IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

LORAYNE AND GENE BARGMAN,

Plaintiffs/Appellees,

vs.

No. 31,088
(D. Ct. No. CV 2010 8447)

SKILLED HEALTHCARE GROUP, INC.,
SKILLED HEALTHCARE, L.L.C.,
CANYON TRANSITIONAL REHABILITATION
CENTER, L.L.C. and
ANMARIE DVORAK, ADMINISTRATOR,

Defendants/Appellants.

Appeal from the Second Judicial District Court,
Bernalillo County, New Mexico
The Honorable Valerie A. Huling, Judge

BRIEF IN CHIEF

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ORAL ARGUMENT REQUESTED

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Introduction

What has been lost in the spate of recent opinions that address substantive unconscionability in the context of an arbitration agreement is an understanding of the standards that a court should apply when an agreement is not completely one-sided. That is the situation that this case presents.

Relying on Cordova v. World Finance Corporation, 2009-NMSC-021, 146 N.M. 256, 208 P.3d 901, the district court concluded that the arbitration agreement at issue was completely one-sided because it includes arbitration exclusions. But in so ruling, the court asked for this Court to provide guidance on the standards that a court should apply to determine whether the presence of an arbitration exclusion always establishes substantive unconscionability under Cordova.

Upon close reading and careful reflection, the standards can be found in Cordova and other precedent in New Mexico. The standards show that the district court's ruling should be reversed, both as a matter of law and of public policy, when they are applied to the record in this case.

Summary of Proceedings

Nature of the case

This appeal arises from denial of a motion to enforce an arbitration agreement. Defendants Skilled Healthcare Group, Inc., Skilled Healthcare, L.L.C., Canyon Transitional Rehabilitation Center, L.L.C., and Administrator, AnMarie

Dvorak appeal from the district court's ruling that the agreement is substantively unconscionable and, on that ground alone, unenforceable.

Course of Proceedings

Plaintiffs LoRayne and Gene Bargman filed a complaint in district court. (R.P. 1-22.) The named defendants, Skilled Healthcare Group, Inc., Skilled Healthcare, L.L.C., Canyon Transitional Rehabilitation Center, L.L.C., and Administrator, AnMarie Dvorak, responded by filing a motion to dismiss/stay the litigation and to compel arbitration pursuant to an arbitration agreement signed by LoRayne Bargman. (R.P. 58-67.) The motion was fully briefed. (R.P. 68-74 (memorandum brief in support); R.P. 89-111 (response brief); R.P. 114-26 (reply brief).) The district court held a hearing on the motion. (11/22/10 Tr.) The court subsequently entered an order denying the motion on the ground that the arbitration agreement was substantively unconscionable. (R.P. 130-31.) Defendants appeal from the order. (R.P. 132-35.)

Relevant Facts

Arbitration Agreement at Issue

After LoRayne Bargman fractured a hip and an ankle, her doctors ordered her to seek inpatient rehabilitative care. (R.P. 89.) She was admitted to Canyon Transitional Rehabilitation Center, a facility located in Albuquerque, and began to receive treatment there. (R.P. 58-59; see also R.P. 1, ¶ 1.)

After a month of receiving treatment, LoRayne Bargman was provided with an Admissions Agreement. (R.P. 58-59.) The signature page of the agreement, among other things, explained that parts of the agreement appeared in attachments. (R.P. 63-64.)

An "ARBITRATION AGREEMENT" was included as a separate attachment to the Admissions Agreement. (R.P. 65-67.) The second paragraph explained that by entering into the agreement Canyon Transitional Rehabilitation Center (Facility) and the Resident were exchanging "mutual promises" to arbitrate "any Dispute (as defined in the following paragraph)." (R.P. 65.) It further explained that if a Dispute arose, they desired to use alternative dispute resolution to resolve the Dispute "in an expeditious manner." (R.P. 65.)

The following paragraph, in addition to describing the informal and binding aspects of arbitration, in relevant part explained

> **By signing this Arbitration Agreement, the Facility and the Resident relinquish their right to have any and all disputes associated with this Arbitration Agreement and the relationship created by the Admission Agreement and/or the provision of services under the Admission Agreement (including, without limitation, . . . claims for negligent care or any other claims of inadequate care provide[d] by the Facility; claims against the Facility or any of its employees, managers, or members) (each, a "Dispute" and, collectively, the "Disputes"), resolved through a lawsuit, namely by a judge, jury or appellate court, except to the extent that New Mexico law provides for judicial action in arbitration proceedings. This Arbitration Agreement shall not apply to either the Facility or the Resident in any disputes pertaining to collections or discharge of residents.**

(R.P. 65.)

Another paragraph followed, which stated:

> **BY SIGNING THIS AGREEMENT, THE FACILITY AND THE RESIDENT UNDERSTAND THAT THEY ARE GIVING UP THEIR CONSTITUTIONAL RIGHT TO A TRIAL IN COURT BY A JUDGE OR JURY, AND THE RIGHT TO APPEAL CONCERNING ANY DISPUTES.**

(R.P. 65.)

The following paragraph encouraged the resident to "ask any questions" about the Arbitration Agreement "and/or to seek the advice of an attorney prior to signing [the] Agreement." (R.P. 65.) It provided a line for the Resident to sign, acknowledging these considerations. (R.P. 65.)

On the following page, subparagraphs, some of which are highlighted here, outlined how the arbitration process would work in practice. (R.P. 66.) Paragraph C explained that the Facility and the Resident would each select an arbitrator, both of whom in turn, would select a third arbitrator who would serve as the lead arbitrator and resolve any pre-arbitration hearing disputes. (R.P. 66.) Paragraph E explained that the lead arbitrator would establish "a reasonable, but limited scheduling order" that would enable the hearing to take place "within twelve (12) months following the appointment of the arbitrators." (R.P. 66.)

Other subparagraphs addressed the parties' mutual discovery rights, identified Albuquerque as the hearing venue, and explained that while the Facility

would "pay 100% of the arbitrators' fees," each side would pay their own attorneys' fees and costs incurred during the arbitration process. (R.P. 66.) The "Governing Law" paragraph explained that New Mexico law, including the New Mexico Uniform Arbitration Act ("NMUAA"), and any applicable federal laws, would govern the enforceability of the Arbitration Agreement. (R.P. 66.)

The next page was a signature page. (R.P. 67.) By signing, the Resident, among other things, would acknowledge:

> **I REPRESENT AND AGREE THAT I FULLY UNDERSTAND AND AGREE TO BE LEGALLY BOUND BY [THE ARBITRATION AGREEMENT'S] PROVISIONS. I UNDERSTAND THAT I HAVE A CHOICE IN SELECTING A PROVIDER . . . . I HAVE BEEN GIVEN ADEQUATE TIME AND THE OPPORTUNITY TO REVIEW THIS ARBITRATION AGREEMENT. I . . . FREELY AND VOLUNTARILY CONSENT TO ALL OF THE TERMS OF THIS ARBITRATION AGREEMENT.**

(R.P. 67.)

After reviewing the Admissions Agreement and its attachments, LoRayne Bargman signed the Admissions Agreement, acknowledging, among other things, that she had read the agreement and each of its attachments and had them explained to her. (R.P. 64.)

She also signed the two acknowledgements in the Arbitration Agreement. (R.P. 65, 67.) Preceding the first acknowledgement was an explanation that the terms of the Arbitration Agreement would be binding on the Resident and, among

others, the Resident's "family members." (R.P. 65.) After signing the Admission and Arbitration Agreements, LoRayne Bargman continued to receive treatment at Canyon Transitional Rehabilitation Center for a short period of time. (R.P. 58-59.)

District Court Proceedings

After she was discharged, LoRayne Bargman, joined by her husband Gene, proceeded to file a lawsuit against Canyon Transitional Rehabilitation Center, L.L.C. and the other named defendants (collectively, hereinafter "Canyon Transitional" except where otherwise stated). (R.P. 1-22.) The complaint alleged negligence, misrepresentation, unfair trade practices, and punitive damages counts on behalf of LoRayne Bargman and a loss of consortium count on behalf of her husband, all of which allegedly arose out of her care at Canyon Transitional. (R.P. 1-22.) Pursuant to section 44-7A-8(a)(2) (2001) of the NMUAA, Canyon Transitional responded by filing a motion to dismiss and/or stay the litigation and to compel arbitration based on the Admissions Agreement and the Arbitration Agreement signed by Mrs. Bargman. (R.P. 58-67.)

In its supporting memorandum brief, Canyon Transitional argued that all of the counts alleged fell within the scope of the Arbitration Agreement and that, based on precedent and public policy in New Mexico, the agreement constituted an enforceable contract against both of the Bargmans. (R.P. 68, 70-72.) Canyon

Transitional attached the Admissions Agreement signature page and the Arbitration Agreement as exhibits to the motion. (R.P. 63-67.)

In responding, the Bargmans challenged the enforceability and scope of the Arbitration Agreement. (R.P. 89-111.) They argued that the agreement lacked consideration. (R.P. 91-93.) They also argued that the agreement was unenforceable on the grounds of procedural and substantive unconscionability. (R.P. 93-98.) In their closing point, they argued that the agreement did not apply to Gene Bargman's loss of consortium claim or to Canyon Transitional's co-defendants. (R.P. 98-99.)

In addressing substantive unconscionability, the Bargmans premised their arguments upon Cordova v. World Finance Corporation, 2009-NMSC-021, 146 N.M. 256, 208 P.3d 901. (R.P. 93.) They focused on the exclusions in the Arbitration Agreement for discharge and collections actions, arguing that the exclusions were "exactly the type of reservation the Cordova court found unconscionable." (R.P. 97.) However, after acknowledging that discharges are subject to administrative proceedings, the Bargmans narrowed their challenge to the collections exclusion. (R.P. 97-98.) They argued that the exclusion was one-sided in favor of Canyon Transitional, reasoning that it was "nearly impossible to imagine under what circumstances" a resident might employ the clause against the facility. (R.P. 97-98.) Thereafter, however, acknowledging a hypothetical

collections case in which "the resident retained the right to sue," (R.P. 98), the Bargmans argued that the agreement was "patently unfair." (R.P. 98.) They argued that the Arbitration Agreement was one-sided overall because it required a resident to give up the right to litigate the claims the resident would bring against Canyon Transitional while enabling Canyon Transitional to litigate the types of claims it would bring against a resident, making the agreement "truly one-sided for the vast majority of disputes" that could arise between the parties. (R.P. 98.)

In its reply brief, Canyon Transitional argued that all of the Bargmans' arguments failed as a matter of law based on the record. (R.P. 114-26.) In replying to the Bargmans' arguments regarding substantive unconscionability, Canyon Transitional pointed out Cordova indicates that for an arbitration agreement to be deemed unenforceable on substantive unconscionability grounds alone, the agreement must be both grossly unreasonable and against public policy under the circumstances. (R.P. 121.) Canyon Transitional explained why those showings could not be made in this case. (R.P. 121.)

In doing so, Canyon Transitional explained that the Arbitration Agreement is bilateral in nature. (R.P. 121.) The agreement's terms bind the parties equally to arbitrate quality of care claims. (R.P. 121.) The terms also bind Canyon Transitional to arbitrate claims against a resident for personal injury to staff and visitors as well as for property damage. (R.P. 121.) The terms also do not reserve

any exclusive right of judicial review for Canyon Transitional regarding any claims subject to arbitration. (R.P. 121.)

Canyon Transitional additionally explained why the exclusions for disputes relating to discharge and collections issues were reasonable, when considered in context. (R.P. 121.) Addressing the discharge exclusion, Canyon Transitional clarified that federal and state law prohibit arbitration of disputes relating to a resident's discharge, requiring instead an administrative hearing with the right of judicial review. (R.P. 121.) Addressing the collections exclusion, Canyon Transitional clarified that the exclusion enabled both it and a resident to litigate "debt collection claims" and that resolving such claims in court conserved both parties' resources. (R.P. 121.)

Replying to the Bargmans' argument that the terms of the Arbitration Agreement were substantively unconscionable under Cordova, Canyon Transitional distinguished Cordova. (R.P. 121-22.) Canyon Transitional clarified that Cordova involved a lender who imposed predatory and usurious terms on a consumer. (R.P. 121-22.) Canyon Transitional also clarified that the terms of the arbitration agreement in Cordova, while purporting to apply equally to both of the parties, included a term under which the lender reserved for itself the right to seek any judicial remedies available to it in the event of the borrower's default, making the agreement truly one-sided, unlike the terms at hand. (R.P. 122.)

Following completion of the briefing (R.P. 127-28), the district court held a hearing on the motion to compel arbitration (11/22/10 Tr.). Counsel for the parties largely reiterated the arguments in their briefs. (11/22/10 Tr.) In addressing the Bargmans' substantive unconscionability point and, in particular, their challenge to the collections exclusion, defense counsel explained that she had done some research which reflected that collection claims had been brought by the predecessor owner of the facility and that it was her understanding that the claims generally had been referred for resolution to court-annexed arbitration. (11/22/10 Tr. at 11-12.)

At one point, the court asked defense counsel to address whether the arbitration process was fair in practice. (11/22/10 Tr. at 12-13.) The court explained that in other cases residents ordered to arbitrate had returned to the court complaining about incurring "huge" fees to initiate arbitration proceedings and that "the arbitrators all work[ed] for nursing homes," making the "whole arbitration setup . . . completely unfair." (11/22/10 Tr. at 12-13.)

Defense counsel responded by highlighting aspects of the Arbitration Agreement which foreclose those problems from arising. Defense counsel explained that under the agreement, the three arbitrators' fees are borne "one hundred percent" by the Facility to "relieve the burden" on a resident to pay such fees. (See 11/22/10 Tr. at 14.) Defense counsel further explained that each side

bears responsibility for their own attorneys' fees and – unless they are awarded – costs, as in litigation. (11/22/10 Tr. at 14.) Defense counsel also explained that the agreement enables each side to pick "[a]ny attorney in the community" as an arbitrator and both of them must agree on a third arbitrator to serve as a neutral decision-maker. (11/22/10 Tr. at 14; 11/22/10 Tr. at 14 ("[W]e've had arbitrations where Bill Snead and Charlie Peifer have sat . . . with a third party.").) Defense counsel additionally explained that each side has mutual document and witness disclosure obligations and equivalent discovery opportunities and the neutral arbitrator is charged with resolving discovery disputes as would a judge. (11/22/10 Tr. at 14.)

Defense counsel added that it would be a mistake to view arbitration as "only favorable to defendants," pointing out that in her experience most arbitrations resulted in an award. (See 11/22/10 Tr. at 14-15.) She also pointed out that there are times when Canyon Transitional might prefer to litigate resident's claims because of the likelihood of a defense verdict if the case was presented to a jury rather than to a panel of arbitrators. (11/22/10 Tr. at 15.)

These considerations, defense counsel summarized, show that the arbitration process under the Arbitration Agreement is "quite fair." (11/22/10 Tr. at 15.) Responding, the court remarked that the Arbitration Agreement sounded like "one of the better agreements." (11/22/10 Tr. at 15.)

After hearing the parties' arguments, the court announced its rulings on issues raised by the parties. The court ruled that the Arbitration Agreement was supported by adequate consideration. (11/22/10 Tr. at 27-28.) The court also ruled that the Bargmans had not proven procedural unconscionability. (11/22/10 Tr. at 24.) The court additionally ruled that Gene Bargman was bound by the arbitration agreement. (11/22/10 Tr. at 24-25.)

The court, however, ruled that the Arbitration Agreement was substantively unconscionable. In explaining the ruling, the court remarked: "I realize there's [Rivera v. American General Financial Services, Inc., 2010-NMCA-046, 148 N.M. 784, 242 P.3d 351] out there and that can also be looked at, but this case seems closer to Cordova." (11/22/10 Tr. at 25.) "[W]hen I see this provision, I know [it] must have been written before Cordova, . . . it just doesn't make sense anymore to write a provision that holds back. I think that if you want to arbitrate, arbitrate everything . . . . Before Cordova I think there were day-to-day rulings arbitration should be honored in a contract and motions to dismiss were granted on a regular basis. (11/22/10 Tr. at 25.) "Since Cordova, I've had a really hard time finding any that get past Cordova, and I have found that this provision is substantively unconscionable." (11/22/10 Tr. at 25-26.) Elaborating, the court stated:

> I need a decision from the Court of Appeals on prior cases with regard to substantive unconscionability on this provision because you are holding back the one thing you want access to the [c]ourt, is on the debt collection . . . . You're using that arbitration provision as a sword

> and a shield. You just can't have it both ways, and that's what is forcing denials of the motions to dismiss.

(11/22/10 Tr. at 26.) In referring to its questioning of defense counsel, supra, the court remarked, "it's nice to hear that this one sounds like it's an acceptable process, that if the Court of Appeals says substantive unconscionability" in "this case is not close enough to Cordova . . . this case will go forward to arbitration." (11/22/10 Tr. at 26.)

The court later entered an order denying the Defendants' motion to compel arbitration based on the following two findings:

> 1. "The 'Arbitration Agreement' is substantively unconscionable, as its terms dictate that Plaintiff is bound to arbitrate the only types of disputes Plaintiff would bring, while Defendants reserve to themselves the ability to litigate the only types of disputes they would bring: actions for collections and discharge."
>
> 2. "Examining elements of substantive unconscionability, the 'Arbitration Agreement' is unenforceable."

(R.P. 130-31.)

Defendants proceeded to appeal the order to this Court. (R.P. 132-35.)

ARGUMENTS

I. THE DISTRICT COURT MISAPPREHENDED THE STANDARDS THAT APPLY TO THE ANALYSIS OF WHETHER AN ARBITRATION AGREEMENT IS SUBSTANTIVELY UNCONSCIONABLE.

Standard of Review: "[A] district court's denial of a motion to compel arbitration" is subject to de novo review. Cordova v. World Fin. Corp., 2009-NMSC-021, ¶ 11, 146 N.M. 256, 208 P.3d 901. Whether "a contract is unconscionable" also presents a question of law subject to de novo review. Id.

Preservation of Issue: The issue was preserved by Canyon Transitional's motion to dismiss/stay the litigation and to compel arbitration, during the hearing on the motion, and by the district court's ruling. Supra pp. 6-13.

"The test" of whether an arbitration agreement is substantively unconscionable "is not simple, nor can it be mechanically applied." Guthmann v. La Vida Llena, 103 N.M. 506, 511, 709 P.2d 675, 680 (1985), overruled on other grounds by Cordova v. World Fin. Corp., 2009-NMSC-021, 146 N.M. 256, 208 P.3d 901. Disregarding that teaching is what led the district court to err. The court's disregard was driven by its perception that Cordova v. World Finance Corporation, 2009-NMSC-021, 146 N.M. 256, 208 P.3d 901 dictated the outcome in this case and, more specifically, the court's reading of the opinion as establishing a new substantive unconscionability standard. The standard, in the court's mind, mandates a bright-line all or nothing approach – meaning that the

presence of an arbitration exception automatically implicates substantive unconscionability. Supra p. 12. That reading resulted in the court excluding from its consideration other authorities that inform the understanding of the standards that a court should apply in analyzing whether an arbitration agreement is substantively unconscionable. Supra pp. 12-13. That reading also resulted in the court excluding from its consideration what the record showed as to the even-handedness and bilateral advantages or benefits of the Arbitration Agreement. Supra pp. 3-5, 8-13.

Unlike what the district court seemed to think, Cordova did not displace "settled" law regarding the standards that a court should keep in mind when analyzing a substantive conscionability challenge. 2009-NMSC-021, ¶ 32. In Cordova, the Supreme Court reaffirmed what Guthmann teaches. "Unconscionability is an equitable doctrine, rooted in public policy, which allows courts to render unenforceable an agreement that is unreasonably favorable to one party." Id. ¶ 21 (alluding to Guthmann). The analysis "focuses on such issues as whether the contract terms are commercially reasonable and fair, the purpose and effect of the terms, the one-sidedness of the terms, and other similar public policy concerns." Id. ¶ 22 (also alluding to Guthmann).

The Supreme Court also left intact the standards that inform analysis of these issues to the extent that the parties' arguments implicate them. In relevant part, they include the following.

Each agreement must be analyzed individually, as a whole, taking into account all of the relevant facts and circumstances. See, e.g., Monette v. Tinsley, 1999-NMCA-040, ¶¶ 18-20, 126 N.M. 748, 975 P.2d 361. The terms of an arbitration agreement must be interpreted by the rules of contract law. Pueblo of Laguna v. Cillessen & Son, 101 N.M. 341, 344, 682 P.2d 197, 200 (1984). That means that a court must "apply the plain meaning of the contract language," Santa Fe Techs., Inc. v. Argus Networks, Inc., 2002-NMCA-030, ¶ 52, 131 N.M. 772, 42 P.3d 1221 (filed 2001) and, correspondingly, must not "read language into a contract that is not there," Heimann v. Kinder-Morgan CO2 Co., L.P., 2006-NMCA-127, ¶ 10, 140 N.M. 552, 144 P.3d 111.

When the terms reflect that the parties have agreed to arbitrate disputes, consistent with New Mexico's policy of favoring freedom to contract, the agreement must be enforced unless it "clearly contravene[s] some law or rule of public morals or violate[s] some fundamental principle of justice." See Reagan v. McGee Drilling Corp., 1997-NMCA-014, ¶ 15, 123 N.M. 68, 933 P.2d 867 (internal quotation marks & citation omitted), holding limited on other grounds by Pina v. Gruy Petroleum Mgmt. Co., 2006-NMCA-063, 139 N.M. 619, 136 P.3d

1029. Public policy in New Mexico strongly favors resolution of disputes through arbitration because arbitration "promotes both judicial efficiency and conservation of resources by all parties." Santa Fe Techs., Inc., 2002-NMCA-030, ¶ 51.

In Cordova, the Supreme Court also did not adopt a standard that an arbitration exception is per se substantively unconscionable. What the Supreme Court stated instead was that "[c]ontract provisions that unreasonably benefit one party over another are substantively unconscionable." 2009-NMSC-021, ¶ 25.

Cordova teaches that impermissible one-sidedness may manifest itself in an oppressive term or through an overall imbalance. Cordova also teaches that such one-sidedness may manifest itself through the practical impact or express wording of the term(s). These understandings emerge from cases the Supreme Court cited and its analysis of the terms of the agreement before it.

The Supreme Court cited cases involving terms that were one-sided in operation. One of the cases, Padilla v. State Farm Mutual Automobile Insurance Co., 2003-NMSC-011, 133 N.M. 661, 68 P.3d 901, involved an arbitration provision between an insurer and an insured which facially appeared to treat the parties equally by requiring them to arbitrate claims and, in the event that an award exceeded a certain amount, enabling either party to pursue de novo judicial review of the award. Cordova, 2009-NMSC-021, ¶ 25; Padilla, 2003-NMSC-011, ¶¶ 2, 10. But in considering the provision, the Supreme Court recognized that it was

"not truly equal in [its] effect[s]." Padilla, 2003-NMSC-011, ¶ 10. While "both parties [were] bound by a low award," they were "not bound when there [was] a high award, when an insurance company [was] more likely to appeal." Id. Compounding that inequity was the recognition that an appeal would subject the insured to "costly sequential litigation," id. ¶ 11, and delayed resolution, see id. ¶ 12. But of greater concern, "[an arbitral] finding in favor of an insured . . . [would] be put at risk . . . because there could be a finding of no liability in the de novo appeal," id. ¶ 10, an outcome which would deprive the insured of the complete remedy the insured was entitled to recover as a matter of law, id. ¶¶ 9, 11-12. The Supreme Court voiced additional concern about "the chilling effect" that the provision could have upon insureds exercising their statutory rights and the consequent thwarting of the public policy goals involved. Id. ¶¶ 12-13.

Fiser v. Dell Computer Corp., 2008-NMSC-046, 144 N.M. 464, 188 P.3d 1215, is another case that the Supreme Court cited in Cordova (albeit for different propositions) which is instructive. Fiser teaches that a one-sided term may be one that under the circumstances involved effectively exculpates a defendant from wrongdoing. Id. ¶¶ 4, 21.

Cordova itself exemplifies express, overall one-sidedness. The case involved a lender which charged usurious and predatory loan rates to impecunious borrowers. 2009-NMSC-021, ¶ 2. A paragraph in the form loan agreement stated

that "the lender alone had the exclusive and unlimited alternative to seek any judicial remedies it might otherwise have available to it . . . in the event of a default by the borrower," id. ¶ 4, a scenario likely to materialize given the borrower's precarious finances. "In striking contrast" the borrower "had no rights under the form agreement to go to court for any reason whatsoever," including to litigate any "grievances related to . . . collection" and "debt-collection causes of action." Id. ¶ 27. The Supreme Court concluded that the "self-serving arbitration scheme" was "so unfairly and unreasonably one-sided" as to make it substantively unconscionable and against public policy. See id. ¶ 32.

All of this is not to say that Cordova did not augment the standards that a court must consider as part of its substantive unconscionability analysis. The Supreme Court made clear that a court may invalidate an arbitration agreement on the basis of substantive unconscionability alone. 2009-NMSC-021, ¶ 24. But for that approach to suffice, the agreement in some way must be "substantively oppressive," id. ¶ 24, or "overly one-sided," see id. ¶ 28, to the detriment of one of the parties. See also id. ¶¶ 31, 32 (alternatively expressing standard as one which requires a showing that the agreement is "grossly unreasonable" or "unfairly and unreasonably one-sided"). The agreement also must offend "public policy," id. ¶ 31. See also id. ¶ 30 (indicating that an arbitration agreement may contravene public policy if it enables a party to use arbitration "as a shield against litigation by

one party while simultaneously reserving solely to itself the sword of a court action") (internal quotation marks & citation omitted); cf. Guthmann, 103 N.M. at 511, 709 P.2d at 680 ("a contract that does not violate public policy is not unconscionable unless one or more of its terms is grossly unfair under the circumstances.").

The understanding of the standards that a court should apply does not end there. Recently, in its opinion in Rivera v. American General Financial Services, 2011-NMSC-033, __ N.M. ___, ___ P.3d ___, the Supreme Court reiterated that a completely one-sided arbitration agreement is substantively unconscionable, relying on Cordova. As in Cordova, the case involved a contract between a lender and a borrower which included an arbitration agreement. Rivera, 2011-NMSC-033, ¶¶ 2-4. In Rivera, the agreement "require[d] the borrower to arbitrate any and all claims" she might have against the lender but gave the lender the option of going "to court for its preferred remedies," id. ¶ 39, making the agreement one that fit within the analytical framework of Cordova. Supra pp. 18-19. In Rivera, the Supreme Court emphasized that the record did not reveal any reasonable basis for excluding the lender's remedies from arbitration. The Supreme Court observed that the arbitrators possessed authority to award those remedies, both as a matter of law and under the terms of the agreement. Rivera, 2011-NMSC-033, ¶¶ 51-53. Based upon these considerations, the Supreme Court concluded that the

defendant's reservation of its right to go to court for the only remedies that it was likely to need, while forcing the plaintiff to arbitrate all of her claims, made the agreement "unreasonably one-sided" and "void." Id. ¶¶ 53-54.

Barron v. Evangelical Lutheran Good Samaritan Society, No. 29,707 (Ct. App. May 31, 2011), adds yet another dimension to the analysis in the context of a nursing home admissions agreement which includes an arbitration agreement. The case did not involve a substantive unconscionability challenge. However this Court did remark that it does not view an arbitration agreement included in a nursing home admissions agreement "as inherently unfair or as leaving one or the other party at a disadvantage," absent some basis or reason for doing so. See slip op. ¶ 41. Following up, the Court pointed out that under the NMUAA, "arbitrators may award punitive damages or any other relief authorized by law in a civil action involving the same claim." Id. (citing NMSA 1978, § 44-7A-22(a) (2001)). The Court also pointed out that the "advantages" or "benefits" of arbitration include that "it generally costs less than litigation and leads to a quicker resolution." Id.

Synthesized, the following lessons emerge. The issue of whether an arbitration agreement is substantively unconscionable must be analyzed on a case-by-case basis. A court must analyze the agreement overall, taking into account the actual terms of the agreement and their practical effect on the parties. If the terms confer an unfair or unreasonable advantage on one party by protecting its rights

and interests to the detriment of the other party, the agreement may be deemed impermissibly one-sided and unenforceable. But absent such a showing, the agreement must be enforced consistent with this State's longstanding policies of holding parties to agreements and economizing the resolution of disputes. Where an arbitration agreement falls on the divide must be determined based upon consideration of what the record before the court shows.

II. APPLICATION OF THE RELEVANT STANDARDS REVEALS THAT THE ARBITRATION AGREEMENT IS SUBSTANTIVELY CONSCIONABLE.

Standard of Review: A district court's analysis of an arbitration agreement is subject to de novo review. See Cordova v. World Fin. Corp., 2009-NMSC-021, ¶ 11, 146 N.M. 256, 208 P.3d 901.

Preservation of Issue: This issue was preserved through the same methods as the preceding issue. Supra p. 14.

The autopilot approach that the district court took once it agreed with the Bargmans that Cordova controlled the analysis in this case is reflected in the order that the court entered. To be sure, comments the court made at the hearing reflect that the court had read Cordova. Supra pp. 12-13; cf. Cordova, 2009-NMSC-021, ¶ 30. The comments also reflect that the court recognized that the discharge exclusion did not provide a basis for finding that the Arbitration Agreement was one-sided in favor of Canyon Transitional. Supra pp. 12-13. But despite that

recognition, the court entered an order citing the exclusion as a basis for its substantive unconscionability ruling. Supra p. 13. That is but one indication of why the district court's reasoning is not sustainable. Beginning anew, by taking a fresh look at the Arbitration Agreement with all of the applicable standards and the record in mind, leads to the conclusion that the Arbitration Agreement is substantively conscionable as a matter of law and that enforcement of the agreement is required by the operative public policy considerations.

A. The Arbitration Agreement does not advantage or benefit Canyon Transitional to the detriment of the Bargmans.

The place to start is by reviewing the terms of the Arbitration Agreement. What the terms reflect is that both parties are bound under the terms of the agreement to arbitrate all claims arising out of a resident's care at Canyon Transitional except for those that fall within the exclusions. Supra p. 3. A resident therefore must arbitrate all non–discharge and non-collection claims against Canyon Transitional and its staff. Supra pp. 3, 8. But just as a resident is bound, so, too, is Canyon Transitional for any claims that it has against the resident which fall outside the exclusions. Supra pp. 3, 8-9. Depending upon the facts involved, each party might prefer to litigate a claim against the other but the agreement forecloses them each from doing so. Supra pp. 8-9, 11. In that regard, the agreement is even-handed.

The same can be said with regard to how the arbitration process works. The Bargmans did not argue that any aspects of the arbitration process were unfair or insufficient and they did not argue that the remedies available to them through arbitration were in any way inadequate (see R.P. 97-98; 11/22/10 Tr. at 17-22) and, after defense counsel explained the process, the district court also did not voice any such concerns, supra pp. 11-13.

Review of the terms shows that there is no basis to fault the process. Because Canyon Transitional covers all of the arbitrators' fees, supra pp. 4-5, 10, a resident is not subject to that upfront cost, which conceivably could present a barrier to a resident pursuing claims against Canyon Transitional. The agreement does not limit or restrict the causes of action that a resident can bring against Canyon Transitional in an arbitration proceeding except for those that fall within the exclusions. (R.P. 65-67.) For purposes of developing support for claims, the agreement imposes equivalent discovery obligations and affords equivalent discovery opportunities. (R.P. 66.) The agreement establishes up to an approximately year-long timetable for the proceedings (R.P. 66), a not unreasonable period of time. The agreement provides an unbiased decision-making body; the presence of the third arbitrator, who serves as a tie-breaker, neutralizes any decisional bias in favor of either party. Supra pp. 4,11. The agreement does not restrict the remedies that the arbitrators may award and, in

addition to compensatory and punitive damages the panel can award costs to a resident who prevails on his or her claim(s). Supra pp. 4-5, 10-11; see also NMSA 1978, § 44-7A-22(a) (2001).

These considerations show that insofar as it requires parties to arbitrate claims, the Arbitration Agreement cannot reasonably be characterized as one-sided or oppressive, either as written or in effect. The agreement procedurally treats the parties equivalently. Cf. Rivera, Cordova. It does not restrict or otherwise alter the resident's legal rights or remedies. Cf. Padilla. It does not lessen Canyon Transitional's duties or otherwise insulate Canyon Transitional from liability. Cf. Fiser.

That leaves the exclusions. But for the reasons that follow, they, too, do not make the agreement impermissibly one-sided.

To begin with, the discharge exclusion is not one-sided in favor of the Canyon Transitional. The exclusion is worded so that either party may invoke it. Supra p. 3. But that is not all. In reality, the party most likely to make use of the exclusion would be a resident or, as the case may be, a resident's family or designated agent. That is because the exclusion becomes operative in the event that the facility seeks to discharge a resident. See 42 C.F.R. § 483.12; 8.354.2.9, .2.16 NMAC. The applicable law entitles the resident to notice and a hearing, as

well as judicial review, to safeguard the resident's best interests. See id. Truly, then, the exclusion exists and operates to protect a resident.

And, as should be evident by now, Canyon Transitional included the exception to comply with federal and state law. Inclusion of the exception therefore should not be viewed as somehow advantaging Canyon Transition. The preceding considerations show the opposite to be true.

All that is left is the collections exclusion. But, it, too is not one-sided in favor of Canyon Transitional. The Bargmans acknowledged that the exclusion could be construed as bilateral. Admittedly, in attempting to fit this case with the analytical track of Cordova, they interpreted the exclusion to apply only to claims for "monies owed but not yet paid." (R.P. 97-98.) But nothing in the actual wording shows that the exclusion is so limited. Supra p. 3. The plain wording thus enables a resident to pursue collections-related claims against Canyon Transitional, or if Canyon Transitional initiated a collections proceeding, any corresponding counterclaim(s). Differently from Cordova and Rivera, then, Canyon Transitional did not reserve the right to go to court to resolve any collections issues solely for itself. Cf. 2009-NMSC-021, ¶ 4; cf. 2011-NMSC-033, ¶ 3.

Moreover, excluding collections claims from arbitration is not unreasonable or unfair. Because of the non-complex nature of collections disputes and the small sums typically involved, it is faster and cheaper for a resident – and, Canyon

Transitional for that matter – to litigate such claims rather than arbitrate them to a resolution before three arbitrators. When collections-related litigation is initiated, defense counsel's research indicates that the claims generally get referred to court-annexed arbitration, supra p. 10, a process which is cost-effective and which achieves streamlined resolution. See N.M. Second Jud. Distr. Local R., Rule LR2-603, § II (arbitration mandated when $25,000 or less at issue); see generally LR2-603 (no arbitrator fee payment imposed); id. § V(A)(5) (120-day award deadline unless extended). From Canyon Transitional's perspective, the sums involved would not make it cost-effective to arbitrate such claims because of the fee amounts that Canyon Transitional must pay three arbitrators. Absent the exclusion, Canyon Transitional likely would not pursue such claims, depriving it of a remedy when a resident fails to pay for services rendered.

Overall, the Arbitration Agreement is not one-sided – or one-directional – in favor of Canyon Transitional. Instead, the agreement strikes a balance in protecting the parties' respective interests. As in any contractual setting there are trade-offs for each side. By paying the arbitrators' fees, Canyon Transitional facilitates the bringing of negligence claims by residents against it. The Arbitration Agreement also preserves a resident's right to an administrative hearing and judicial review in cases involving discharge. In exchange, Canyon Transitional retains the ability to go to court to collect payment for services

rendered to a resident which remain unpaid. But fundamentally what matters is that as a whole the terms enable each party to recover the remedies that the party is most likely to need in the forum where it makes the most sense to do so. Because of the savings realized, both in terms of money and time, arbitrating negligence claims leads to quicker and less expensive resolution. The same observation applies to litigating collections claims. In whichever arena the parties find themselves, the parties possess the same rights and remedies available by law.

B. The Arbitration Agreement is also enforceable on public policy grounds.

Canyon Transitional has already explained why the Arbitration Agreement is not one-sided. By extension, the public policy rationale in Cordova, supra pp. 19-20 (2009-NMSC-021, ¶ 30), should not apply.

Because the agreement is not substantively unconscionable, the public policy considerations that have traditionally applied to the analysis of whether an arbitration agreement is enforceable, supra pp. 16-17, should control. "When a party agrees to a non-judicial forum for dispute resolution, the party should be held to that agreement," Lisanti v. Alamo Title Insurance, 2002-NMSC-032, ¶ 17, 132 N.M. 750, 55 P.3d 962, when no basis not to enforce the contract exists, supra p. 16 (Reagan). "[R]educ[ing] caseloads in the courts, not only by allowing arbitration, but also requiring controversies to be resolved by arbitration where contracts so provide" effectuates the NMUAA, Dairyland Ins. Co. v. Rose, 92

N.M. 527, 531, 591 P.2d 281, 285 (1979), by conserving all of the interested parties resources, supra p. 17 (Santa Fe Techs.).

Not enforcing the Arbitration Agreement would contravene those policies. It would enable the Bargmans to use the collections exclusion, which along with the discharge exclusion, is not implicated by the claims in their complaint (see R.P. 1-22), to escape the agreement which LoRayne Bargman, on behalf of herself and her husband, agreed to be bound by. It would also contravene the goals of allowing parties to resolve disputes through the cheapest and fastest means and of reducing demands on the courts of this State.

III. IN LIGHT OF THE SUPREME COURT'S RECENT RULING IN RIVERA, REMAND MAY BE APPROPRIATE.

The law relating to substantive unconscionability analysis has evolved since the district court ruled. The Supreme Court's recent opinion Rivera, 2011-NMSC-033, ___ N.M. ___, ___ P.3d ___ places the burden on a defendant to justify an arbitration exclusion, see id. ¶¶ 50-54. If this Court concludes that the record is insufficient in that regard, the proper course would be to remand the case so that an evidentiary record relating to the collections exclusion may be developed for the district court to consider in the first instance.

Conclusion

The understanding which emerges is that the Arbitration Agreement in this case is one that is fair and reasonable to both a resident and Canyon Transitional. Accordingly, the district court's ruling should be reversed or, alternatively, the case should be remanded for a more complete evidentiary record to be developed.

Statement Regarding Oral Argument

Appellants request oral argument. Appellants believe that oral argument will assist the Court in understanding the facts and proceedings underlying this appeal, in apprehending critical aspects of Appellants' legal argument, and in otherwise deciding the merits of the appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was served by first-class mail upon the following c0ounsel of record

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