CASE NO. H024481

IN THE COURT OF APPEAL OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ANTONE BOGHOS,

Plaintiff,

vs.

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

Defendants.

Appeal from the Superior Court for Santa Clara County
Jamie Jacobs-May, Judge

BRIEF OF APPELLEE

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INTRODUCTION AND STATEMENT OF THE CASE

This is an appeal from an order of the Superior Court, Santa Clara County, denying the motion by Appellants Lloyd's of London or Underwriters at Lloyd's, International Risk Management Group, and Petersen International Underwriters (hereafter collectively "Lloyd's" or "Appellants") to compel arbitration of claims by Appellee Antone Boghos based on the denial of payment to him under his long term disability insurance policy. The Superior Court correctly held that Lloyd's consented to the jurisdiction of a court to resolve Boghos' "failure to pay" claims through the Service of Suit Clause in its insurance policy.

This appeal raises several questions of California contract law. The first is whether an insurance contract compels an insured individual to arbitrate his claims where the insurer drafted the contract to include both a general provision for arbitration of claims and a specific provision consenting to the individual's choice to litigate his particular type of claim in court. The second is whether the arbitration clause, if it does compel arbitration of these claims, is unconscionable when the parties agree that it is a contract of adhesion, it contains a provision expressly preserving the insurer's right to take cases to court, and it would require the insured claimant to pay thousands of dollars to arbitrate his claims. The judgment of the court below should be affirmed on either ground.

A. Statement of Facts

Antone "Tony" Boghos was self-employed as executive of a plumbing business, Atlas Plumbing and Sewer Services, Inc., in Milpitas. **(Appellants' Appendix pp. 66-67.)** On September 28, 1998, Boghos applied for a long term disability insurance policy with Petersen

International Underwriters, to be underwritten by Certain Underwriters at Lloyd's. **(Id.)** The policy took effect January 8, 1999, guaranteeing Boghos a monthly payment benefit if he sustained accidental injuries rendering him unable to perform his job. **(AA pp. 36, 45.)**

The application and policy contained several provisions addressing resolution of different types of disputes. The application contained general provisions stating as follows:

> Binding Arbitration -Waiver of Right to Trial by Jury: I understand and agree that any dispute concerning this insurance must be submitted to binding arbitration if the amount in dispute exceeds the jurisdictional limits of small claims court and is not resolved with a formal review by Underwriters. I understand and agree that this is a waiver of my and Underwriters' rights to a trial by jury.

(AA pp. 36 and 37.) Lloyds' Certificate of Insurance contained a provision applying specifically to disputes for failure to pay benefits under the policy. It stated, in relevant part:

> **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 agree to abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

(AA p. 41.) Finally, page 23 of the Declaration of Insurance contained a provision stating:

> BINDING ARBITRATION: Not withstanding any other item setforth [*sic*] herein, the parties hereby agree that any dispute which arises shall be settled in Binding Arbitration. By agreeing to Binding Arbitration, all parties acknowledge and agree that they waive their right to a trial by a jury. Binding arbitration will be held before a neutral arbitration who will be agreed to by all

> parties. 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. One arbitrator shall be appointed by Us. The second arbitrator shall be appointed by You. The third arbitrator shall be agreed by the two appointed arbitrators. 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 the parties.

(AA p. 51.)

On or about May 14, 2000, Boghos received a traumatic blow to the back of his head and neck causing him to lose consciousness. **(AA p. 4.)** As a result of his injuries from the accident, Boghos suffers constant vertigo and headaches and has lost 35 pounds. **(AA p. 67.)** He has been prescribed Vicodin, Naprolin, and Meclezine, suffers from loss of concentration and diminished physical strength leaving him unable to perform his work responsibilities with his business. **(Id.)** He lost his commercial property, was divorced by his wife, and faces a financial crisis that required him to move in with his 21 year-old son. **(Id.)**

Because of these injuries, Boghos applied for the long term disability benefits that were due him under his policy. On approximately December 8, 2000, Boghos received a letter from Lloyd's notifying him that they were discontinuing payments to him. **(AA p. 4.)**

B. The Proceedings Below

On November 26, 2001, Boghos filed suit in the Superior Court of the State of California, Santa Clara County, against Lloyd's, International Risk Management Group, Petersen International Underwriters, and unnamed individuals for their refusal to pay the benefits due under his disability policy. The complaint stated claims for bad faith denial of

insurance, breach of contract and implied covenant of good faith and fair dealing, and intentional infliction of emotional distress. **(AA pp. 3-6.)**

On February 6, 2002, Lloyd's moved the court to compel arbitration of Boghos' claims. **(*See* AA pp. 27-34)**. Boghos opposed the motion, arguing that Lloyd's and the other defendants had plainly consented to his right to litigate failure to pay claims in court through the Service of Suit Clause. Boghos argued that any ambiguity found between this and the Binding Arbitration clause should be resolved in favor of his right to choose the forum for resolving these claims. **(Id.)** Boghos also argued that the arbitration clause would be unconscionable if it compelled arbitration of his claims because it was a contract of adhesion, its terms regarding arbitration were ambiguous, and it required him to pay exceedingly high arbitration fees and travel expenses that he could not afford. **(AA pp. 59-64.)** In support of his argument about arbitration costs, Boghos produced evidence showing that the American Arbitration Association's (AAA's) Commercial Arbitration Rules selected by Lloyd's would require him to pay thousands of dollars in arbitration-related costs, including half of AAA's $11,000 case filing and servicing fees, $150 to $250 per day in hearing fees, travel costs to and from Los Angeles, and half of the arbitrators' fees of $350 to $500 *per hour* for up to seven hearing days before a one or three-arbitrator panel. **(AA pp. 86-87.)**

Lloyd's answered that California contract law requires arbitration of Boghos' claims. Lloyd's claimed that Boghos' interpretation of the Service of Suit Clause nullified the arbitration clause, inconsistent with California law requiring that each provision be given effect to the extent reasonably practicable. **(AA pp. 98-99.)** Lloyd's further argued that its

arbitration clause is not unconscionable because, although it is a contract of adhesion, it is mutually binding. **(AA p. 101.)** Lloyd's also claimed that Boghos' challenge to the Los Angeles venue requirement was untimely because Lloyd's might eventually agree to hold hearings at a location more accessible to him. **(AA pp. 101-02.)** Finally, Lloyd's argued that the high arbitration costs were permissible because Boghos' underlying claims were based on common law, not statutory, rights and because there was insufficient evidence of his inability to pay these costs. **(AA pp. 102-03.)**

On April 17, 2002, the Superior Court denied Lloyds' motion to compel arbitration. The court found that Lloyds clearly consented to the jurisdiction of a court to resolve failure to pay claims, that any ambiguity in the insurance policy resulting from a conflict between the Service of Suit and arbitration clauses must be resolved in favor of Boghos, and that the separate Service of Suit Clause statement reserving Lloyds' right to commence, remove or transfer an action to United States courts would render the arbitration clause unconscionable as a non-mutual waiver of Boghos' rights. **(AA p. 107.)** This appeal followed.

LEGAL DISCUSSION

I. THE COURT BELOW CORRECTLY HELD THAT LLOYDS' POLICY ALLOWS BOGHOS TO BRING FAILURE TO PAY CLAIMS IN COURT.

The trial court's holding that the policy does not compel Boghos to arbitrate his claims for failure to pay was correct in light of applicable California contract law. The policy's Service of Suit Clause plainly states that "[i]n 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[.]" **(AA p. 41.)** Boghos therefore has the right to elect to litigate his claims in this case in court.

A. California Courts Have Held that Lloyds' Contract Language Gives the Insured the Right to Choose the Forum for Failure to Pay Claims.

At least two courts applying California law have interpreted substantially identical insurance contract language, including that in a Lloyd's policy, to give the insured the right to a choice of forum for failure to pay claims. In Oil Well Service Co. v. Underwriters at Lloyd's London, 302 F. Supp. 384 (C.D. Cal. 1969), the court held that a Lloyd's service of suit clause stating that "in the event of a failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the assured (or Reassured), will submit to the jurisdiction of any court of competent jurisdiction within the United States," prohibited Lloyd's from removing a claimant's state court case to federal court. *Id*. at 385. The court rejected Lloyds' argument that the clause was only a statement of assent to the jurisdiction of American courts, finding that the key phrase "at the request

of the assured" gave the insured a unilateral right to choose the forum and therefore a right to have the case remanded. Id. Similarly, in Perini Corp. v. Orion Ins. Co., Ltd., 331 F. Supp. 453 (E.D. Cal. 1971), the court held based on identical contract language that "if the insurer reneges on any amount, an action based upon its failure to pay may be commenced in a forum selected by the insured." Id. at 457 (emphasis omitted). It is therefore established law in California that Lloyds' Service of Suit Clause language consenting to have a court hear failure to pay claims "at the request of the assured," **(AA p. 41)** gives the insured the right to choose the forum for resolving these claims.[1]

The fact that California courts have held that the Service of Suit Clause gives claimants the sole right to choose the forum for their failure to pay claims distinguishes the primary authority cited by Lloyd's for its narrow construction of this clause. See McDermott Int'l, Inc. v. Lloyd's Underwriters of London, 944 F.2d 1199, 1206 (5th Cir. 1991) ("underwriters' exercise of its removal right is not necessarily inconsistent with any of its obligations under the service-of-suit clause"). Since interpreting contracts is a matter of state law, decisions applying California law to this provision should be far more controlling than those applying the law of other states.

Lloyds' argument that the policy's arbitration clause takes away Boghos' right to

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[1] The California courts' interpretation of this clause is hardly novel. See, e.g., Foster v. Chesapeake Ins. Co., Ltd., 933 F.2d 1207, 1216-17 (3d Cir. 1991) (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, 955 F. Supp. 1066, 1068 (E.D. Wisc. 1997) (same); General Phoenix Corp. v. Malyon, 88 F. Supp. 502, 503 (S.D.N.Y. 1949) (same).

choose the forum is contrary to the rules of California contract law that both parties agree apply in this case. **(See Appellants' Opening Brief at 12 n.3.)** The Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, and the California Arbitration Act, Civil Code § 1280 *et seq*., apply state contract law rules of interpretation and enforcement to arbitration clauses. All the provisions of Lloyds' disability insurance policy therefore should be construed according to established principles of California law These include the requirements that "[t]he whole of a contract is to be taken together so as to give effect to every part, if reasonably practicable," (Civil Code § 1641); that "when a general and particular provision are inconsistent, the latter is paramount to the former[,]" (Code of Civil Procedure § 1859); and that "[i]n cases of uncertainty . . ., the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist," (Civil Code § 1654). Under these rules of construction, the Service of Suit and Binding Arbitration Clauses should be read together to give Boghos the right to choose between court and arbitration for resolving his claims for failure to pay benefits due under his disability insurance policy.

B. The Service of Suit and Arbitration Clauses Both Have Effect Only if They Let Boghos Choose Between Court and Arbitration for His Claims.

Under California law, a contract should be interpreted to give effect to each of its provisions with each term aiding in the construction of the other. See Civil Code § 1641; § 3541 ("[a]n interpretation which gives effect is preferred to one which makes void.") When construing a contract, "the court should give effect to every provision" so that "[a]n interpretation which renders part of the instrument to be surplusage should be avoided."

National City Police Officers' Ass'n v. City of National City, 87 Cal. App. 4th 1274, 1279, 105 Cal. Rptr. 2d 237 (2001); see also Palmer v. Truck Insurance Exchange, 21 Cal. 4th 1109, 1115, 90 Cal. Rptr. 2d 647 (1999) (applying rule to insurance policy terms).

The Service of Suit and Binding Arbitration Clauses therefore must each be construed in light of the other so that each has effect and neither is rendered superfluous. The Service of Suit Clause is on the first page marked "Provisions" in the Lloyd's Certificate and applies specifically to disputes based on a failure to pay amounts claimed due under the policy. **(AA p. 41.)** This is precisely the type of dispute in this case. The Binding Arbitration Clause is on the last page of the Declaration of Insurance under the heading "General Provisions," and provides for arbitration of "any dispute which arises." **(AA p. 51.)**

Whatever effect these two clauses might have in isolation, they can be construed in tandem to provide as follows: (1) all disputes other than those based on a failure to pay *must* be resolved through arbitration under the Binding Arbitration Clause; (2) for failure to pay claims, the claimant has a *choice* of forum wherein he may *either* submit his claims to arbitration under the Binding Arbitration Clause or he may exercise his right under the Service of Suit Clause to litigate his claims in a court of competent jurisdiction. Courts applying the rule that contract terms must be given effect to the extent reasonably practicable have adopted precisely this interpretation of Lloyds' Service of Suit and Binding Arbitration Clauses. See Transit Casualty Co. in Receivership v. Certain Underwriters at Lloyd's of London, 963 S.W.2d 392, 399 (Mo. Ct. App. 1998); Thiokol Corp. v. Certain Underwriters at Lloyd's of London, 1997 U.S. Dist. Lexis 8264 at *13-14 (D. Utah 1997). This is also the

only construction of the contract offered to this Court that gives effect to both provisions.

Lloyds' argument that Boghos' construction would "void the policy's arbitration clause" **(Brief at 18)** has no merit. First, this construction gives the arbitration clause effect by making its application mandatory to disputes other than claims based on failure to pay money due under the policy.[2] See Transit Casualty Co., 963 S.W.2d at 399. This construction also gives the arbitration clause effect by recognizing the insured claimant's right, *at his own election*, to resort to binding arbitration for failure to pay claims, a right he otherwise could not assert. Id. Finally, this construction gives the Service of Suit Clause effect by preserving the insured claimant's right to litigate failure to pay claims in court. In sum, Lloyds' claim that Boghos would void the arbitration clause fails. His construction gives independent effect to both the Service of Suit and the Binding Arbitration Clause.

Lloyds' construction of these provisions, by contrast, would render the Service of Suit Clause meaningless. Lloyd's contends that the provisions "should be reconciled by a reading that finds the service-of-suit clause's submission to jurisdiction language applicable only to proceedings for the enforcement of arbitration awards." **(Brief at 18.)** But if the only effect of the Service of Suit Clause were to permit parties to file actions to confirm arbitration

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[2] See, e.g., Certain Underwriters at Lloyd's v. A&D Interests, Inc., 197 F. Supp. 2d 741 (S.D. Tex. 2002) (insurer's action seeking declaration that policy is void); Clare v. Richards, 992 F. Supp. 891 (E.D. Tex. 1998) (action by Lloyd's representative for declaration that individual's policy is void); Scheiner v. Wallace, 955 F. Supp. 232 (S.D.N.Y. 1997) (action by parties insured under theft policies against Lloyd's representatives asserting claims for malpractice, malicious prosecution, abuse of process, and violations of federal civil rights statute).

awards, then the provision would be a nullity. That right is guaranteed by statute in California, as in many other states. As Lloyd's recognizes **(Brief at 15-16)**, arbitration awards in California are not self-enforcing. The California Arbitration Act therefore gives parties an independent right to petition courts for enforcement of arbitration awards. See Code of Civil Procedure § 1285.; see also 9 U.S.C. § 207 (allowing any party to covered arbitration agreement to file action to confirm award).[3] This Court should reject Lloyds' construction of the Service of Suit Clause because it fails to give the provision effect.

Lloyds' narrow construction of the Service of Suit Clause should be rejected for three additional reasons. First, the language of the clause offers no basis for a construction limiting its application to the confirmation of arbitration awards. The clause makes no reference to actions involving arbitration, and the *only* condition it places on the insured's right to elect a judicial forum is the existence of a claim for the underwriters' failure to pay an amount claimed under the policy. See Transit Casualty Co., 963 S.W.2d at 398-99 (rejecting Lloyds' construction for failing to give effect to "amount claimed" condition).

Second, the Service of Suit Clause lists Lloyds' forum selection rights, including rights to commence an action or transfer or remove an action to another court, but again does not list a right to compel arbitration. Under the maxim *expressio unius est exclusio alterius*, the omission of arbitration from the enumeration of Lloyds' forum selection rights further

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[3] A suit concerning an arbitration agreement that is not entirely between United States citizens is governed by 9 U.S.C. §§ 201 et seq. See McDermott International, Inc. v. Lloyd's Underwriters of London, 944 F.2d 1199, 1208 (5th Cir. 1991).

supports a conclusion that Lloyd's has no right to compel arbitration of failure to pay claims.

Finally, the Service of Suit Clause should not be construed to address actions to confirm arbitration awards because the clause only covers claims for failure to pay. Thus, under Lloyds' construction, the clause would prohibit confirmation actions for any other type of claim that insured individuals may assert, in direct contravention of state and federal law creating a general right to petition a court for the confirmation of any arbitration award. Since "[a] contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect," Civil Code § 1643, the Service of Suit Clause should be construed to avoid this problem.

The Service of Suit and Binding Arbitration Clauses of Lloyds' long-term disability insurance policy are reconcilable if they are read together to permit Boghos to choose between litigating in court or arbitrating his claims for failure to pay benefits due under the policy. This construction gives effect to both provisions by applying the arbitration clause to non-failure to pay claims and by giving the insured claimant the choice of applying either provision for failure to pay claims. See Transit Casualty Co., 963 S.W.2d at 399. Lloyds' construction, by contrast, gives no effect to the Service of Suit Clause, finds no support in the plain language of that clause, and violates applicable California rules for the construction and enforcement of contracts. The Court should reject this construction and hold that the Service of Suit Clause gives Boghos the right to litigate his failure to pay claims in court.

C. Any Conflict Between the Service of Suit and Arbitration Clauses Should Be Resolved in Favor of Boghos' Right to Litigate His Claims in Court.

California contract law dictates that any conflict between the Service of Suit and Binding Arbitration Clauses be resolved by applying the former to permit Boghos to litigate his claims for benefits due under the policy in court. The service of suit provision that Boghos relies upon applies specifically to the dispute at issue here, whereas the arbitration clause asserted by Lloyd's is one of general application. The Binding Arbitration clause appears under the heading "general provisions" and applies to "any dispute which arises," **(AA p. 51)**, while the Service of Suit Clause applies specifically to claims for failure to pay. In the construction of contractual agreements, "when a general and particular provision are inconsistent, the latter is paramount to the former [so that] a particular intent will control over a general one that is inconsistent with it." Code of Civil Procedure § 1859; see also Scudder v. Pierce, 159 Cal. 429, 433 (1911); Southern Cal. Gas Co. v. City of Santa Clara, 202 F. Supp. 2d 1129, 1134 (C.D. Cal. 2002) (citing § 1859).

This generally applicable rule of contract law regarding the relation between specific and general provisions applies to disputes over the construction of arbitration clauses. See Sanserino v. Shamberger, 245 Cal. App. 2d 630, 634-35, 54 Cal. Rptr. 206 (1966) (clause requiring appraisal upon termination of partnership interests supercedes arbitration clause applicable to disputes arising at any time during existence of partnership); see also Transit Casualty Co., 963 S.W.2d at 398 (applying specific/general rule to hold that Lloyds' Service of Suit Clause overrides Binding Arbitration Clause). Therefore, if the Court finds that the Service of Suit and Binding Arbitration Clauses create conflicting procedures for resolving Boghos' failure to pay claims, it should hold that the general provisions of the latter for

resolving "any dispute which arises" give way to the specific provisions of the former for resolving actions, such as this one, that are based on "the failure of Underwriters to pay any amount claimed due under the insurance."

Another compelling reason for resolving any conflict between the two provisions in favor of Boghos' construction preserving his right to litigate his claims in court is the rule of California law that ambiguity in a contract "should be interpreted most strongly against the party who caused the uncertainty to exist." Civil Code § 1654. When applied to insurance policies, this rule of construction serves important policy goals:

> The rule of resolving ambiguities against the insurer does not serve as a mere tie-breaker; it rests upon fundamental considerations of policy. In view of the somewhat fictional nature of intent in standardized contracts, the considerations which support the rule that ambiguities in the policy are interpreted against the drafter are more compelling than those which prompt the application of the mechanical expressio unius maxim. We do not believe the maxim should serve to defeat the basic rule that the insurance contract should be interpreted against the draftsman.

Steven v. Fidelity and Casualty Co. of N.Y., 58 Cal.2d 862, 871, 27 Cal. Rptr. 172 (1962); see also Victoria v. Superior Court, 40 Cal.3d 734, 744, 222 Cal. Rptr. 1 (1986) (quoting Steven). Any ambiguity created by a perceived conflict between the Service of Suit and Binding Arbitration Clauses should therefore be resolved in favor of Boghos.

There are no competing considerations of federal or state law that would overcome application of the rule for resolving ambiguities against the insurer here. Lloyds' argument that the rule has no application because this case involves construction of an arbitration clause **(Brief at 21-22)** has been rejected by the California Supreme Court. In Victoria v.

Superior Court, 40 Cal. 3d 734, 222 Cal. Rptr. 1 (1986), 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 against the provider for negligent employment of an orderly who was accused of sexually assaulting the patient. Id. at 737. The court placed this question at the intersection between general policies favoring arbitration and ordinary principles of contract, including the rule that ambiguity in an adhesive contract be resolved against its drafter. Id. at 738. In construing the arbitration clause not to cover the patient's negligent employment claim, the California Supreme Court specifically analogized to insurance contracts and held that federal and state arbitration policy do not override California's rules for resolving ambiguities in adhesive contracts against their drafters:

> 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). The court concluded both that construing the arbitration clause against the drafter to exclude the patient's claims was warranted based on the contract's adhesive nature, and that this "does no violence to the general policy in favor of arbitration." Id. at 747.[4] Since Lloyd's concedes that its policy is a contract of adhesion **(Brief at 25)**, the

[4] Victoria's holding on this point is well-supported. See, e.g., Dumais v. American Golf Corp., 299 F.3d 1216, 1219-20 (10th Cir. 2002) (applying ambiguity-against-drafter rule to conclude that arbitration clause is illusory and unenforceable based on employer's power to change terms); Stephens v. TES Franchising, 2002 WL 1608281 at *2-3 (D. Conn. July 10, 2002) (applying drafter rule to hold that arbitration clause is overridden by separate

rule should apply here to resolve ambiguity in favor of Boghos.

The fact that this personal disability insurance policy is, by Lloyds' own admission, a contract of adhesion further distinguishes this case from McDermott Int'l, Inc. v. Lloyd's Underwriters of London, 944 F.2d 1199 (5th Cir. 1991), the primary authority cited by Lloyd's. **(See Brief at 16-18.)** In McDermott, the Fifth Circuit applied another state's contract law and made a finding of fact that the insured claimant, a large business whose subsidiary supplied power generation equipment to utilities, specifically chose the disputed clause language for its contract so that the claimant could not invoke the policy-drafter principle. Id. at 1207. McDermott therefore has no application in this case, where California contract law is clear that ambiguities in adhesive contracts (including arbitration agreements) must be resolved against their drafters.

The argument for resolving ambiguity in favor of Boghos and against forced arbitration is even stronger here than it was in Victoria. There, the ambiguity presented to the court involved the scope of claims to which the arbitration clause alone would apply. The court acknowledged federal and state case law finding that such ambiguities should be resolved in favor of arbitration, see, e.g., Moses H. Cone Memorial Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24-25 (1983) (case where non-drafting party sought arbitration), but

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provision stating that the parties "agree to submit any disputes between them to the jurisdiction and venue of a court. . ."); Quigley v. KPMG Peat Marwick, LLP, 749 A.2d 405, 416 (N.J. Super. Ct. App. Div. 2000) ("despite the general rule that arbitration clauses are to be liberally construed, courts have not hesitated to apply the common-law rule that 'a court should construe ambiguous language against the interest of the party that drafted it.') (quoting Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995)).

distinguished those cases as involving non-adhesive business contracts to which the rule might not apply and held that ambiguities as to the scope of arbitration clauses in adhesive contracts between businesses and individuals must be resolved against the drafter. Id.[5] The ambiguity that would exist in this case if the Service of Suit and Binding Arbitration Clauses were in conflict does not concern the *scope* of claims covered by the arbitration clause, but rather the *manner* by which arbitration may be demanded.

The parties agree that Boghos' failure to pay claims *can* be arbitrated pursuant to the Binding Arbitration Clause. But they disagree as to whether these claims *must* be arbitrated because the arbitration clause provides exclusive procedures for resolving these claims or whether the Service of Suit Clause provides an additional procedural option whereby Boghos may elect either to arbitrate or to litigate these claims in court. The Federal Arbitration Act allows courts to direct arbitration "in the manner provided for in [the parties'] agreement," 9 U.S.C. § 4, so that federal policy is simply one of "ensuring that private agreements to arbitrate are enforced according to their terms." Volt Info. Sciences, Inc. v. Bd. of Trustees, Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) (agreement to arbitrate under procedural rules staying arbitration pending outcome of related litigation is enforceable under

[5] See also Graham v. Scissor-Tail, Inc., 28 Cal.3d 807, 819 n.16, 171 Cal. Rptr. 604 (1981) (applying drafter rule to terms of arbitration clause); Maggio v. Windward Capital Mgmt. Co., 80 Cal. App. 4th 1210, 1215, 96 Cal. Rptr. 2d 168 (2000) (applying drafter rule to dispute over scope of arbitration clause).

the FAA).[6] Therefore, general arbitration policy should play no role in resolving ambiguity as to whether one or both parties has a right to demand arbitration under these provisions. Instead, any ambiguity should be resolved against Lloyd's as the insurance policy's drafter.

Finally, Lloyd's cannot avoid the rule for resolving ambiguity against the drafter by resorting to arguments concerning the parties' "objectively reasonable expectations." **(Brief at 19-21.)** Citing the rule of California law that a contract "must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it," Civil Code § 1649, Lloyd's asserts based solely on citations to the arbitration clause language (and without reference to the Service of Suit Clause) that Boghos "could not have reasonably expected that he was free to ignore the arbitration clause and litigate all disputes concerning payment in California courts." **(Brief at 20.)** As set forth above, the proper interpretation of the arbitration clause, *when it is viewed in tandem with the policy's Service of Suit Clause*, compels just that result or at least creates an ambiguity that must be resolved through application of the rules described herein.

Absent extrinsic evidence of the parties' reasonable expectations as to the meaning of contract terms, Section 1649 gives way to the rule that ambiguity must be resolved against the drafter. This was precisely the holding of the California Supreme Court in AIU Insurance Co. v. Superior Court of Santa Clara County, 51 Cal.3d 807, 822-23, 274 Cal. Rptr. 820

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[6] Cf. Wells v. Chevy Chase Bank, F.S.B., 768 A.2d 620, 630 (Md. 2001) (clause allowing arbitration "at the request and expense of the claiming party" prohibits bank from compelling arbitration under the FAA where consumers filed claims in court).

(1990). AIU involved a dispute over the scope of coverage under a liability insurance contract. Id. at 813-14. The court applied Section 1649 and the drafter rule as follows:

> Because the insurer writes the policy, it is held 'responsible' for ambiguous language, which is therefore construed in favor of coverage. It follows, however, that where the policyholder does not suffer from lack of legal sophistication or a relative lack of bargaining power, and where it is clear that an insurance policy was actually negotiated and jointly drafted, we need not go so far in protecting the insured from ambiguous or highly technical drafting.

Id. at 822-23. The court held that the rule for resolving ambiguity against the insurer applied even though the claimant was a business because there was no evidence demonstrating that the insured would have anticipated the insurer's technical and restrictive interpretation of policy language. Id. 823. Likewise, there is no evidence here showing that Boghos would have anticipated Lloyds' technical and restrictive reading of the Service of Suit Clause.[7] Therefore, the rule for resolving ambiguity against the insurer should apply to resolve any conflict between the two policy provisions in favor of Boghos' construction.

Faced with precisely the same arguments regarding the same language in the same contract, another court concluded as follows:

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[7] The absence of such evidence distinguishes this case from several that Lloyd's cites as support for its arguments. See, e.g., Old Dominion Ins. Co. v. Dependable Reinsurance Co., Ltd., 472 So.2d 1365, 1368 (Fla. Dist. Ct. App. 1985) (construing arbitration and service of suit clauses in retrocession agreement between insurers to require arbitration of failure to pay claims based in part on claimant's familiarity with "usage of the trade" and on claimant's initial attempt to seek arbitration); Continental Casualty Co. v. Certain Underwriters at Lloyd's, 1993 U.S. Dist. Lexis 21345 at *4 (N.D. Cal. July 21, 1993) (arbitration and service of suit clauses in reinsurance contract require arbitration of failure to pay claims based in part on industry custom and record evidence demonstrating claimant's familiarity with practice of requiring arbitration).

> "'[I]f 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 would now like for this court to interpret it.

Transit Casualty Co., 963 S.W.2d at 398 (citations omitted) (quoting Thiokol Corp. v. Certain Underwriters at Lloyd's of London, 1997 U.S. Dist. Lexis 8264 at *15 n.3 (D. Utah May 6,1997). The same conclusion should hold here. The Service of Suit Clause covers Boghos' claims for failure to pay money owed under the policy, giving him a right to litigate those claims in court. The clause contains no limiting language with regard to arbitration or actions to enforce arbitration awards. While this clause can be reconciled with the policy's arbitration clause through a reading that gives Boghos a choice between court and arbitration for resolving these claims, any conflict that is found between the Service of Suit Clause's permissive language and the arbitration clause's mandatory language must be resolved in favor of the former under the principles of California contract law that specific terms override more general terms and that ambiguities in contracts of adhesion must be resolved against the drafter. The Court should hold that the provisions of Lloyds' long-term disability insurance policy permit Boghos to litigate his failure to pay claims in court.

II. THE ARBITRATION CLAUSE IS UNCONSCIONABLE IF IT REQUIRES ARBITRATION OF BOGHOS' CLAIMS IN THIS CASE.

It is well-established California law that a court may refuse to enforce any facially valid contract on the ground that it is unconscionable. See CAL CIV. § 1670.5(a). "Because

unconscionability is a reason for refusing to enforce contracts generally, it is also a valid reason for refusing to enforce an arbitration agreement." Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal. 4th 83, 114, 99 Cal. Rptr. 2d 745 (2000); see also Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

Courts applying California contract law have recognized that unconscionability has both "procedural" and "substantive" elements. The Ninth Circuit recently described the relevant considerations for each of these prongs as follows:

> The procedural aspect is manifested by (1) 'oppression,' which refers to an inequality of bargaining power resulting in no meaningful choice for the weaker party, or (2) 'surprise,' which occurs when the supposedly agreed-upon terms are hidden in a document. Substantive unconscionability, on the other hand, refers to an overly harsh allocation of risks or costs which is not justified by the circumstances under which the contract was made.

Navellier v. Sletten, 262 F.3d 923, 940 (9th Cir. 2001) (citations omitted); see also A&M Produce Co. v. FMC Corp., 135 Cal.App.3d 473, 493 (1982) ("When nonnegotiable terms on preprinted form agreements combine with disparate bargaining power, resulting in the allocation of commercial risks in a socially or economically unreasonable manner, the concept of unconscionability...furnishes legal justification for refusing enforcement. . .")

Both the procedural and substantive elements must be present before a court will hold that a contract is unenforceable, but they need not be present to the same degree. Instead, there is a "sliding scale relationship between the two concepts: the greater the degree of substantive unconscionability, the less the degree of procedural unconscionability that is required to annul the contract or clause," and vice versa. Carboni v. Arrospide, 2

Cal.App.4th 76, 83 (1991); see also Armendariz, 24 Cal.4th at 114.

The Court should hold that Lloyds' arbitration clause is unconscionable if it compels arbitration of Boghos' claims. The clause was a non-negotiable adhesive contract that would impose a non-mutual waiver of Boghos' access to court while forcing him to pay enormous arbitration-related costs to vindicate his claims. For all of these reasons, the arbitration clause is both procedurally and substantively unconscionable and should not be enforced.

A. The Arbitration Clause Is Procedurally Unconscionable Because it Was a Non-Negotiable Contract of Adhesion.

A contract provision may be found procedurally unconscionable in the face of unequal bargaining power between parties "which results in no real negotiation and 'an absence of meaningful choice'" in the formation of the contract. A&M Produce, 135 Cal.App.3d at 486-87 (citations omitted). In A&M Produce, the parties were "an enormous diversified corporation . . . and a relatively small but experienced farming company." *Id.* at 489. The court found that the contrast between these parties, especially as to commercial experience and expertise, helped render the corporation's contractual liability waiver unconscionable.

The fact that an arbitration clause is presented as a contract of adhesion is sufficient to establish procedural unconscionability under California law. In Flores v. Transamerica Homefirst, Inc., 93 Cal. App. 4th 846, 113 Cal. Rptr. 2d 376 (2002), the court examined an arbitration clause in loan papers signed by elderly homeowners, found that "the undisputed facts indicate that the arbitration agreement was imposed upon plaintiffs on a 'take it or leave it' basis," and held that "[t]he arbitration agreement was a contract of adhesion and thereby

procedurally unconscionable." Id. at 853-54.[8] Inequality of bargaining power between the parties to an employment contract was also an animating factor behind the discussion of unconscionability in the California Supreme Court's Armendariz decision. See 24 Cal. 4th at 113. Based on the indisputably adhesive nature of Lloyds' arbitration clause, Boghos should be found to have established the procedural element of unconscionability here.

Lloyd's concedes that "the arbitration agreement is a contract of adhesion because it is part of a standard form whose terms were not subject to negotiation[.]" **(Brief at 25.)** While Lloyd's disputes the claim that the arbitration clause is procedurally unconscionable, its concession is sufficient to support this finding. The concession finds additional support in the record from Boghos' statement that he "was not given any opportunity to negotiate the terms of this insurance policy" and that, had he known, he "would never have agreed to have to pay the huge cost of commercial arbitration." **(AA p. 67.)** Because Boghos had no opportunity to negotiate regarding the arbitration clause and because the clause's steep cost requirements were presented so as to surprise him after his claims arose, the Court should find that the arbitration clause is procedurally unconscionable.

B. The Terms of the Arbitration Clause are Substantively Unconscionable as They Apply Here.

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[8] See also ACORN v. Household Int'l, Inc., 211 F. Supp. 2d 1160, 1168 (N.D. Cal. 2002) ("A contract or clause is procedurally unconscionable if it is a contract of adhesion."); Ferguson v. Countrywide Credit Industries, Inc., 298 F.3d 778, 784 (9th Cir. 2002) (same); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893 (9th Cir. 2002) (same); Mercuro v. Superior Court of Los Angeles County, 96 Cal. App. 4th 167, 174, 116 Cal. Rptr. 2d 671 (2002) (same).

1. One-sided Arbitration Clauses are Unconscionable Under California Law.

Provisions of a contract of adhesion are substantively unconscionable if they fall outside the reasonable expectations of the weaker or "adhering" party or if they are unduly oppressive. See Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807, 820, 171 Cal. Rptr. 604 (1981); Armenadariz, 24 Cal. 4th at 113. In Armendariz, the California Supreme Court held that an adhesive arbitration clause presented to an employee as a condition of her employment was unconscionable where the terms of the clause applied only to require arbitration of the employee's claims, while reserving for the employer who drafted the contract a unilateral right to pursue its claims in court. Id. at 117. The court found that "it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on 'business realities.'" Id. California courts have therefore repeatedly held that adhesive arbitration clauses in employment and consumer contracts are unconscionable if they do not mutually bind the drafter of the clause to arbitrate its own claims.[9]

If Lloyds' policy provisions compel arbitration of Boghos' failure to pay claims, then the court should hold that the arbitration clause is unconscionable when read in tandem with

[9] See Mercuro v. Superior Court, 96 Cal. App. 4th at 176; Flores v. Transamerica Homefirst, Inc., 93 Cal. App. 4th at 854-55; Kinney v. United Healthcare Serv's, Inc., 70 Cal. App. 4th 1322, 1332, 83 Cal. Rptr. 2d 348 (1999); Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1541-42, 60 Cal. Rptr. 2d 138 (1997); Ferguson, 298 F.3d at 784-85; Circuit City, 279 F.3d at 893-94; ACORN v. Household Int'l, 211 F. Supp. 2d at 1173.

the Service of Suit Clause's statement that "[n]othing 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 . . ." **(AA p. 41.)** Such a reservation of rights, alongside a construction of the contract to prohibit Boghos from litigating any of his claims in court, would render these provisions non-mutual and therefore unconscionable.

2. The High Costs Imposed Under Lloyds' Arbitration Clause in this Case are Unlawful and Render the Clause Unconscionable.

The record demonstrates that Boghos will have to bear enormous costs to arbitrate his claims under the terms of Lloyds' arbitration clause. The record establishes the following: (1) Boghos must arbitrate under the American Arbitration Association's ("AAA's") Commercial Arbitration Rules **(AA p. 51)**; (2) he must pay half the costs of arbitration **(AA p. 51)**; (3) the filing fee and case service fee for his claims under AAA's commercial rules would be $8,500 and $2,500 respectively **(AA pp. 86 and 89)**; (4) the hearing fees under AAA's commercial rules are between $150 and $250 per day per party **(AA pp. 87 and 94)**; (5) the average arbitrator's fee in Santa Clara County is $350 to $500 *per hour* **(AA p. 87)**; see also Ting v. AT&T, 182 F. Supp. 2d 902, 917 (N.D. Cal. 2002) (AAA study shows average commercial arbitrator compensation of $1,899 per hearing day). The arbitration clause also mandates that "the venue shall be in Los Angeles County or at another location if agreed by all parties," **(AA p. 51)**, thus requiring Boghos to travel 350 miles to arbitrate his claims and giving Lloyd's veto power over any venue more accessible to Boghos' home

in Milpitas.[10] Boghos therefore may have to pay tens of thousands of dollars for a full hearing on his claims for unpaid disability insurance benefits. **(AA p. 87.)** The Court should hold that these enormous cost requirements render the arbitration clause unconscionable.

Under federal and state law, arbitration clauses are enforceable only if they make proceedings accessible so that claimants can effectively enforce their rights. See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (citation omitted). The U.S. Supreme Court has recognized that "the existence of large arbitration costs could preclude a litigant. . .from effectively vindicating its rights," Green Tree Financial Corp. v. Randolph, 513 U.S. 79, 90 (2000). In light of these concerns, the California Supreme Court held that "the imposition of substantial forum fees is contrary to public policy, and is therefore grounds for invalidating or 'revoking' an arbitration agreement and denying a petition to compel arbitration[.]" Armendariz v. Foundation Health Psychare Services, Inc., 24 Cal. 4th 83, 110, 99 Cal. Rptr. 2d 745 (2000). Armendariz adopted a bright line rule regarding the imposition of arbitration costs through adhesive employment contracts, holding that:

> when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or process cannot generally require the employee to bear any *type* of expense that the employee would not be required

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[10] This long-distance travel requirement for consumers by itself is unconscionable under California law. See, e.g., Patterson v. ITT Consumer Financial Corp., 114 Cal. App. 4th 1659, 1665-66, 18 Cal. Rptr. 2d 563 (1993) (lender's clause requiring borrowers to consent to arbitration in Minnesota); Pinedo v. Premium Tobacco Stores, Inc., 85 Cal. App. 4th 774, 781, 102 Cal. Rptr. 2d 435 (2000) (Los Angeles area employer's requirement that employees arbitrate in Oakland); Bolter v. Superior Court of Orange County, 87 Cal. App. 4th 900, 909 104 Cal. Rptr. 2d 888 (2001) (franchisor's requirement that franchisees arbitrate in Utah).

to bear if he or she were free to bring the action in court.

24 Cal. 4th at 110-11 (emphasis in original). While this rule arose out of a discussion of compulsory arbitration of employees' statutory claims, Id. 99-113, it should apply here as a baseline requirement or at least as a touchstone for measuring the costs that Boghos faces.

The concerns over unexpected and prohibitive costs arising out of adhesive arbitration requirements that animated Armendariz, Id. at 111-112 and 115, are equally present here, where Lloyd's admits that its arbitration clause was non-negotiable and adhesive. The fact that Boghos' claims are based on common law, rather than statutory, rights should not be a basis for disregarding all concern about his ability to access the arbitral forum. See Ting v. AT&T, 182 F. Supp. 2d at 933 ("It is hard to conceive of how an adhesive contractual provision which prevents someone from effectively vindicating non-statutory legal rights would not be substantively unconscionable. . .") (citing Sosa v. Paulos, 924 P.2d 357, 262 (Utah 1996)). Armendariz provides a readily applicable standard against which Lloyds' requirement that Boghos pay more than $4,000 in filing fees, more than $2,000 in case administration fees, thousands of dollars per hearing day in arbitrator's fees, plus additional fees and long distance travel costs should be found illegal and unconscionable.[11]

Lloyds' argument that these enormous arbitration costs must be permissible because

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[11] Although Armendariz discussed arbitration costs and unconscionability separately, California courts have often held that adhesive contracts imposing arbitration costs against consumers and employees are unconscionable. See, e.g., Circuit City, 279 F.3d at 894 (clause requiring employee to pay half of arbitrator's fees is unconscionable); Ferguson, 298 F.3d at 785 (same); Ting, 182 F. Supp. 2d at 933-35 (consumer contract's prohibitive arbitration cost provisions are illegal and unconscionable).

its cost-splitting requirement is consistent with the California Arbitration Act's default rule of even cost allocation, Code of Civil Procedure § 1284.2, is of no avail. First, the arbitration clause in Armendariz explicitly incorporated Section 1284.2 to require the employee to pay half of all costs. See 24 Cal. 4th at 107. But the California Supreme Court held that the employer was obligated to pay all of the costs that were unique to the arbitration system that it imposed against its employee. Id. at 110-11 and 113; see also Circuit City, 279 F.3d at 894 (clause requiring employee to pay half the arbitrator's fees is unconscionable). Furthermore, Lloyds' reliance on Section 1284.2 misses the mark on the issue presented in this case. Boghos is not arguing that pro rata arbitration cost allocations are *per se* unlawful. He is arguing that *this* cost-splitting requirement is unconsionable because it requires him to pay the enormous filing, case administration, and arbitrator's fees that AAA imposes under its Commercial Arbitration Rules, which Lloyd's specifically wrote into its arbitration clause.

The relevant authority therefore is not Section 1284.2, but the body of cases from courts in California and around the country holding that the enormous costs imposed against consumers under AAA's commercial rules are illegal and unenforceable. In Ting v. AT&T, 182 F. Supp. 2d 902 (N.D. Cal. 2002), the court held that evidence of the substantial costs that consumers would have to pay under AAA's commercial rules supported a finding that AT&T's mandatory arbitration clause was unconscionable. Id. at 933-35. After examining AAA's commercial fee schedules, the court hypothesized a consumer with a $100,000 claim who would have to pay a case filing fee of $1,250, an extra service fee of $750, and a deposit of $3,800 as her share of the arbitrator's fees for a four-day hearing. Id. at 934. The court

held that this $5,800 up-front payment requirement from a consumer would be prohibitive and supported a finding that the arbitration clause was unconscionable. Id. Here, Boghos' share of the case filing and administration fees *alone* would be $5,500, without accounting for his share of the arbitrators' $350 to $500 *hourly* fees in a case that may require up to seven days of hearings before one or three arbitrators. The Court should hold, consistent with cases from across the country where consumers faced substantial costs under AAA's commercial fee schedule, that Lloyds' arbitration clause is unconscionable.[12]

Boghos submitted evidence demonstrating that he lost his business, has no income, is unable to work, and had to move in with his son. **(AA p. 67 and 87.)** Lloyds' contention that an out-of-work plumbing contractor must do more to show that he cannot afford to pay tens of thousands of dollars to arbitrate claims for disability insurance benefits should be rejected. As one court recently held, "nothing. . .requires courts to undertake detailed analyses of the household budgets of low-level employees to conclude that arbitration costs in the thousands of dollars deter the vindication of the employees' claims in arbitral fora." Giordano v. Pep Boys–Manny, Moe & Jack, Inc., 2001 WL 484360 at *6 (E.D. Pa. March

[12] See, e.g., Popovich v. McDonald's Corp., 189 F. Supp.2d 772, 777-778 (N.D. Ill. 2002) (AAA commercial rules imposing "staggering" costs of $48,000 to $126,000 against consumers render clause unenforceable); Phillips v. Associated Home Equity Services, Inc., 179 F. Supp.2d 840,846 (N.D. Ill. 2001) ($4,000 filing fee plus costs under AAA Commercial Rules are unenforceable against consumer); Arnold v. Goldstar Financial Systems, Inc., 2002 WL 1941546*10 (N.D. Ill. Aug. 22,2002) (consumer cannot be required to arbitrate where AAA commercial rules require fee payment of $3,600); Mendez v. Palm Harbor Homes, Inc., 45 P.3d 594, 602-608 (Wash. App. 2002) (consumers cannot be required to pay $2,000 filing fee under AAA commercial rules).

29, 2001). Boghos has met his burden of proving that arbitration costs would be prohibitive.

California courts have held repeatedly that businesses cannot use adhesive arbitration clauses and high forum costs to prevent consumers from enforcing their rights. In Mendez v. Palm Harbor Homes, 45 P.3d at 605, another state's court of appeals similarly found that:

> Avoiding the public court system to save time and money is a laudable societal 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.

The Court should hold here that Lloyds' mandatory arbitration clause is unconscionable for imposing prohibitive costs against Boghos.

CONCLUSION

For the reasons set forth herein, the order of the Superior Court, Santa Clara County, denying Appellants' motion to compel arbitration should be affirmed.

Dated: September 27, 2002

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 9,074 words as counted by the WordPerfect (version 10) word-processing program used to generate this brief.

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PROOF OF SERVICE BY MAIL

Robert H. Bohn certifies and declares as follows:

I am over the age of eighteen years, and not a party to this action. My business address is Bohn & Bohn, LLP, 152 North Third Street, Suite 200, San Jose, CA 95112, which is located in the county where the mailing described below took place.

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