NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0452-13T4

ANNEMARIE MORGAN and
TIFFANY DEVER,

Plaintiffs-Respondents,

v.

SANFORD BROWN INSTITUTE,
CAREER EDUCATION CORPORATION,
INC.,

Defendants-Appellants,

and

MATTHEW DIACONT, GREG LNU,
SALVATORE COSTA, JANET YOUNG,
and KRISTA HOLDEN,

Defendants.

Argued March 26, 2014 - Decided September 8, 2014

Before Judges Lihotz and Hoffman.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-1898-13.

Louis Smith argued the cause for appellants (Greenberg Traurig, LLP, attorneys; Brian T. Feeney, of the Pennsylvania bar, admitted pro hac vice, and Mr. Smith, on the briefs).

Robert J. O'Shea, Jr., argued the cause for respondents.

PER CURIAM

Corporate defendants, Sanford Brown Institute (Sanford Brown) and Career Education Corporation (CEC), appeal from the August 23, 2013 Law Division order denying their motion to compel arbitration of plaintiffs' common law and Consumer Fraud Act (CFA) claims relating to their enrollment in career training programs. The motion judge found the arbitration provisions of the enrollment agreement signed by plaintiffs "contradict the [CFA] in at least two ways." We reverse, concluding the arbitration provision at issue is broad enough to cover plaintiffs' CFA claims.

I.

Sanford Brown, a division of CEC, provides career training programs in healthcare, business and legal administration, and computer-related fields at thirty campuses nationwide.[1] CEC is a for-profit higher education organization.[2]

Plaintiffs Annemarie Morgan and Tiffany Dever enrolled at Sanford Brown's Trevose, Pennsylvania location in November 2009. Both plaintiffs signed the same "Enrollment Agreement," which provides, directly above plaintiffs' signatures, "THIS CONTRACT

[1] SANFORD-BROWN, http://www.sanfordbrown.edu/ (last visited Aug. 29, 2014).

[2] Career Education Corporation, N.Y. TIMES, http://topics.nytimes.com/top/news/business/companies/career-education-corporation/index.html (last visited Aug. 29, 2014).

CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES." Further, it contains a section entitled "Agreement to Arbitrate," providing:

> Any disputes, claims, or controversies between the parties to this Enrollment Agreement arising out of or relating to (i) this Enrollment Agreement; (ii) the Student's recruitment, enrollment, attendance, or education; (iii) financial aid or career service assistance by [Sanford-Brown]; (iv) any claim, no matter how described, pleaded or styled, relating, in any manner, to any act or omission regarding the Student's relationship with [Sanford-Brown], its employees, or with externship sites or their employees; or (v) any objection to arbitrability or the existence, scope, validity, construction, or enforceability of this Arbitration Agreement shall be resolved pursuant to this paragraph (the "Arbitration Agreement").

The arbitration provision also addresses choice of law, stating:

> The arbitrator shall apply federal law to the fullest extent possible, and the substantive and procedural provisions of the Federal Arbitration Act (9 U.S.C. §§ 1-16) shall govern this Arbitration Agreement and any and all issues relating to the enforcement of the Arbitration Agreement and the arbitrability of claims between parties.

Further, the agreement specifies "[e]ach party shall bear the expense of its own counsel" and "[t]he arbitrator will have no authority to award attorney's fees except as expressly provided by this Enrollment Agreement or authorized by law or

the rules of the arbitration forum." The agreement authorized the arbitrator to award "monetary damages," but also specifically provided "[t]he arbitrator will have no authority to award consequential damages, indirect damages, treble damages or punitive damages[.]"

Additionally, the agreement contains a severability clause, which states:

> If any part or parts of this Arbitration Agreement are found to be invalid or unenforceable by a decision of a tribunal of competent jurisdiction, then such specific part or parts shall be of no force and effect and shall be severed, but the remainder of this Arbitration Agreement shall continue in full force and effect.

On May 2, 2013, plaintiffs filed a complaint against defendants Sanford Brown, CEC, Matthew Diacont, Greg LNU, Salvatore Costa, Janet Young and Krista Holden,[3] asserting: violations of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20 (count one); breach of contract (count two); breach of warranties (count three); and negligent misrepresentation (count four). Defendants responded to the complaint with a pre-answer motion to compel arbitration, pursuant to Rule 4:6-2, and dismiss plaintiffs' complaint, or in the alternative, to stay

[3] Defendant Matthew Diacont is an administrator at Sanford Brown, and defendants Salvatore Costa, Janet Young and Krista Holden are employees of Sanford Brown.

the action pending arbitration. Plaintiffs opposed the motion. Following oral argument, on August 23, 2013, the motion judge denied defendants' motion, thus permitting plaintiffs to pursue their claims in the Law Division. This appeal followed.

II.

Orders compelling or denying arbitration are deemed final and appealable as of right. R. 2:2-3(a); GMAC v. Pittella, 205 N.J. 572, 587 (2011). Because the issue of whether the parties have agreed to arbitrate is a question of law, we review a judge's decision to compel or deny arbitration de novo. Hirsch v. Amper Fin. Servs., 215 N.J. 174, 186 (2013). Therefore, "the trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Waskevich v. Herold Law, P.A., 431 N.J. Super. 293, 297 (App. Div. 2013) (citations and internal quotation marks omitted).

The substantive protection of the Federal Arbitration Act (FAA) "'applies irrespective of whether arbitrability is raised in federal or state court.'" Ibid. (alteration in original) (quoting Martindale v. Sandvik, Inc., 173 N.J. 76, 84 (2002)).

> 9 U.S.C.A. §§ 1-3 "declare[s] a national policy favoring arbitration, Southland Corp. v. Keating, 465 U.S. 1, 10, 104 S. Ct. 852, 858, 79 L. Ed. 2d 1, 12 (1984), and provides that a "written provision in . . . a contract evidencing a transaction involving

> commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."
>
> [Ibid.]

In determining the scope of an arbitration provision, courts recognize "a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Id. at 298 (citation and internal quotation marks omitted). While the FAA applies to both state and federal proceedings, "'state contract-law principles generally govern a determination whether a valid agreement to arbitrate exists.'" Ibid. (quoting Hojnowski v. Vans Skate Park, 187 N.J. 323, 342 (2006)).

However, the policy favoring arbitration is "not without limits." Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001). Pursuant to both federal and state law, "'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" Angrisani v. Fin. Tech. Ventures, L.P., 402 N.J. Super. 138, 148-49 (App. Div. 2008) (quoting AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S.

643, 648, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648, 655 (1986)). "[T]he duty to arbitrate . . . [is] dependent solely on the parties' agreement." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cantone Research, Inc., 427 N.J. Super. 45, 58 (App. Div.) (alteration in original) (citation and internal quotation marks omitted), certif. denied, 212 N.J. 460 (2012). "[I]n determining the scope of an arbitration agreement, a court must 'focus on the factual allegations in the complaint rather than the legal causes of action asserted.'" EPIX Holdings Corp. v. Marsh & McLennan Cos., Inc., 410 N.J. Super. 453, 472-73 (App. Div. 2009) (quoting Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 846 (2d Cir. 1987)).

III.

Defendants argue the FAA governs issues presented by this appeal because the arbitration agreement involves interstate commerce. Section 2 of the FAA provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
>
> [9 U.S.C.A. § 2.]

Pursuant to this section, "the FAA preempts any state law purporting to invalidate an arbitration agreement "involving interstate commerce." Estate of Ruszala ex rel. Mizerak v. Brookdale Living Cmtys., Inc., 415 N.J. Super. 272, 289 (App. Div. 2010) (quoting Young v. Prudential Ins. Co. of Am., 297 N.J. Super. 605, 616 (App. Div.), certif. denied, 149 N.J. 408 (1997). "Commerce" is defined to include "commerce among the several States . . . ." 9 U.S.C.A. § 1.

The United States Supreme Court has interpreted "'involving commerce' to be the 'functional equivalent of the . . . term affecting commerce[,]' . . . provid[ing] for the enforcement of arbitration agreements within the full reach of the Commerce Clause.'" Ruszala, supra, 415 N.J. Super. at 289-90 (quoting Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56, 123 S. Ct. 2037, 2039, 156 L. Ed. 2d 46, 51 (2003) (alterations in original)). Further, "the FAA will reach transactions 'in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice subject to federal control.'" Id. at 290 (quoting Citizens Bank, supra, 539 U.S. at 56, 123 S. Ct. at 2040, 156 L. Ed. 2d at 51). Citizens of different states engaged "in the performance of contractual obligations in one of those states because such a contract

necessitates interstate travel of both personnel and payments" creates a "nexus to interstate commerce . . . ." Ibid.

This case clearly involves interstate commerce because the transaction at issue occurred between two New Jersey residents and a Texas corporation operating a Pennsylvania campus. See Alfano v. BDO Seidman, LLP, 393 N.J. Super. 560, 574 (App. Div. 2007) (holding a transaction between a New Jersey resident and a German corporation in a New York office, involving international investments, comprised interstate commerce). Therefore, the FAA governs.

Under such circumstances, the FAA preempts "any state law or regulation that seeks to preclude the enforceability of an arbitration provision on grounds other than those which 'exist at law or in equity for the revocation of any contract.'" Ruszala, supra, 415 N.J. Super. at 293 (quoting 9 U.S.C.A. § 2). "'[C]ontract law defenses, such as fraud, duress, and unconscionability may be invoked to invalidate an arbitration agreement without contravening § 2' of the FAA." Id. at 293-94 (quoting Doctor's Assocs., Inc. v. Casarotta, 517 U.S. 681, 687, 116 S. Ct. 1652, 1656, 134 L. Ed. 2d 902, 909 (1996)).

Defendants contend the trial court erroneously ignored the agreement's delegation clause,[4] which required it to submit issues of arbitrability to arbitration. However, plaintiffs attack the agreement as a contract of adhesion, and argue we should treat it as "presumptively voidable under law."

The motion judge's responsibility to determine issues of arbitrability depends on whether it is an issue of substantive or procedural arbitrability. Merrill Lynch, supra, 427 N.J. Super. at 59. Therefore, the threshold question is which forum has jurisdiction to resolve whether plaintiffs' claims are subject to binding arbitration.

Substantive arbitrability

> refers to whether the particular grievance is within the scope of the arbitration clause specifying what the parties have agreed to arbitrate. Issues of substantive arbitrability are generally decided by the court. Procedural arbitrability refers to whether a party has met the procedural conditions for arbitration. Matters of procedural arbitrability should be left to the arbitrator. Further, there is a presumption that the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability. The Howsam [v. Dean Witter Reynolds, 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)] Court

[4] The Supreme Court defined a delegation provision as "an agreement to arbitrate threshold issues concerning the arbitration agreement" such as "'gateway' questions of 'arbitrability.'" Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 68-69, 130 S. Ct. 2772, 2777, 177 L. Ed. 2d 403, 411 (2010).

> has determined that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. The Court also determined that it is a judicial decision, not a question left to an arbitrator, whether the parties have submitted a particular dispute to arbitration . . . [u]nless the parties clearly and unmistakably provide otherwise.
>
> [Ibid. (alteration in original) (internal citations and quotation marks omitted).]

This is consistent with federal law, under which issues of substantive arbitrability are generally for the courts to decide, see Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003), unless the agreement provides the arbitrator may decide arbitrability issues, see Howsam, supra, 537 U.S. at 83, 123 S. Ct. at 592, 154 L. Ed. 2d at 498.

Here, the parties "clearly and unmistakably" agreed an arbitrator would determine issues of arbitrability, as the agreement mimics the American Arbitration Association's rules, stating "any objection to arbitrability or the existence, scope, validity, construction, or enforceability of this [a]rbitration [a]greement shall be resolved pursuant to this paragraph."[5]

[5] Rule 7 of the AAA Commercial Arbitration Rules provide: "[T]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the (continued)

Therefore, whether applying federal or New Jersey law to the terms of the parties' agreement, issues of arbitrability should be submitted to the arbitrator because the parties agreed to do so.

However, plaintiffs contend the agreement is unconscionable as they challenge it as a contract of adhesion. As such, they bear the burden of proving the defense of unconscionability. Martindale, supra, 173 N.J. at 91. Under the FAA, a challenge to an agreement as a whole, rather than a "specific challenge to the arbitration agreement" is "for an arbitrator to decide." Muhammad v. Cnty. Bank of Rehoboth Beach, DE, 189 N.J. 1, 14 (2006) (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006)). Yet, if a party challenges the validity of the precise arbitration provision, the court must consider the challenge before ordering compliance with the agreement. Jackson, supra, 561 U.S. at 71, 130 S. Ct. at 2778, 177 L. Ed. 2d at 412. When an arbitration agreement contains a delegation clause, unless a party challenges "the delegation provision specifically," the court must "treat it as valid under

---

(continued)
existence, scope or validity of the arbitration agreement . . . ."

§ 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." Id. at 72, 130 S. Ct. at 2779, 177 L. Ed. 2d at 413.

Here, it is not clear whether plaintiffs argue the agreement as a whole, or merely the precise arbitration provision, is unconscionable. What is clear, however, is plaintiffs have not specifically attacked the delegation clause. Accordingly, we conclude arbitrability is for the arbitrator to decide.

Agreements to arbitrate state law claims do not violate public policy. Curtis v. Cellco P'ship, 413 N.J. Super. 26, 34 (App. Div. 2010). "It is well-settled 'that parties to an agreement may waive statutory remedies in favor of arbitration[.]'" Ibid. (quoting Garfinkel, supra, 168 N.J. at 131). "Only if a statute or its legislative history evidences an intention to preclude alternate forms of dispute resolution, will arbitration be an unenforceable option." Ibid. (citations and internal quotation marks omitted). In determining whether "the scope of an arbitration clause encompasses a CFA claim, we understand the tension between, on the one hand, the policy favoring liberal construction of arbitration provisions in a contract and, on the other hand, the CFA's intended effect of rooting out consumer fraud." Id. at 36. Nonetheless, "CFA

claims may be the subject of arbitration and need not be exclusively presented in a judicial forum." Id. at 37.

When a party seeks to compel arbitration of a statutory claim, including those under the CFA,

> the court enforces the arbitration clause when the contract provisions (1) contain language reflecting a general understanding of the type of claims included in the waiver; or (2) provide that, by signing, the [party] agrees to arbitrate all statutory claims arising out of the relationship, or any claim or dispute based on a federal or state statute.
>
> [Waskevich, supra, 431 N.J. Super. at 299 (citations and internal quotation marks omitted).]

The agreement states the arbitrator has no authority to award attorney's fees unless "expressly provided by this Enrollment Agreement or authorized by law or the rules of the arbitration forum." The motion judge found this clause in contradiction with the CFA.

"'[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial, forum.'" Delta Funding Corp. v. Harris, 189 N.J. 28, 44 (2006) (quoting Martindale, supra, 173 N.J. at 93). While this requirement "has its genesis in federal arbitration law, it is equally applicable in determining unconscionability under New

Jersey law." Ibid. Consequently, an agreement to arbitrate may not "limit a consumer's ability to pursue the statutory remedy of attorney's fees and costs" or treble damages when available to prevailing parties. Ibid.

The CFA provides "mandatory attorney's fees and costs to prevailing parties[,]" which are plainly recoverable under the agreement at issue. Ibid. On the other hand, N.J.S.A. 56:8-19 of the CFA, provides for mandatory treble damages "if a consumer-fraud plaintiff proves both an unlawful practice under the Act and an ascertainable loss." D'Agostino v. Maldonado, 216 N.J. 168, 185 (2013) (citation and internal quotation marks omitted). The arbitration agreement's clause prohibiting the arbitrator from awarding treble damages under any circumstances, divests the arbitrator of the power to award treble damages to a plaintiff who proves the two statutory requirements. To the extent that this provision in the agreement would prevent plaintiffs from recovering treble damages under the CFA, it is unconscionable, and thus, unenforceable.

"Further, 'our courts have recognized that [i]f a contract contains an illegal provision and such provision is severable, courts will enforce the remainder of the contract after excising the illegal portion, so long as the prohibited and valid provisions are severable.'" Wein v. Morris, 194 N.J. 364, 376

(2008) (quoting Muhammad, supra, 189 N.J. at 26). "Severability is only an option if striking the unenforceable portions of an agreement leaves behind a clear residue that is manifestly consistent with the 'central purpose' of the contracting parties, and that is capable of enforcement." NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 437 (App. Div. 2011) (citing Jacob v. Norris, McLaughlin & Marcus, 128 N.J. 10, 33 (1992)).

If an arbitrator were to interpret the disputed provisions in a manner that would render them unconscionable, those provisions could be severed and the remainder of the agreement would be capable of enforcement. The arbitration agreement's broad severability clause supports such a result. See Foulke Mgmt., supra, 421 N.J. Super. at 437 (noting the court has severed and enforced arbitration provisions when no "inconsistencies or ambiguities [exist] in . . . common terms[,]" but not in cases involving "multiple, conflicting, and unclear arbitration clauses spanning . . . [multiple] different documents").

In summary, we conclude that the arbitration agreement is sufficiently clear, unambiguously worded, and drawn in suitably broad language to provide plaintiffs with reasonable notice of the requirement to arbitrate all claims related to their

enrollment agreements, including their CFA claims. We further conclude the severability clause addresses the motion judge's understandable concern of possible conflict with the CFA. We therefore reverse the trial court's order, dismiss plaintiffs' complaint, and direct that plaintiffs' claims be sent to arbitration, as required under the arbitration provision of the enrollment agreements.

Reversed.