., in Milpitas, California. (Appellants' Appendix at 66-67.) On September 28, 1998, Boghos applied for a long-term personal disability insurance policy with Petersen International Underwriters, to be underwritten by Certain Underwriters at Lloyd's. (*Id.*) His policy took effect on January 8, 1999 and promised him a monthly payment benefit in the event he were to sustain accidental injuries rendering him unable to continue performing the duties of his job. (AA at 36, 45.)

The Lloyd's Certificate of Insurance contains two distinct forum selection clauses. On its first page of terms under the heading of "Certificate Provisions," the policy has a "Service of Suit" clause that specifically addresses forum selection for disputes over the payment of policy benefits claimed due, stating in relevant part as follows:

> 4. **Service of Suit Clause.** In the event of the failure of Underwriters to pay any amount claimed to be due under the insurance described herein, Underwriters have agreed that, *at the request of the Assured* (or Reinsured)[,] *they will submit to*

> *the jurisdiction of a court of competent jurisdiction* within the United States. Nothing in this clause constitutes or should be understood to constitute a waiver of Underwriters' rights to commence an action in any court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States. In any suit instituted against any one of them upon the insurance described herein, *Underwriters have agreed to abide by the final decision of any such Court* or of any Appellate Court in the event of an appeal.

(AA at 41) (emphasis added.) Ten pages later, at the bottom of a page titled "General Provisions," the policy also contains a general arbitration clause that states in relevant part:

> Not withstanding any other item set forth herein, the parties hereby agree that any dispute which arises shall be settled in Binding Arbitration. . . . If the parties cannot agree as to the arbitrator, or believe that a single arbitrator cannot adequately settle the dispute, then an arbitration panel made up of three arbitrators shall be formed. . . . The *venue shall be in Los Angeles County* or at another location if agreed by all parties. The *arbitration will be governed by the commercial arbitration rules of the American Arbitration Association. Costs for the arbitration shall be equally split among all parties*.

(AA at 51) (emphasis added.) This page also includes a provision stating that "This certificate, any attached endorsements or other papers make up the entire contract." (*Id.*)

After acquiring the policy, Boghos performed all required acts under the terms of the policy and fully complied with its terms and conditions. (AA at 4.) On or about May 14, 2000, Boghos received a traumatic blow to the back of his head and neck that caused him to lose consciousness. (*Id.*) As a result of his injuries from this accident, Boghos suffers constant vertigo and headaches, has lost 35 pounds, and experiences loss of concentration

and diminished physical strength that have left him unable to perform his former work responsibilities running his plumbing business. (AA at 67.)

After he sustained these injuries, Boghos applied for long-term disability benefits under his policy. Although Lloyd's initially paid him the policy benefits, Boghos received a letter from Lloyd's on approximately December 8, 2000 stating that his benefits were being discontinued. (AA at 4.) Lloyd's never thereafter reinstated his insurance benefits.

B. The Proceedings Below

1. The Superior Court Action

On November 26, 2001, Boghos filed suit in the Superior Court of the State of California, Santa Clara County, against Lloyd's of London, International Risk Management Group, Petersen International Underwriters, and unnamed individuals (collectively, "Lloyd's" or the "underwriters") for their refusal to pay policy benefits. In his complaint, Boghos asserted claims for breach of contract and breach of the implied covenant of good faith and fair dealing, for which he sought reinstatement of the insurance and contract damages. He also alleged bad faith denial of insurance and intentional infliction of emotional distress, seeking general compensatory and punitive damages. (AA at 3-6.)

Lloyd's moved the Superior Court to compel arbitration of these claims. (*See* AA at 27-34.) Boghos opposed the motion to compel, arguing that it was inconsistent with the insurance policy's service of suit clause wherein the underwriters had agreed to litigate

Boghos's claims for benefits payments in court. (AA at 59.) Since he was asserting claims based on a failure to pay benefits due under the policy and since he elected to file his claims in court, Boghos argued that he satisfied all of this clause's requirements and that Lloyd's was contractually bound to litigate his claims in court. (*Id.*) Boghos argued that any ambiguity resulting from a conflict between the service of suit clause and the arbitration clause must be decided in his favor under the state law rule that ambiguous terms in an insurance policy must be resolved strictly against the insurer who created the ambiguity when it drafted the policy. (*Id.*)

Boghos also argued that the policy's arbitration clause was unconscionable and could not be enforced against him because it was a non-negotiable adhesion contract whose express terms would force him to pay exorbitant arbitration costs in order to vindicate his claims for disability benefits and bad faith tort damages. In support of his argument that the arbitration clause was procedurally unconscionable, Boghos emphasized that it was a non-negotiable adhesion contract, and that it created an unfair surprise by imposing additional and burdensome terms concerning distant venue and cost-sharing obligations that were not disclosed when Boghos signed the application for his policy. (*Id.* at 61-62, 64).

In arguing that the arbitration clause was substantively unconscionable for imposing exorbitant forum costs, Boghos pointed to the clause's terms explicitly requiring him to pay half the costs of arbitration, to arbitrate under the Commercial Arbitration Rules of the

American Arbitration Association ("AAA"), and to go to Los Angeles for arbitration. (*Id*. at 62-64, 81.) Boghos produced the relevant provisions of AAA's Commercial Rules and fee schedule to demonstrate that these contract terms threatened to saddle him with exorbitant and prohibitive forum-specific costs, which included half of:

- AAA's $8,500 Initial Filing Fee (AA at 89, 90);
- AAA's $2,500 Case Service Fee (AA at 89);
- AAA's $150 to $250 per day Hearing Fees (AA at 94);
- the $350 to $500 *hourly* arbitrator's or arbitrators' fees (AA at 87); plus
- the cost of travel to and from Los Angeles under the clause's venue provision.

For a case like his that would require multiple hearing days before either a one or three-arbitrator panel (as stipulated in the arbitration clause), Boghos showed that he would have to pay far in excess of $10,000 in forum-specific costs. (*Id*.) Boghos testified that he could not afford to pay these arbitration costs because he was out of work, was unable to perform his job functions, had lost his business and commercial property, and consequently was in the midst of a serious financial crisis. (*Id*. at 67.)

On April 17, 2002, the Superior Court denied the motion to compel arbitration. The court found that the policy's service of suit clause precluded the motion because the clause "clearly states that the defendants consent to submit to the jurisdiction of a court of competent jurisdiction within the United States and to abide by the final decision of any such

court . . ." (*Id*. at 107.) The court also found that the policy's binding arbitration clause conflicted with the service of suit clause and that any ambiguity between the two clauses must be resolved in Boghos's favor and against the defendants who drafted the policy. (*Id*.) Finally, the court held that the arbitration clause was unconscionable because it affected a one-sided waiver of Boghos' rights when it appeared in tandem with a service of suit clause allowing the underwriters to commence, remove, or transfer actions in the court system. (*Id*.)

2. The Court of Appeal Proceedings

Lloyd's appealed the trial court's ruling to the Court of Appeal, Sixth Appellate Division. Lloyd's argued for reversal on the grounds that the trial court misinterpreted the service of suit clause and incorrectly failed to apply the arbitration clause to Boghos's claims, and that the trial court erred in finding the arbitration clause unconscionable. While Lloyd's conceded that its arbitration clause is a contract of adhesion, it alleged that the costs imposed under the clause are not financially oppressive because Boghos can afford to pay them. In support of this contention, Lloyd's attempted to introduce into the factual record for the first time on appeal certain papers from Boghos's divorce proceedings that purportedly would demonstrate his ability to pay the arbitration costs that he had set out in the trial court.[1]

[1] *See* Appellants' Opening Brief at 12-13.

In response, Boghos argued that the service of suit clause precluded compulsory arbitration of his benefits-related claims and that the arbitration clause was unconscionable primarily because its terms would saddle him with exorbitant forum costs. Boghos argued that these cost-shifting requirements violated both the bright-line rule of *Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal. 4th 83, prohibiting forum cost-shifting against individual litigants asserting certain types of claims, and general unconscionability principles prohibiting the imposition of oppressive and one-sided terms through non-negotiable adhesion contracts. Boghos did not object to Lloyds' thirteenth-hour introduction of his divorce papers into the appellate record. He noted that these records were irrelevant under the bright-line cost rule of *Armendariz*, but he also emphasized that these records strengthened his argument that the arbitration clause's cost-shifting provisions were oppressive by demonstrating that, during the one-year period from July 2001 to July 2002:

- He earned no gross salary or wages;
- He received $2,508 in monthly Social Security Disability and rental earnings;
- These earnings were offset by monthly expenses of over $6,000; and therefore that
- His net monthly savings after expenses was approximately *minus* $3,500.[2]

On May 29, 2003, the Court of Appeal affirmed the trial court's ruling denying the

[2] *See* Appellee's Response to Request for Judicial Notice in the Court of Appeal.

motion to compel arbitration. The Court of Appeal held that the service of suit clause prohibited Lloyd's from compelling Boghos to arbitrate in the face of his election of a judicial forum for his claims. The court rejected Lloyds' narrow construction of the service of suit clause, finding that "to say that the phrase 'failure . . . to pay any amount claimed to be due under the insurance described herein' really means only actions to enforce arbitration awards *turns the plain language of the clause upon its head*." (Att. 1 to Pet. at 4) (emphasis added.) The court found that Boghos's interpretation of the provisions to provide coverage claimants with a choice of forum gave effect to both provisions. (*Id*. at 5-6.) The court also held that any ambiguity resulting from a conflict between these forum selection clauses must be resolved in Boghos's favor. (*Id*. at 6, 8.)

The Court of Appeal also held that Lloyds' arbitration clause was unenforceable because it required Boghos to pay excessive forum costs to arbitrate his claims. The Court of Appeal relied on this Court's rulings in *Armendariz* and *Little v. Auto Stiegler, Inc.* 29 Cal. 4th 1064, *cert. denied*, (2003) 124 S. Ct. 83 holding that the rule against arbitration cost-shifting in these cases applies to a policyholder's claims for disability insurance coverage. (Att. 1 to Pet. p. 11.) Based on this authority, the Court of Appeal held that "Boghos should not be required to share in the cost of arbitration," and that "Lloyd's arbitration clause, which requires that the parties split the costs, is unconscionable."[3] (*Id*. at 11-12.) On June

[3] Having held that the cost-shifting terms rendered the arbitration clause unenforceable on its face, the Court of Appeal denied Lloyds' request for judicial notice

27, 2003, the Court of Appeal certified its opinion for publication and denied Lloyds' petition for rehearing.

Lloyds' petition for this Court's review was granted on September 24, 2003.

SUMMARY OF ARGUMENT

1. Boghos should not be compelled to arbitrate because the policy's arbitration clause forces him to pay exorbitant forum costs to vindicate claims for disability coverage and bad faith insurance damages. Boghos has documented how the clause's cost-shifting provisions would force him to pay thousands of dollars in arbitration costs. These cost-shifting burdens violate both California's bright-line public policy rule against shifting forum costs against individual litigants asserting unwaivable claims that vindicate public interests, and general state law unconscionability principles that would apply here under a case-specific inquiry.

By requiring Boghos to pay half of all arbitration costs, Lloyds' arbitration clause runs afoul of the bright-line rule of *Armendariz* and *Little* barring corporations from imposing forum costs in excess of court costs against individuals asserting unwaivable claims that vindicate public interests. In *Armendariz*, the Court applied this bright-line rule against cost-shifting to protect employees asserting discrimination claims under the Fair

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of Boghos's divorce records. (Att. 1 to Pet. at 12 n.4.)

Employment and Housing Act (FEHA). 24 Cal. 4th at 112-13. In *Little*, the Court applied the rule to protect an employee asserting a common law claim of wrongful discharge in violation of public policy. 29 Cal. 4th at 1077. The Court held in both cases that the bright-line rule enforced California's general prohibition in Civil Code Sections 1668 and 3513 against exculpatory contracts that are contrary to public policy.

Boghos is entitled to the same protection against unwanted forum costs in this case for two compelling and related reasons. First, his bad faith insurance claims arise from law that was unquestionably established for public reasons. The legislature has established a strong public policy against insurance bad faith practices in the Insurance Code's express prohibition of such practices, INS. CODE § 790.03(h)(5); its declaration of a public interest in regulating insurance practices, INS. CODE § 790; and in the Commercial Code's general prohibition against contracts waiving bad faith liability, COMM. CODE § 1102(3). Likewise, this Court has often held that insurance is a "vital service" deemed "quasi-public in nature," that insurers must give serious consideration to the public's interests when making coverage determinations, and that bad faith insurance claimants have a unique right to seek tort remedies to vindicate these public interests. *See*, *e.g.*, *Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal. 3d 809, 820. Second, and equally important, the anti-exculpatory concerns of *Armendariz* and *Little* are vividly illustrated here, where Boghos faces exorbitant forum costs to vindicate his claims for *disability* coverage. These claims are

premised on the fact that he suffered a serious injury, can no longer work in his job, has lost substantial income, and therefore is especially vulnerable to the deterrent effect of high arbitration costs. An injured disability claimant's extreme financial vulnerability therefore only magnifies the public policy concerns giving rise to both the bad faith insurance tort claim and the bright-line anti-exculpatory rule against cost-shifting. Therefore, the rule should apply here.

Even if the bright-line rule does not apply, however, Lloyds' arbitration clause should be held unconscionable under a case-by-case inquiry because Boghos has demonstrated that its cost-shifting terms would saddle him with thousands of dollars in arbitration costs to vindicate his claims in this case for disability coverage and bad faith damages. Under California law, a contract provision is unconscionable where a substantial disparity in bargaining power between the parties results in terms imposing an unreasonable or one-sided allocation of risk favoring the powerful party. *See A&M Produce Co. v. FMC Corp.* (1982) 135 Cal. App. 3d 473, 493. This Court has long recognized the adhesive nature of insurance policy provisions like this one and the considerable imbalance in bargaining power between insurers and individual policy holders. *See*, *e.g.*, *Egan*, 24 Cal. 3d at 820.

Boghos has produced considerable evidence showing the arbitration clause's harsh and one-sided effects. Under the clause's terms requiring him to pay half the costs of arbitrating in Los Angeles under AAA's Commercial Rules, the record shows that Boghos

would have to pay well over $10,000 in forum and travel expenses for a three-day arbitration hearing on his claims. (AA at 86-92.) The record also shows that Boghos has been out of work since his injury and has faced a financial crisis where his expenditure obligations vastly exceed his limited earnings. (AA at 67.) Under these circumstances, the arbitration clause causes harsh and one-sided results because its cost provisions pose an extreme disadvantage for Boghos that Lloyd's itself does not face in paying its share of the arbitration costs. The arbitration clause is therefore unconscionable.

2. The disability insurance policy does not in any event require Boghos to arbitrate his claims for coverage benefits and bad faith damages. The policy's service of suit clause specifically allows him to choose a judicial forum for resolving these very types of claims. The clause states that, for claims involving "the failure of Underwriters to pay any amount claimed to be due under the insurance," they will "submit to the jurisdiction of a court of competent jurisdiction" and will "abide by the final decision of such Court or of any Appellate Court in the event of an appeal." By its plain language, this clause gives Boghos an unqualified right to go to court and stay in court for his coverage claims.

Lloyds' argument that the policy's arbitration clause supercedes the service of suit clause also fails for several reasons. First, it turns the contract law rule for harmonizing specific and general provisions, Code of Civil Procedure § 1859, on its head by making the arbitration clause's general application to "any dispute" supercede the service of suit

clause's specific application to cases involving "the failure of Underwriters to pay any amount claimed to be due under the insurance described herein." Likewise, Lloyds' arguments relying on the arbitration clause's "notwithstanding" language should be rejected both because they would create a license for deception by allowing Lloyd's to avoid any contrary promise it makes elsewhere in the disability policy by simple reference to this language, and because they would leave the service of suit clause with no independent or plausible effect.

Finally, the Court should also reject Lloyds' argument that federal and state arbitration law resolve all uncertainty concerning the two clauses in favor of a construction compelling Boghos to arbitrate despite his election of a court. This argument conflicts with California's contract law rule for interpreting ambiguous terms in adhesion contracts "most strongly" against the drafter. *See* CIV. CODE § 1654; *Steven v. Fidelity and Casualty Co. of N.Y.* (1962) 58 Cal. 2d 862, 871. The argument also misconstrues the effect of the arbitration statutes, whose purpose is to place arbitration clauses on the "same footing as other contracts," thereby subjecting them to the same rules of interpretation, enforcement, and revocation that apply to every other insurance policy term.

For any or all of these reasons, the Court should deny Lloyds' motion to compel Boghos to arbitrate his claims.

ARGUMENT

I. THE ARBITRATION CLAUSE IS UNENFORCEABLE FOR IMPOSING EXCESSIVE FORUM COSTS AGAINST BOGHOS.

A. The Arbitration Clause's Cost-Shifting Provisions Violate Public Policy Against Exculpatory Contracts under *Armendariz* and *Little*.

By explicitly requiring Boghos to pay half the costs of arbitrating his claims for bad faith denial of insurance, Lloyds' mandatory arbitration clause runs afoul of California public policy prohibiting exculpatory contracts, and therefore should not be enforced. This public policy is embodied in two separate Civil Code provisions. Section 1668 declares all contractual waivers of liability for "fraud, or willful injury to the person or property of another, *or violation of law*, whether willful or negligent," to be "against the policy of the law." CIV. CODE § 1668 (emphasis added). Similarly, Section 3513 prohibits all waivers of liability under any "law *established for a public reason*." CIV. CODE § 3513 (emphasis added). Since these anti-exculpatory statutes both create generally applicable rules of public policy that govern all contracts, they can apply to regulate arbitration clauses consistent with the FAA and CAA. *Armendariz*, 24 Cal. 4th at 100; *Little*, 29 Cal. 4th at 1076-77.

1. *Armendariz* and *Little* Prohibit Imposition of Forum Costs in Excess of Court Costs against Parties With Unwaivable Claims.

In *Armendariz*, this Court held that California's anti-exculpatory rules protect individual litigants asserting unwaivable claims by imposing certain minimum safeguards in cases where these claims are covered by a company's mandatory arbitration clause. These safeguards were meant to ensure that mandatory arbitration clauses, like all other contracts,

do not effect the direct or indirect waiver of an individual claimant's non-waivable rights. *Armendariz*, 24 Cal. 4th at 101. *Armendariz* recognized as one of these safeguards the bright-line rule that the party imposing a non-negotiable arbitration clause must bear "*all types of costs that are unique to arbitration*," *id*. at 108-12 (emphasis added). The Court found that this safeguard "will ensure that employees bringing FEHA claims will not be deterred by costs greater than the usual costs incurred during litigation, costs that are essentially imposed on an employee by the employer." *Id*. at 111. The Court also noted the rule's basic fairness, "inasmuch as it places the cost of arbitration on the party that imposes it." *Id*. at 111.[4]

Armendariz applied this and the other anti-exculpatory safeguards to protect employees asserting sex discrimination claims under the FEHA. The Court held that an employee's FEHA claims are unwaivable under Sections 1668 and 3513 because the rights recognized in the Act were unquestionably established for public purposes. *Id*. As evidence of these public purposes, the Court cited to the FEHA's preamble declaring the state's public policy against sex discrimination in employment, and to several of the Court's earlier opinions recognizing this public policy. *Id*. Based on this evidence of a public purpose

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[4] Lloyds' contention that *Armendariz* does not actually prohibit cost-shifting, but instead merely provides a default rule for where an arbitration clause is silent, Brief at 50-51, cannot be squared with the Court's holding that "an arbitration agreement or arbitration process *cannot generally require* the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court." *Armendariz*, 24 Cal. 4th at 110-11.

underpinning the employees' FEHA claims, the Court held that these claims are unwaivable and that an employer can only compel arbitration of these claims if it provides all of the protections set forth in the opinion.

In *Little*, the Court held that the anti-exculpatory protections of *Armendariz* cover claimants asserting unwaivable *common law* claims that are designed to protect public interests. The plaintiff in *Little* was a former employee bringing a common law action for wrongful termination in violation of public policy. *Little*, 29 Cal. 4th at 1068-69. This cause of action was first recognized in *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal. 3d 167, which held that an employee who was fired for refusing to take part in his employer's illegal price-fixing scheme could maintain an action for tort damages against the employer under a theory of wrongful termination in violation of public policy. *Id.* at 169-70. The availability of tort (rather than contract) remedies to *Tameny* claimants reflects the fact that the underlying claim arises, not out of the breach of any contractual promise, but instead out of the employer's breach of a public duty imposed by law (i.e., the penal code's prohibitions against price-fixing) so that the claimant's recovery in tort vindicates important public policy interests. *Id.* In light of the underlying public purpose of the *Tameny* cause of action, the Court in *Little* found that this type of claim is "almost by definition unwaivable" under Sections 1668 and 3513. *Little*, 29 Cal. 4th at 1077.

Despite the fact that the *Tameny* claim is a judicially recognized cause of action that

the legislature never directly embraced, *Little* squarely held that this claim "is designed to further a public interest and therefore 'cannot be contravened by a private agreement.'" *Id*. (quoting *Armendariz*, 24 Cal. 4th at 100). The Court thus found that any employer's contract inducing an employee's waiver of the *Tameny* cause of action would be unenforceable as against public policy under Sections 1668 and 3513. *Id*. Since no other contract waiving these claims would ever be enforceable, an arbitration clause that effected such a waiver by failing to comply with the *Armendariz* requirements would also be unenforceable on the same grounds. *Little* thus concluded by holding that "the *Armendariz* requirements are as appropriate to the arbitration of *Tameny* claims as to unwaivable statutory claims." *Id*.

Under *Armendariz* and *Little*, individual claimants asserting either statutory or common law claims that are unwaivable because they were recognized for public reasons cannot be forced under a corporation's mandatory arbitration clause to bear any arbitration costs that exceed the court costs for vindicating their claims. This bright-line rule against cost-shifting gives effect to the broad anti-exculpatory goals of Sections 1668 and 3513, as those provisions apply to preserve claims alleging "violation of law, whether willful or negligent," and claims enforcing any law that was "established for a public reason." Since Boghos's bad faith insurance claims also seek tort remedies that were recognized to vindicate public interests, these claims should likewise be protected under the *Armendariz* and *Little* prohibition against forum cost-shifting, and therefore should bar enforcement of

Lloyds' mandatory arbitration clause that explicitly violates this prohibition.

2. Boghos's Bad Faith Insurance Claims are Unwaivable Because They Enforce Laws Established for Public Reasons.

Boghos's claims for bad faith denial of insurance are unwaivable under Sections 1668 and 3513 because they vindicate laws established for public reasons. Bad faith insurance claims have long been held to vindicate important public policy interests arising out of the unique nature of insurance as a public good. While statutory and common law prohibitions against bad faith conduct by commercial entities are widespread, and typically unwaivable, the prohibition against bad faith conduct by insurance providers is also unique in providing tort remedies to claimants to vindicate the public interests relating to insurance coverage.

For the better part of a century, the legislature and this Court have recognized a vital public interest in the regulation of insurance industry practices. The legislature declared this public interest in the preamble to the Insurance Code's Unfair Practices Act. INS. CODE § 790. This policy statement establishes the Act's purpose of regulating insurance industry practices in accordance with the will of Congress under the federal McCarren-Ferguson Act, whose own express "Declaration of policy" recognizes that "the continued regulation and taxation by the several States of the business of insurance is in the public interest." 15 U.S.C. § 1011. This Court likewise observed, in rejecting a constitutional challenge to Insurance Code's provisions addressing insolvency, that:

> It is no longer open to question but that the business of insurance is affected

> with a public interest. The state has an important and vital interest in the liquidation or reorganization of such a business. Neither the company nor a policyholder has the inviolate rights that characterize private contracts.

Carpenter v. Pacific Mutual Life Ins. Co. (1937) 10 Cal. 2d 307, 329 (citations omitted). This strong public interest in regulating insurance practices to secure people's access to coverage gave rise to the unique bad faith tort action that Boghos is asserting in this case.

This Court first recognized the bad faith insurance damages remedy in *Comunale v. Traders and General Ins. Co.* (1958) 50 Cal. 2d 654. *Comunale* held that a liability insurer's refusal to accept a reasonable settlement offer within a policy's limits that results in a judgment against the policyholder for an amount exceeding those limits gives rise to a claim by the policyholder against the insurer for the entire amount of the judgment. *Id*. at 661. In *Crisci v. Security Ins. Co.* (1967) 66 Cal. 2d 425, the Court held that the insurer's liability for amounts greater than the policy limit when it refuses to settle within that limit reflected the fact that the policyholder's claim is not for bad faith breach of a duty under the policy itself, but rather for breach of a duty arising from the "implied covenant of good faith and fair dealing." *Id*. at 430. The Court found that this implied duty of good faith and the extra-contractual remedies for its breach are necessary to effectuate the public policy interests relating to the unique structure of the insurance relationship, where the insurer's financial interest in withholding settlement payments would defeat the very purpose of insurance to provide protection to policyholders. *Id*. Absent this legal duty, the Court

reasoned, a contract-based cap on the insurer's liability could leave the insurer free to "gamble with the insured's money to further its own interests." *Id*. at 430-31.

The Court has subsequently held on repeated occasions that an insurer's duty of good faith and fair dealing is one imposed by law, that this duty is absolute and cannot be altered by contract, and that the tort remedies for breach of this duty vindicate the public interests that give rise to the duty. In *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal. 3d 566, the Court held that an insurer's bad faith refusal to pay benefits directly to a fire insurance policyholder gave rise to a cause of action by the policyholder for tort remedies separate and apart from any contract damages that might also be available. *Id*. at 573-75. With regard to the nature of the bad faith insurance cause of action, *Gruenberg* held that:

> The duty violated–that of dealing fairly and in good faith with the other party to a contract of insurance–is a duty imposed by law, not one arising from the terms of the contract itself. In other words, this duty of dealing fairly and in good faith is *nonconsensual in origin rather than consensual*. Breach of this duty is a tort.

Id. at 574 (emphasis added). In light of its holding that the duty of good faith and fair dealing is one imposed by law, the Court rejected the insurers' argument that the policyholder's breach of the policy should extinguish his bad faith claim just as it would any contract claim. *Id*. at 577-78. Instead, the Court held that the claimant's breach of the policy could not extinguish his bad faith tort claims because "the duty of good faith and fair dealing on the part of defendant insurance companies is an absolute one." *Id*. at 578.

Gruenberg's holding that an insurer's duty of good faith and fair dealing is imposed by law, is absolute, and cannot be avoided through a contract should be sufficient by itself to demonstrate that Boghos's bad faith insurance claims here are unwaivable and therefore covered by the *Armendariz* and *Little* prohibition against forum cost-shifting. But subsequent case law makes absolutely clear that these claims are unwaivable precisely because they were established to vindicate public interests.

In *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal. 3d 809, the Court relied heavily on public policy interests in upholding a jury's award of punitive damages to a claimant alleging bad faith denial of disability insurance coverage. *Egan* began by recognizing the core purposes of disability insurance in providing security and peace of mind when an insured is unable to work, and of punitive damages awards in deterring "acts deemed socially unacceptable" and discouraging "the perpetuation of objectionable corporate policies." *Id.* at 819, 820. The Court then tied these two sets of interests together by holding that the "special relationship between the insurer and the insured illustrates the public policy considerations that may support exemplary damages in cases such as this." *Id.* at 820. Therefore the punitive damages tort remedy for bad faith insurance claimants plainly arises out of law established for public reasons.

In support of its holding that public policy considerations supported the availability of punitive damages tort remedies for bad faith insurance claimants, *Egan* explained that:

> The insurers' obligations are rooted in their status as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements. As a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust.

Id. (citation omitted).[5] Based on these public interests and based on its recognition of the inherent imbalance and adhesive nature of insurance relationships, *Egan* concluded that the availability of punitive damages remedies for bad faith insurance claimants is "compatible with recognition of *insurers' underlying public obligations* and reflects an attempt to restore balance in the contractual relationship." *Egan*, 24 Cal. 3d at 820 (emphasis added).[6]

Egan's discussion of the strong public policy interests giving rise to bad faith insurance tort remedies did not appear in a vacuum. To the contrary, the legislature has

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[5] *See also 20th Century Ins. Co. v. Superior Court* (2001), 90 Cal. App. 4th 1247, 1265 ("The field of insurance so greatly affects the public interest that the industry is viewed as a 'quasi-public' business in which the special relationship between the insurer and insureds requires special considerations.")

[6] *See also 20th Century Ins. Co.*, 90 Cal. App. 4th at 1266 ("The significant public relationship between the insured and insurer justifies the availability of tort remedies, and distinguishes insurance contracts from other types of contracts."); Note, *Defining Public Policy Torts in At-Will Dismissals* (1981) 34 STAN. L. REV. 153, 163-64 ("the insured can be viewed as a private attorney general enforcing the insurer's duty to the public at large; the suit arises from the contractual relationship between the parties, but the duty and remedies for breach arise from public interests independent of the contract.").

declared the public's interest both in regulating insurance industry practices generally and in prohibiting bad faith conduct in particular. In addition to the policy statement in the Insurance Code's Unfair Practices Act setting out the general interest in insurance industry regulation discussed earlier herein, several additional statutory provisions specifically proscribe bad faith practices and conduct.

First, the Insurance Code's Unfair Practices Act squarely targets within its listing of prohibited "unfair claims settlement practices," an insurer's pattern or practice of "[n]ot attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear." INS. CODE § 790.03(h)(5). The Unfair Practices Act makes such bad faith conduct by insurers punishable by a fine of up to $5,000 per act as determined by the Insurance Commissioner. INS. CODE § 790.035(a). Therefore the legislature itself has declared an intent to prohibit the type of conduct that forms the basis for Boghos's bad faith insurance tort claims.

This Court has recognized that common law bad faith insurance claims and remedies help effectuate the Insurance Code's express prohibition of bad faith settlement practices. In *Moradi-Shalal v. Fireman's Fund Ins. Co's.* (1988) 46 Cal. 3d 287, the Court held that the Unfair Practices Act does not itself give rise to a private right of action to enforce its provisions. *Id*. at 305, *overruling Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal. 3d 880. In reaching this conclusion, however, the Court answered concerns about potential

under-enforcement of the Act's policies and prohibitions by emphasizing that these policies would still be enforced due to the availability of both administrative sanctions under the Act and common law damages remedies for injured claimants and policyholders. With regard to the latter, the Court specifically identified the policyholder's cause of action for "breach of the implied covenant of good faith and fair dealing" and the availability of punitive damages remedies. *Moradi-Shalal*, 46 Cal. 3d at 304-05. Therefore, Boghos's common law bad faith insurance claims function much like the unwaivable *Tameny* cause of action examined in *Little* by giving effect to specific legislative prohibitions in the absence of an express statutory right of action.[7]

Likewise, the legislature's declaration of a broad public policy against bad faith conduct by *all* commercial entities through its specific prohibition of contractual waivers of bad faith liability should be conclusive proof that Boghos's bad faith insurance claims are unwaivable. In the Commercial Code's beginning statement of purposes, the legislature declared that "the obligations of good faith, diligence, reasonableness and care prescribed by this code may not be disclaimed by agreement." COMM. CODE § 1102(3); *see also*

[7] Therefore, Lloyds' distinction of Boghos's bad faith insurance tort claims from the *Tameny* claims in *Little* on the ground that they do not reference a statute's policy goals, Brief at 52-54, does not hold up. *Moradi-Shalal* recognizes that bad faith tort claims like Boghos's *do* help further the statutory prohibition of bad faith practices in the Insurance Code. Lloyds' reliance on *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, Brief at 53-54, is thus of no help because Boghos's bad faith insurance claims are "supported by . . .statutory provisions," and are "public" because they vindicate public interests, as *Gruenberg* and *Egan* recognized.

COMM. CODE § 4103(a) (prohibiting contractual waivers of good faith duties in bank deposit agreements). Boghos's common law bad faith claims thus can be seen to vindicate public interests that extend beyond the insurance industry.

Although the legislature has barred contractual waivers of bad faith liability by all commercial actors, this Court has repeatedly recognized that the public has a unique interest in preventing bad faith conduct by insurers. The Court has returned to this unique public interest time and again in declining to extend the bad faith tort remedy beyond the insurance setting. In *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, the refused to recognize a discharged employee's bad faith tort claim, holding instead that employees are subject to the general rule that bad faith claims are only actionable in contract. *Id.* at 692; *see also Freeman Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal. 4th 85, 94 and 103 (rejecting bad faith commercial tort; distinguishing insurance context). The Court in *Foley* differentiated between employment and insurance relationships as follows:

> [A] breach in the employment context does not place the employee in the same economic dilemma that an insured faces when an insurer in bad faith refuses to pay a claim or to accept a settlement offer within policy limits. When an insurer takes such actions, the insured cannot turn to the market place to find another insurance company willing to pay for the loss already incurred. . . . Moreover, the role of the employer differs from that of the 'quasi-public' insurance company with whom individuals contract specifically in order to obtain protection from potential specified economic harm. . . . Finally, there is a fundamental difference between the insurance and employment relationships. In the insurance relationship, the insurer's and insured's interest are financially at odds. If the insurer pays a claim, it diminishes its fiscal resources. The insured, of course, has paid for protection

and expects to have its losses recompensed.

Foley, 47 Cal. 3d at 693 (citations omitted). The Court's refusal to recognize a bad faith tort claim outside of this context thus further demonstrates that the bad faith insurance tort action was established specifically to vindicate the public's interests in maintaining the integrity of the insurance relationship and preserving the availability of this vital service.[8]

In light of these public reasons giving rise to bad faith insurance tort claims, the Court should hold that these claims are unwaivable and therefore covered by the anti-exculpatory requirements of *Armendariz* and *Little*. The facts of this case vividly illustrate the wisdom of applying this rule for bad faith insurance claims. Boghos's claims are premised on the fact that he suffered a serious injury, can no longer work in his former job, has suffered a precipitous decline in earnings, is mired in a financial crisis, and was denied disability coverage. These are exactly the circumstances this Court identified in *Egan* and *Foley* as creating the public interests that gave rise to the bad faith tort action. Yet, without the bright-line rule, Lloyd's could undermine these interests by requiring Boghos to pay

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[8] Based on this recognition of insurance claimants' unique economic vulnerability and the strong public interests in the insurance relationship, the Court should not embrace the recent holding in *Gutierrez v. Autowest, Inc.* (Ct. App. 2003) 7 Cal. Rptr. 3d 267, that the *Armendariz* bright-line cost rule is inapplicable to consumer cases. *Id*. at 283-84. The only question presented here is whether the well-established public interests in the insurance relationship and the unique economic vulnerability of insurance claimants warrant application of the *Armendariz* cost rule. *Gutierrez* is not persuasive authority because it had no occasion to address these specific issues. By contrast, this Court's discussions of insurance and employment in *Foley* and *Egan* provide strong support for applying the bright-line cost protection to insurance claimants.

thousands upon thousands of dollars in arbitration costs to vindicate his bad faith claims right at the time when he is most financially vulnerable. Lloyds' success in this endeavor would thus threaten to extinguish not only Boghos's private interest in obtaining compensation, but also the public's interests in holding insurers like Lloyd's accountable for their coverage obligations. Therefore, the Court should hold that Boghos's bad faith insurance claims are unwaivable under Sections 1668 and 3513, and are covered under the bright-line anti-exculpatory rule of *Armendariz* and *Little* against the imposition of unwanted forum costs.

Since it is beyond dispute that Lloyds' mandatory arbitration clause violates the *Armendariz* and *Little* rule by requiring Boghos to pay half the costs of arbitration, the Court should also hold that the arbitration clause is unenforceable as against public policy for illegally burdening Boghos's exercise of unwaivable public rights.

B. The Arbitration Clause is Unconscionable Under a Case-Specific Inquiry.

Even if the bright-line public policy rule does not apply, the Court should hold that Lloyds' arbitration clause is unconscionable under generally applicable California contract law. The principle that courts can refuse to enforce unconscionable contracts is codified in Civil Code Section 1670.5. Since unconscionability is a grounds for refusing to enforce any contract, it is a valid reason for refusing to enforce an arbitration clause. *Armendariz*, 24 Cal. 4th at 114. A contract or contract provision is unconscionable under California law

"[w]hen non-negotiable terms on preprinted form agreements combine with disparate bargaining power, resulting in the allocation of commercial risks in a socially or economically unreasonable manner." *A&M Produce Co.*,135 Cal. App. 3d at 493.

Unconscionability has both procedural and substantive elements. Procedural unconscionability focuses on oppression or surprise resulting from unequal bargaining power in the formation of a contract between parties. *Little*, 29 Cal. 4th at 1071. Substantive unconscionability focuses on the overly harsh or one-sided results of a contract's terms. *Id*. Both elements must be present before a court will hold that a contract is unconscionable, but they need not be present to the same degree. *Armendariz*, 24 Cal. 4th at 114. Instead, there is a sliding scale relationship between the two elements wherein "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id*. Here, there is ample evidence of both elements for the Court to hold that Lloyds' mandatory arbitration clause is unconscionable.

1. The Arbitration Clause is Procedurally Unconscionable.

There is no real question but that Lloyds' arbitration clause is procedurally unconscionable. This Court recently reaffirmed in *Little* that procedural unconscionability is established where there is a contract of adhesion:

> The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, 'which, imposed and drafted by the party of

> superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'

Little, 29 Cal. 4th at 1071 (quoting *Armendariz*, 24 Cal. 4th at 114).[9]

Lloyd's does not dispute that its disability policy's mandatory arbitration clause is a contract of adhesion, nor can it. The arbitration clause was written as a standard-form policy term by Lloyd's, the party with unquestionably superior bargaining power, and was unilaterally imposed on a take-it-or-leave-it basis with no opportunity for policyholders like Boghos to bargain over its inclusion. This Court often has recognized the fundamentally adhesive nature of personal insurance policies, wherein "the relationship of insurer and insured is inherently unbalanced" and "the adhesive nature of insurance contracts places the insurer in a superior bargaining position." *Egan*, 24 Cal. 3d at 820; *see also*, *e.g.*, *Steven v. Fidelity and Casualty*, 58 Cal. 2d at 871 (describing the "somewhat fictional nature of intent" in these "standardized contracts").

Without regard to its adhesive nature, Lloyd's argues that the arbitration clause is not procedurally unconscionable because "Boghos could easily have purchased an insurance contract that did not mandate arbitration," and because the clause's terms "were not unfairly surprising." Brief at 43. Putting aside the complete absence of record evidence supporting

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[9] *See also Ting v. AT&T* (9th Cir.) 319 F.3d 1126, 1148 ("A contract is procedurally unconscionable if it is a contract of adhesion, *i.e.* a standardized contract, drafted by the party of superior bargaining strength, that relegates to the subscribing party the opportunity to adhere to the contract or reject it"), *cert. denied*, (2003) 124 S. Ct. 53.

Lloyds' assertion about the availability of market alternatives, this argument fails under *Little* and the various other cases holding that procedural unconscionability is established through a contract's adhesive nature alone, as found in a party's use of its advantage in bargaining power to impose non-negotiable terms that "relegates to the subscribing party only the opportunity to adhere to the contract or reject it" in its entirety. *Little*, 29 Cal. 4th at 1071 (citation omitted); *see also Ting*, 319 F.3d at 1149 (finding consumer arbitration clause procedurally unconscionable regardless of market alternatives based on lack of bargaining opportunity). In holding that an arbitration clause provision was unconscionable, *Little* made no reference to either the availability of market alternatives or the existence of "surprise."

While Lloyd's is wrong in arguing that surprise is an essential element of procedural unconscionability, it is also wrong in asserting that evidence of surprise is lacking here. To the contrary, the manner in which Lloyd's wrote the policy and its arbitration clause makes it a surprise for policyholders like Boghos to find out both that they have to arbitrate coverage claims in the first place, and that they will have to pay thousands of dollars to do so. As discussed herein, the policy's service of suit clause at the very least *appears* to give policyholders the option to take their coverage claims to court by stating at the outset of the policy that "Underwriters have agreed that, *at the request of the Assured* . . ., they will submit to the jurisdiction of a court" and will "abide by the final decision of such Court."

(AA at 41.) The presence of this policy language makes it considerably less likely that Boghos would expect to have to arbitrate these claims.[10]

Likewise, the arbitration clause's imposition of thousands of dollars in arbitration costs through a bare reference to the AAA's Commercial Rules makes the actual burdens of arbitration even more of a surprise to Boghos. In *Harper v. Ultimo* (2003) 113 Cal. App. 4th 418, the Court of Appeal-Fourth District recently held an arbitration clause procedurally unconscionable due to surprise where the clause incorporated arbitration rules that restricted a claimant's access to substantive remedies. *Harper* succinctly held as follows: "Here is the oppression: The inability to receive relief is artfully hidden by merely referencing the Better Business Bureau arbitration rules." *Id*. at 422. The surprise and oppression is even worse here because Boghos, at the time he purportedly agreed to arbitrate, did not – *and could not* – learn the full extent of the clause's cost burdens because AAA is not a transparent body whose fees are easy to discern. While a claimant can (with effort) obtain a schedule of AAA's commercial filing fees, he or she cannot at the time of contracting learn the most substantial element of the costs – namely, the arbitrator's fees – because this information is not publicly available. In *Ting v. AT&T*, 182 F. Supp. 2d at 916-17, the Northern District found that "it [is] difficult for a class member before filing to meaningfully estimate the cost

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[10] *Cf. Ting v. AT&T*, (N.D. Cal. 2002) 182 F. Supp. 2d 902, 930 (language in consumer contract mailing that tends to prevent readers from understanding restrictions on their rights supports finding of procedural unconscionability), *aff'd in part and rev'd in part*, (9th Cir.) 319 F.3d 1126, *cert. denied*, (2003) 124 S. Ct. 53.

to have the case arbitrated under the [AAA] Commercial Rules. Neither the AAA website or rules, nor the AT&T website, provides a class member with any information about likely arbitrator's fees."[11] Therefore, Lloyds' insurance policy and arbitration clause created unfair surprises through the manner in which they disclosed both Boghos's duty to arbitrate coverage claims and the extent of his obligation to pay costs in doing so.

There is thus ample evidence of procedural unconscionability in this case. Lloyds' mandatory arbitration clause is plainly a non-negotiable contract of adhesion. Therefore, with or without the additional evidence of surprise that is also present here, Boghos has demonstrated that the arbitration clause is procedurally unconscionable.

2. Lloyds' Arbitration Clause is Substantively Unconscionable.

As this Court has held, a contract provision is substantively unconscionable if it produces "'overly harsh' or 'one-sided' results." *Armendariz*, 24 Cal. 4th at 114 (quoting *A&M Produce*, 135 Cal. App. 3d at 486-87). Although "[s]ubstantively unconscionable terms may take various forms, [they] may generally be described as unfairly one-sided." *Little*, 29 Cal. 4th at 1071. *Armendariz* held that an employer's arbitration clause covering only the employee's discharge claims but not any of the employer's claims was substantively unconscionable for misusing arbitration "as a means for maximizing employer advantage."

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[11] *See also Camacho v. Holiday Homes, Inc.* (W.D. Va. 2001) 167 F. Supp. 2d 892, 897 n.4 ("It is impossible to establish the exact amount Camacho would have to pay because the arbitrator sets the amount after the arbitration has been filed.")

24 Cal. 4th at 117-18. In *Little*, the Court similarly held that an employer's facially neutral arbitration clause provision requiring a written opinion and immediate *de novo* review only for awards over $50,000 was unconscionable because it effectively benefitted only the employer and was not justified by any reason other than to maximize the employer's advantage. 29 Cal. 4th at 1073. Under this same analysis, the Court should hold here that the cost-shifting and venue provisions of Lloyds' arbitration clause likewise are substantively unconscionable for imposing harsh and effectively one-sided burdens against Boghos.

Under *Green Tree Fin. Corp. v. Randolph* (2000), 531 U.S. 79, "a party seek[ing] to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs." The undisputed record evidence here more than satisfies Boghos's burden of proof. First, the terms of the clause itself show that Boghos has to pay half the costs of arbitration, that he has to arbitrate under the AAA's Commercial Arbitration Rules, and that he has to arbitrate in Los Angeles. (AA at 51.) Second, the AAA Commercial Rules and other evidence put into the record show that these terms would obligate Boghos to pay (1) $4,250 in arbitration filing fees (AA at 89, 90); (2) $1,250 in additional case service fees (*id.*); (3) $150 to $250 per hearing day in administrative fees (AA at 94); (4) half of the arbitrator's or arbitrators'

fees shown to be between $350 and $500 *per hour* (AA at 87);[12] and (5) the cost of 350 miles' travel between Milpitas and Los Angeles. Boghos thus would have to pay over $10,000 for a three-day arbitration hearing on his claims for disability coverage and bad faith damages.

Finally, Boghos has been out of work since his injury, has no work-related income, and faces a financial crisis where his expenses are depleting his resources. This record thus vividly demonstrates the harsh and one-sided effect of Lloyds' arbitration clause in forcing Boghos alone to have to choose between foregoing his claims altogether or else drawing against his depleting resources to pay these costs and have some chance to vindicate his claims for disability coverage and bad faith damages.

A substantial body of case law from California and elsewhere holds that the harsh and potentially prohibitive effect of requiring individual consumers to bear the enormous costs under AAA's Commercial Arbitration Rules renders an arbitration clause unconscionable or otherwise unenforceable. In *Ting v. AT&T*, 182 F. Supp. 2d at 934, the Northern District examined AAA's commercial fee schedule, hypothesized a consumer with a $100,000 claim whom AAA would require to pay a $1,250 case filing fee, a $750 case service fee, and a $3,800 deposit as her share of the arbitrator's fees for a four-day hearing. *Ting* held that this $5,800 up-front payment requirement would be prohibitive for consumers and therefore

[12] *See also Ting v. AT&T*, 182 F. Supp. 2d at 917 (citing AAA study showing average commercial arbitrator compensation in California of $1,899 *per hearing day*).

supported a finding that the arbitration clause imposing the requirement was unconscionable under California law. *Id.*, *aff'd in relevant part*, 319 F.3d at 1151.

Similarly, the Court of Appeal-First District recently held in *Gutierrez*, 7 Cal. Rptr. 2d at 277, that a car dealer's mandatory arbitration clause was unconscionable based on its requirement that consumers pay substantial fees under AAA's Commercial Rules. *Gutierrez* addressed evidence showing that the dealer's arbitration clause would require individual car-buyers to pay $8,000 in up-front filing fees under AAA's Commercial Rules. *Id.* 278. Based on this plus evidence concerning the plaintiffs' income, expenses, and savings, *Gutierrez* held that, "where a consumer enters into an adhesive contract that mandates arbitration, it is unconscionable to condition that process on the consumer posting fees he or she cannot pay." *Id.* at 277. In light of the comparable record evidence produced here and in light of *Ting*, *Gutierrez*, and the numerous other cases where courts have protected consumers against the enormous costs under AAA's Commercial Rules, this Court should hold that Lloyds' arbitration clause is substantively unconscionable for imposing such costs against Boghos.[13]

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[13] *See also*, *e.g.*, *Popovich v. McDonald's Corp.* (N.D. Ill. 2002) 189 F. Supp. 2d 772, 777-78 (AAA commercial rules imposing "staggering" costs of $48,000 to $126,000 against consumers render arbitration clause unenforceable); *Phillips v. Associates Home Equity Serv's, Inc.*, (N.D. Ill. 2001) 179 F. Supp. 2d 840, 846 (case involving sub-prime mortgage borrower); *Camacho*, 167 F. Supp. 2d at 897 (manufacturer home-owners); *Mendez v. Palm Harbor Homes, Inc.* (Wash. App. 2002) 45 P.3d 594, 602-08 (same); *cf. Spinetti v. Service Corp. Int'l* (3d Cir. 2003) 324 F.3d 212, 217 (employee required to pay $4,250 in AAA filing fees, $150 per day hearing fee,

In addition to its explicit cost-shifting requirement and its application of the AAA Commercial Rules and fee schedule, the arbitration clause's venue provision is also substantively unconscionable for requiring Boghos to arbitrate in Los Angeles. Several California appellate courts have struck down mandatory arbitration clauses where companies imposed distant forum requirements against individual litigants. In *Bolter v. Superior Court* (2001) 87 Cal. App. 4th 900, the Court of Appeal-Fourth District held that a corporate franchisor's mandatory arbitration clause for individual franchise owners was unconscionable on various grounds, including that it required California franchisees to travel to Utah for arbitration and that it prohibited consolidated actions and punitive damages awards. *Id*. at 909. *Bolter* held that the distant forum provision was "unduly oppressive" for the individual franchise owners, explaining that:

> Because Dry-Chem franchises are by nature small businesses, it is simply not a reasonable or affordable option for franchisees to abandon their offices for any length of time to litigate a dispute several thousand miles away.

Id.[14] The same prohibition should apply here to prevent Lloyd's from unilaterally imposing

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half of arbitrator's fees); *Alexander v. Anthony Int'l, L.P.* (3d Cir. 2003) 341 F.3d 256, 269 (employment case with excessive AAA fees); *Cooper v. MRM Investment Co.* (M.D. Tenn. 2002) 199 F. Supp. 2d 771, 781-82 (low-income employee).

[14] *See also Comb v. Paypal, Inc.* (N.D. Cal. 2002) 218 F. Supp. 2d 1165, 1177 (finding arbitration clause unconscionable based in part on Santa Clara venue provision); *Yu v. Signet Bank/Virginia* (2001) 69 Cal. App. 4th 1377, 1388 (venue for California credit cardholders in Virginia); *Pinedo v. Premium Tobacco Stores, Inc.* (2000) 85 Cal. App. 4th 774, 781 (venue for Los Angeles-area employees in Oakland); *Patterson v. ITT Consumer Fin. Corp.* (1993) 114 Cal. App. 4th 1659, 1665-66 (venue for low income

the inconvenience and cost of hundreds of miles of travel against Boghos, a formerly self-employed plumbing contractor seeking disability insurance coverage.[15] The Court should hold that this venue provision, like the cost-shifting terms, is substantively unconscionable.[16]

Finally, the Court should reject Lloyds' argument that the arbitration clause is not substantively unconscionable because it "was not unjustifiably harsh when it was made," based on a statute allowing some cost-sharing and based on Boghos's income *at the time he obtained his disability policy*. (Brief at 54-55.) First, Lloyds' statutory argument based on Civil Procedure Code § 1284.2 fails for the same reason that the employer's argument based on that provision failed in *Armendariz*. As this Court recognized there, "section 1284.2 is a default provision" that cannot be used to effect a waiver of substantive rights and was not intended to saddle employees or other individual parties to adhesive contracts with large arbitration costs. *Armendariz*, 24 Cal. 4th at 112-13. Therefore, it likewise should not be

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California consumers in Minnesota).

[15] Lloyd's cannot disavow its arbitration clause's distant forum requirement by pointing to its language stating that "venue shall be in Los Angeles or at another location *if agreed by all parties*." This would be a non-starter for the simple reason that *any* contract provision can be changed by agreement of all parties. Therefore the highlighted language is irrelevant and the venue provision should be treated as indistinguishable from those in *Bolter*, *Pinedo*, and *Patterson*.

[16] Since the arbitration clause has multiple unconscionable terms that work together in imposing excessive costs against claimants, the clause is "permeated" with an unconscionable purpose and should be struck entirely rather than having any offensive provision severed. *See Armendariz*, 24 Cal. 4th at 124.

used to support a contract whose terms would otherwise be unconscionable.

Second, and more fundamentally, Lloyds' argument for charging Boghos with an ability to pay enormous arbitration costs based on *his former income* is perverse. A rule allowing insurance companies like Lloyd's of London to impose arbitration costs against *disability* claimants as though they were still healthy and working would be a license to extinguish their claims, which only arise *after they are injured, are no longer working*, and thus are in the worst position to bear the kinds of costs involved here. In *Spinetti v. Service Corp. Int'l* (3d Cir. 2003) 324 F.3d 212, the Third Circuit rejected an almost identical argument. *Spinetti* held that an employer's arbitration clause requiring a former employee to pay the costs of arbitrating her Title VII claims was unlawful. In addressing the plaintiff's ability to pay, the Third Circuit found that "[a]lthough Spinetti was earning $63,000 a year when employed by SCI, she was unemployed for six months following her termination," and subsequently "was earning less than $300 per week while her monthly expenses for food and rent totaled approximately $2,000," and therefore could not be compelled to bear the costs of arbitrating her claims. *Id.* at 217.[17] Likewise, this Court should reject Lloyds' argument and should squarely hold that any consideration of arbitration costs imposed by a disability

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[17] *See also Morrison v. Circuit City Stores, Inc.* (6th Cir. 2003) 317 F.3d 646, 669 (requirement that Title VII claimant pay $1,622 in arbitration costs "must be considered from the vantage point of the potential litigant in this case. Recently terminated, the potential litigant must continue to pay for housing, utilities, transportation, food, and the other necessities of life in contemporary society despite losing her primary, and most likely, only source of income.").

insurer *must* account for the claimant's actual and foreseeable financial condition at the time the arbitration clause is enforced.[18]

At bottom, Lloyd's argues that federal and state arbitration law allow an insurance giant to force an out-of-work plumbing contractor to pay well over $10,000 in forum costs to vindicate his claims for disability policy coverage and bad faith damages. But this Court and countless others have held repeatedly that public policy and general unconscionability principles prohibit corporations from using adhesive mandatory arbitration clauses to impose burdens that would extinguish or unfairly burden the rights of consumers, employees, and other individual parties. In *Mendez v. Palm Harbor Homes, Inc.* (Wash. App. 2002) 45 P.3d 594, the court drew the line between arbitration and mandatory arbitration abuse as follows:

> Avoiding the public court system to save time and money is a laudable social goal. But avoiding the public court system in a way that effectively denies citizens access to resolving every day societal disputes is unconscionable. Goals favoring arbitration of civil disputes must not be used to work oppression. When the goals given in support of contract clauses like this are used as a sword to strike down access to justice instead of as a shield against prohibitive costs, we must defer to the overriding principle of access to justice.

Id. at 605.

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[18] This is also consistent with the Sixth Circuit's "revised case-by-case approach" to assessing arbitration fees set out in *Morrison*. In *Morrison*, a statutory rights case, the Sixth Circuit held that litigants must have a chance to show that "the potential costs of arbitration are great enough to deter them *and similarly situated individuals* from seeking to vindicate their federal statutory rights in the arbitral forum." *Morrison*, 317 F.3d at 663 (emphasis added) Under this approach, courts would have to consider the loss of work and subsequent decline in income that all disability claimants typically experience.

In light of all the evidence here demonstrating that Lloyds' mandatory arbitration clause would impose exorbitant cost burdens upon Boghos in his attempt to vindicate claims for disability insurance coverage and bad faith damages, the Court should hold either that the clause is unconscionable based on the harsh and one-sided effect of these burdens or else that it violates public policy by illegally burdening Boghos's exercise of public rights.

II. THE INSURANCE POLICY DOES NOT IN ANY EVENT COMPEL BOGHOS TO ARBITRATE HIS CLAIMS RELATING TO COVERAGE.

A. The Plain Language of the Service of Suit Clause Gives Boghos the Choice to Litigate His Claims in Court.

The parties' insurance policy does not compel Boghos to arbitrate his claims in this case. The policy's service of suit clause covers any claim alleging a "failure of Underwriters to pay any amount claimed to be due under the insurance described herein." Lloyd's has never disputed that all of Boghos's claims fall within the coverage of this clause. The clause declares that Lloyd's agrees that, "at the request of the Assured (or Reinsured), they will submit to the jurisdiction of a court of competent jurisdiction within the United States," and that they will "abide by the final decision of such Court or any Appellate Court in the event of an appeal." The plain language of these terms gives Boghos an unqualified right to choose to go to court and stay in court for his claims in this case.

Lloyd's contends that the service of suit clause is only a limited waiver of objections to a court's personal jurisdiction that does not give Boghos a right to litigate claims in court.

(Brief at 23-26). This argument fails for several reasons. First, several courts have interpreted virtually identical policy provisions, including those in a Lloyd's policy, to give claimants an affirmative right to choose the forum for resolving their claims. In *Oil Well Service Co. v. Underwriters at Lloyd's London* (C.D. Cal. 1969) 302 F. Supp. 384, Lloyds argued, as it does here, that its service of suit clause did not limit its right to override the claimant's forum selection. *Id*. But the district court squarely rejected this argument and held that the policy language "at the request of the Assured," coupled with the claimant's filing in state court, prohibited Lloyd's from overriding this choice by removing the case to federal court. *Id*.; *see also Perini Corp. v. Orion Ins. Co., Ltd.* (E.D. Cal. 1971) 441 F. Supp. 453, 454 ("The meaning of the service of suit clause is generally clear. It purports to compel the insurer to submit to the forum chosen by a dissatisfied policy holder who sues to recover proceeds owing under the policy.")[19]

The precise terms of the service of suit clause here make an even more compelling case that Lloyd's cannot override Boghos's choice of a court over arbitration. The clause here, unlike those in *Oil Well* and *Perini*, does qualify Boghos's forum selection right by reserving Lloyds' countervailing rights to remove or transfer cases *to another court*. The

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[19] These courts' interpretation of the service of suit clause is hardly novel. *See, e.g.*, *Foster v. Chesapeake Ins. Co., Ltd.* (3d Cir. 1991) 933 F.2d 1207, 1216-17 (service of suit clause giving assent to any court's jurisdiction "at the request of the [insured]" waives insurer's right to remove case to federal court); *Archdiocese of Milwaukee v. Underwriters at Lloyd's, London* (E.D. Wisc. 1997) 955 F. Supp. 1066, 1068 (same); *General Phoenix Corp. v. Malyon* (S.D.N.Y. 1949) 88 F. Supp. 502, 503 (same).

clause states specifically that Lloyd's reserves the rights to (1) commence a case in a U.S. court; (2) remove a case to federal court; and (3) transfer a case between courts. In the face of this express enumeration of *Lloyds'* forum selection rights for coverage claims, the clause's silence regarding arbitration further demonstrates that Lloyd's cannot override Boghos's choice of a court over arbitration for claims under this clause. Similarly, Lloyds' promise to "abide by the final decision of such Court or any Appellate Court in the event of an appeal," yet further undermines Lloyds' argument that the service of suit clause only concerns jurisdiction and not the forum where claims are actually decided. Therefore, the Court should hold that the service of suit clause gives Boghos an affirmative right to choose between court and arbitration for resolving his coverage-related claims.

B. The Arbitration Clause Does Not Supercede the Service of Suit Clause.

Since numerous courts have held that Lloyds' service of suit clause gives claimants the right to a choice of forum for their coverage claims, the primary question here is whether these rights survive in the face of the policy's binding arbitration clause. Lloyd's argues that, despite the service of suit clause, the arbitration clause compels arbitration of Boghos's coverage claims because of the former's language stating that "any dispute which arises shall be settled in binding arbitration," and that this is so "[n]otwithstanding any other item set forth herein." (Brief at 17-20.) But this construction of the arbitration clause effectively supercedes the service of suit clause's own forum selection terms, and therefore cannot be

squared with the California contract law rules that govern both provisions.

Lloyds' construction of the binding arbitration clause to override the service of suit clause violates a number of rules for interpreting contract terms. First, Lloyds' use of the arbitration clause language addressing "any dispute which arises" to override the service of suit clause's forum selection provisions specifically addressing coverage disputes stands on its head the rule of construction that, "when a general and particular provision are inconsistent, the latter is paramount to the former [and] a particular intent will control over a general one that is inconsistent with it." CIV. PROC. § 1859; *see also Scudder v. Pierce* (1911) 159 Cal. 429, 433; *see also Sanserino v. Shamberger* (1966) 245 Cal. App. 2d 630, 634-35 (clause requiring appraisal upon termination of partnership supercedes agreement's general arbitration clause). If there is any conflict between the service of suit clause's forum selection provisions for coverage claims and the arbitration clause's provisions for "any claim," the former should apply to Boghos's coverage-related claims here.

Lloyds' argument (Brief at 17-22, 34) that the arbitration clause's "notwithstanding" language reverses the general rule and gives the arbitration clause precedence over every other policy provision should also be rejected. The only authority Lloyd's cites in support of this use of the "notwithstanding" provision to override any contrary policy term is *Nelson v. Angel* (1954) 124 Cal. App. 2d 861, which held that "notwithstanding" language in a commercial lease's specific provision for bankruptcy remedies applied to supercede the

contract's general remedies provision. *Id*. at 865. But this does not support Lloyds' argument here for using the general arbitration clause's "notwithstanding" language to extinguish Boghos's forum selection rights specified in the service of suit clause. If Lloyd's is right that the arbitration clause's "notwithstanding" language overrides contrary policy terms by its own force, then Boghos would be compelled to arbitrate here even if the service of suit clause had gone a step further and stated squarely that "the insured does not have to arbitrate coverage claims." The Court should reject this argument for allowing Lloyd's to disavow its own express contractual promises.

Furthermore, Lloyds' broad construction of the arbitration clause would render the service of suit clause superfluous by giving it no independent or plausible effect. Lloyd's argues that the service of suit clause applies to actions to enforce the arbitration clause or an arbitration award. (Brief at 37-39.) But, as Lloyd's recognizes, a court's jurisdiction over actions to enforce arbitration awards is already established by statute. *See* CIV. PROC. § 1285. This would seem to render the service of suit clause superfluous in contravention of the rule that "[t]he whole of a contract is to be taken together so as to give effect to every part," CIV. § 1641; *see also National City Police Officers' Ass'n v. City of National City* (2001) 87 Cal. App. 4th 1274, 1279 ("an interpretation which renders part of the instrument surplusage should be avoided"). This construction of the service of suit clause merely to bestow a pre-existing statutory right is also implausible and problematic because the clause

applies only to coverage claims and therefore would not recognize this statutory right for any other types of claims. Since "[a] contract must receive such interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect," CIV. § 1643, the Court should reject Lloyds' construction of the service of suit clause for drawing an unreasonable distinction between claims that are governed by the same statute.[20]

Unlike Lloyds' tenuous construction of the policy's forum selection clauses, Boghos's construction gives clear and lawful effect to both provisions. Under this construction, the binding arbitration clause would have mandatory application to all non-coverage claims and either the service of suit clause or the arbitration clause would apply to coverage claims, at the claimant's election. In *Transit Casualty Co. in Receivership v. Certain Underwriters at Lloyd's of London* (Mo. Ct. App. 1998) 963 S.W.2d 392, the court embraced this exact construction, recognizing its adherence to the requirement that contract terms must be given effect to the extent reasonably practicable. *Id*. at 399. Since this is the only interpretation presented that gives meaningful effect to both clauses, the Court should

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[20] Lloyd's attempts to account for this differentiation by positing that the service of suit clause allows enforcement actions for coverage claims in *any* court, whereas Section 1285 will allow enforcement actions for all other claims only in California state courts. (Brief at 39.) But Lloyd's does not even begin to explain why it would have bothered to write a policy term whose *only* effect is to allow Boghos to bring actions to enforce arbitration awards in courts other than state courts in California, but only in cases involving coverage claims and not in cases based on other types of claims. The Court should reject this construction of the service of suit clause as implausible and unsupported by the clause's plain language creating an affirmative forum selection right for Boghos.

likewise hold here that the arbitration clause does not compel Boghos to arbitrate coverage claims in light of the service of suit clause's forum selection provisions for these specific claims.

Finally, if the Court finds that the forum selection provisions of the service of suit and binding arbitration clauses cannot be reconciled, then it should resolve the ambiguity resulting from this conflict in favor of allowing Boghos to litigate his coverage-related claims in court. It is a fundamental rule of California contract law that, "[i]n cases of uncertainty not removed by the [Code's] preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." CIV. CODE § 1654. As this Court has held in applying this rule to insurance policies: "The rule of resolving ambiguities against the insurer does not serve as a mere tie-breaker; it rests upon fundamental considerations of policy." *Steven*, 58 Cal. 2d at 871. Consistent with these considerations for protecting the weaker parties to adhesion contracts, the Court should apply the rule here to prevent Lloyd's from imposing an ambiguous and uncertain waiver of Boghos's access to the civil justice system.

C. Federal Arbitration Law Does Not Displace State Contract Law.

Finally, the Court should reject Lloyds' argument (Brief at 40-42) that federal and California arbitration law displace the contract law rule for construing ambiguity against the drafter with an *inverse* rule requiring a construction in *favor* of a drafter trying to compel

arbitration through ambiguous contract provisions. This inverted rule for enforcing ambiguous arbitration requirements is undesirable precisely because it would create an incentive for corporate drafters of standard-form contracts to disguise their waivers of an adhering party's rights. But, putting this concern aside, the Court should reject the argument because it already has considered and rejected this very argument in *Victoria v. Superior Court* (1986) 40 Cal. 3d 734. There, the Court addressed whether a healthcare provider's arbitration clause covering claims "arising from rendition or failure to render services," applied to a patient's claim that the provider negligently employed an orderly who sexually assaulted the patient. *Victoria*, 40 Cal. 3d at 737. While it recognized the relevance of both contract law and arbitration law principles to this question, the Court drew a specific analogy to insurance contracts in holding that arbitration law does not override the contract law rule for resolving ambiguity in favor of the adhering party:

> While it has been held that 'doubts concerning the scope of arbitrable issues are to be resolved in favor of arbitration,' that rule was announced in the context of a commercial contract devoid of allegations or evidence of adhesion. The agreement in this case may be more analogous to standardized insurance contracts in which it has long been established that ambiguous clauses . . . are to be interpreted against the insurer.

Id. at 744 (citations omitted). *Victoria* concluded that construing the arbitration clause against the provider to exclude the claims from the clause's coverage was warranted due to the contract's adhesive nature, and that this construction "does no violence to the general policy in favor of arbitration." *Id*. at 747. Since it is undisputed that the disability insurance

policy here is also a contract of adhesion, the same result should apply here.[21]

Victoria's holding on this point is undoubtedly correct, and is consistent with the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* The FAA establishes that contractual arbitration clauses within its coverage are generally enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Under this savings clause of the FAA, "state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas* (1987) 482 U.S. 483, 492 n.9. This includes state law rules for interpreting contracts. *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.* (1989) 489 U.S. 468, 474 ("the interpretation of private contracts is ordinarily a question of state law."); *Green Tree Fin. Corp. v. Bazzle* (2003) 123 S. Ct. 2402, 2406 ("state law, not federal law, normally govern such [contract interpretation] matters"). Therefore, this Court was correct in *Victoria* to apply the normal state law rule for interpreting ambiguous contract terms against their drafter even though the ambiguity involved an arbitration clause.

The argument here that the arbitration statutes should not invert the drafter rule is

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[21] The fact that the personal disability policy here is a contract of adhesion between an insurance underwriter and an individual distinguishes this case from several of the commercial reinsurance cases cited by Lloyd's. *See*, *e.g.*, *McDermott Int'l, Inc. v. Lloyd's Underwriters of London* (5th Cir. 1991) 944 F.2d 1199, 1207 (finding that commercial claimant had chosen policy terms that included arbitration clause).

even stronger here than it was in *Victoria*. There, the Court addressed an ambiguity in the scope of the arbitration clause itself, a circumstance where the U.S. Supreme Court had previously found that ambiguity should be resolved in favor of arbitrating disputed claims. *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.* (1983) 460 U.S. 1, 24-25.[22] But here, the ambiguity concerns not the scope of claims covered under the arbitration clause itself, but instead the *manner* by which arbitration may be initiated for claims covered by two different forum selection clauses in the policy. Specifically, the ambiguity is over whether Boghos's coverage claims *must* be arbitrated upon Lloyds' demand based solely on the arbitration clause or whether Boghos may choose between court and arbitration after a coverage dispute arises based on the service of suit clause's provision of an additional forum.[23] On this type of ambiguity, the FAA should be agnostic since the Act only provides for arbitration "in the manner provided for in the [parties'] agreement." 9 U.S.C. § 4; *see also Volt Info. Sciences*, 489 U.S. at 479 (FAA's policy is one of "ensuring that private agreements to arbitrate are enforced according to their terms"). Therefore, the Court should hold that the normal rule for interpreting ambiguous contract terms against their drafter applies here to allow Boghos to choose between the policy's two forum selection provisions

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[22] Notably, *Moses H. Cone* was a case involving a commercial construction contract where the party that drafted the contract was *resisting* arbitration. *Id*. at 4-7.

[23] *Cf. Wells v. Chevy Chase Bank, F.S.B.* (Md. 2001) 768 A.2d 620, 630 (clause allowing arbitration "at the request and expense of the claiming party" prohibits bank from compelling arbitration where consumer claimants elected to litigate in court).

for his coverage claims.

In *Transit Casualty Co.*, the Missouri Court of Appeals addressed the exact same arguments Lloyd's is making here, and rejected them out of hand:

> If Lloyd's- -one of the largest and most experienced underwriters in history- - wanted to make its own boilerplate service of suit clause only an 'aid to arbitration,' it could have employed simple English words to do so. [Lloyd's] did not do so. This is the reason for the rule that courts construe ambiguities in contracts against those who draft them. [Lloyd's is] in no position to complain at this point about the fact that they failed to draft the language as they now would like for this court to interpret it.

Transit Casualty Co., 963 S.W. 2d at 398 (citations omitted). The same result should apply here. The disability policy's service of suit clause clearly provides that Lloyd's will consent to a court's jurisdiction and final decision for Boghos's coverage claims. Lloyd's should not be allowed to disavow this promise by resorting to a contrary arbitration clause and to arbitration statutes that apply ordinary contract law rules. The Court should hold instead that the policy does not require Boghos to arbitrate his claims.

CONCLUSION

For all of the reasons set forth herein, the Court of Appeal-Sixth District's and the Superior Court's denial of Defendants' motion to compel arbitration should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

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SUPREME COURT OF CALIFORNIA
Case Name: Certain Underwriters at Lloyd's sued and served as Lloyd's of London; International Risk Management Group; Petersen International Underwriters v. Antone Boghos
Case No: S117735

COURT OF APPEAL, SIXTH APPELLATE DISTRICT
Case Name: Antone Boghos v. Certain Underwriters at Lloyd's sued and served as Lloyd's of London; International Risk Management Group; Petersen International Underwriters
Case No:: H024481

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
Case Name: Antone Boghos v. Lloyd's of London, et al.
Case No.: CV803331

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Parties Served:

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X **(Federal)** I declare that I am employed in the office of a member of the Bar of this Court, at whose direction the service was made.

Executed at San Jose, California, on January 22, 2004.

JODIE SMITH