[Cite as *DeVito v. Autos Direct Online, Inc.*, 2015-Ohio-3336.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100831

LAURA DEVITO

PLAINTIFF-APPELLANT

vs.

AUTOS DIRECT ONLINE, INC.

DEFENDANT-APPELLEE

DECISION EN BANC:
AFFIRMED AS MODIFIED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-811164

BEFORE: En Banc Court

RELEASED AND JOURNALIZED: August 20, 2015

ATTORNEYS FOR APPELLANT

Ronald L. Burdge
Elizabeth A. Wells
Burdge Law Office
2299 Miamisburg-Centerville Road
Dayton, OH 45459

ATTORNEY FOR APPELLEE

David A. Corrado
Law Offices of David A. Corrado
Skylight Office Tower
1660 W. Second Street, Suite 410
Cleveland, OH 44113

TIM McCORMACK, J.:

{¶1} The heart of the matter that we decide in this en banc decision is a classic contract question: did the disputing parties herein have a meeting of the minds about each of the terms of the written agreement that is before us? Or conversely, is this a purported agreement that in part or full is no agreement at all because one party was incapable of agreeing to a key term? Were certain terms so egregiously hidden or purposefully obfuscated as to preclude mutual agreement? Further, we address whether all, part, or none of the purported agreement remains standing as a result of the relationship of its divisible sections.

{¶2} Guided by basic contract principles and Ohio's strong presumption in favor of arbitration, we determine in this conflict that the loser-pays provision of the subject arbitration agreement is unconscionable and against public policy. That provision is hereby excised from this arbitration agreement. The non-offending terms of the arbitration agreement remain enforceable.

{¶3} Plaintiff-appellant, Laura Devito, purchased a used 2008 Infiniti online from defendant-appellee, Autos Direct Online, Inc. ("ADO"). Devito alleged that when the vehicle was delivered to her, mechanical problems that were to be fixed had not been fixed as promised by ADO. She then brought Consumer Sales Practices Act ("CSPA") and fraud claims against ADO. The trial court granted ADO's motion to stay the

proceedings pending arbitration. On appeal, Devito argues the arbitration agreement is invalid. A provision in the arbitration agreement of particular interest that she highlighted is the loser-pays provision. This provision mandates that the consumer pay all arbitration costs and expenses, including attorney fees, should the consumer fail to prevail.

{¶4} In a recent decision from this court, *Autos Direct Online, Inc. v. Hedeen*, 2014-Ohio-4200, 19 N.E.3d 957 (8th Dist.), which involved an identical arbitration agreement, the majority of the panel found the entire arbitration agreement invalid because of the inclusion of the loser-pays provision. The panel found the provision to be against public policy.

{¶5} Pursuant to App.R. 26 and Loc.App.R. 26(B), this court sua sponte considers the present appeal en banc. We conclude that the loser-pays provision is invalid because it is both unconscionable and against public policy. We do, however, agree with the dissent in *Hedeen* that, absent the offending loser-pays provision, the arbitration agreement is otherwise valid and enforceable. Therefore, we affirm the judgment of the trial court staying the proceedings pending arbitration. The loser-pays provision is stricken from the arbitration agreement.

I. Factual and Procedural Background

{¶6} In 2013, Devito purchased a 2008 Infiniti online. She alleged that before purchasing the vehicle, she had a mechanic inspect the vehicle, which inspection revealed several mechanical problems. She asserted that, as part of the deal, ADO agreed to have

all the identified problems repaired. She alleged that, before the sale, ADO represented to her that all the problems had been repaired and she purchased the vehicle based on ADO's representation. However, when the vehicle was delivered to her in Massachusetts, some of the mechanical problems had not been fixed.

{¶7} After being frustrated in her ability to resolve the issues with ADO, Devito brought Consumer Sales Practices Act and fraud claims, among other causes of action, against ADO. ADO moved the trial court to stay the proceedings and refer the matter to arbitration pursuant to the arbitration agreement signed by Devito.

{¶8} Before the sale was effectuated, ADO sales staff emailed Devito a stack of documents, among which was the arbitration agreement. According to Devito, she was unaware of the existence of the document; no one from ADO told her about arbitration or provided arbitration rules or procedures; and she was rushed through the sales paperwork under the impression the vehicle would be re-listed if the signed sales papers were not returned immediately.

{¶9} Devito opposed ADO's motion to stay pending arbitration. Of particular interest in this appeal is the following paragraph in the arbitration agreement:

> The arbitration shall be filed and held in the County of Cuyahoga, State of Ohio. The arbitration shall be through a panel of three (3) arbitrators; one appointed by us, one appointed by you and the third chosen from the AAA list of arbitrators by those two (2) appointed arbitrators. The arbitrators shall apply relevant law. The decision of the arbitrators shall be final and

binding on all parties to the proceedings. *The non-prevailing party shall pay, and the arbitrators shall award the prevailing party's arbitration costs and expenses, including reasonable attorney's fees.*

(Emphasis added.)

{¶10} The trial court granted ADO's motion and stayed proceedings pending arbitration. On appeal, Devito claims the trial court abused its discretion by granting ADO's motion to stay proceedings.[1]

{¶11} We find the loser-pays provision unenforceable as it is substantively and procedurally unconscionable, and is further against public policy. With the removal of this offending provision, the arbitration agreement is otherwise enforceable. Therefore, we affirm the trial court's decision staying the proceedings pending arbitration, but excise the loser-pays provision from the arbitration agreement.

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[1]Appellant raises three issues for our review under her single assignment of error.

1. Whether the trial court abused its discretion when it granted appellee's motion to stay proceedings pending arbitration where ADO's form arbitration clause is unconscionable and unenforceable.

2. Whether the trial court abused its discretion when it granted appellee's motion to stay proceedings pending arbitration where ADO's form arbitration clause includes a "loser pay provision" which is illusory, attempts to modify the CSPA, violates public policy and the CSPA, and misrepresents to a consumer his or her rights under the CSPA.

3. Whether the trial court abused its discretion when it granted appellee's motion to stay proceedings pending arbitration where ADO's form arbitration clause includes a "final and binding provision" which attempts to modify the Ohio arbitration rules, violates public policy and the CSPA, and misrepresents to a

II. Arbitration as Favored Dispute Resolution Mechanism

{¶12} It is well settled that the arbitration process is a favored method to settle disputes. Both the Ohio General Assembly and the courts have expressed a strong public policy favoring arbitration. *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 15. Arbitration is favored because it provides the parties "'with a relatively expeditious and economical means of resolving a dispute.'" *Id.*, quoting *Schaefer v. Allstate Ins. Co.*, 63 Ohio St.3d 708, 712, 590 N.E.2d 1242 (1992).

{¶13} Arbitration is a matter of contract. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). The elements of a contract are voluntary offer and acceptance, supported by valid consideration. *Noroski v. Fallet*, 2 Ohio St.3d 77, 79, 442 N.E.2d 1302 (1982).

III. Unconscionability: Substantive and Procedural

{¶14} When, however, an agreement is made under circumstances or terms that are so one-sided that the exchange of promises is involuntary, the law regards it as unfair or "unconscionable" to enforce the contract. The Supreme Court of the United States has defined an unconscionable agreement as one "'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.'" *Thonen v. McNeil-Akron, Inc.*, 661 F.Supp. 1252 (N.D.Ohio 1986), quoting *Hume v. United States*, 132 U.S. 406, 411, 10 S.Ct. 124, 33 L.Ed. 393 (1889).

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consumer his or her rights under Ohio law.

{¶15} The notion of unconscionability includes "'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'" *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 33, quoting *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 383, 613 N.E.2d 183 (1993). The doctrine embodies two concepts:

> (1) unfair and unreasonable contract terms, i.e., "substantive unconscionability," and (2) individualized circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible, i.e., "procedural unconscionability," or, * * * "bargaining naughtiness."

Collins v. Click Camera & Video, 86 Ohio App.3d 826, 834, 621 N.E.2d 1294 (2d Dist.1993).

{¶16} The party claiming unconscionability of an agreement bears the burden of proving that the agreement is both substantively and procedurally unconscionable. *Taylor Bldg.* at ¶ 33. A determination of whether a written agreement is unconscionable is an issue of law, and we review de novo. *Id.* at ¶ 34.

{¶17} Substantive unconscionability goes to the terms of the contract. *Ball v. Ohio State Home Servs., Inc.*, 168 Ohio App.3d 622, 2006-Ohio-4464, 861 N.E.2d 553, ¶ 7 (9th Dist.). "Substantive unconscionability involves those factors which relate to the contract terms themselves and whether they are commercially reasonable." *Collins* at 834.

When a contractual term is "so one-sided as to oppress or unfairly surprise" a party, the contractual term is said to be substantively unconscionable. *Neubrander v. Dean Witter Reynolds, Inc.*, 81 Ohio App.3d 308, 311-312, 610 N.E.2d 1089 (9th Dist.1992). Essentially, it goes to the unfairness or unreasonableness of the contractual terms. *Featherstone v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 Ohio App.3d 27, 2004-Ohio-5953, 822 N.E.2d 841, ¶ 13 (9th Dist.).

{¶18} For assessing substantive unconscionability, the courts have considered factors such as: "the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability." *Collins*, 86 Ohio App.3d at 834, 621 N.E.2d 1294, citing *Fotomat Corp. of Florida v. Chanda*, 464 So.2d 626 (Fla.App.1985), and *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co.*, 54 Ohio St.2d 147, 375 N.E.2d 410 (1978).

{¶19} Regarding procedural unconscionability, when a party has such superior bargaining power that the other party lacks a "meaningful choice" to enter into the contract, the contract is said to be procedurally unconscionable. *Taylor Bldg.*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶ 33. The courts have also characterized it as a lack of voluntary meeting of the minds due to the circumstances surrounding the execution of the contract. *Collins* at 834.

> Procedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties, e.g., "age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible * * *."

Collins at 834, quoting *Johnson v. Mobil Oil Corp*., 415 F.Supp. 264 (E.D.Michigan 1976). The crucial question is whether a party, considering his education or lack of it, had a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print. *Lake Ridge Academy*, 66 Ohio St.3d at 383, 613 N.E.2d 183.

{¶20} A finding of unconscionability requires both procedural and substantive unconscionability, although procedural and substantive aspects of unconscionability are often integrally related. Most cases of unconscionability involve a combination of procedural and substantive unconscionability, and if more of one is present, then less of the other is required; "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required." (Citation omitted.) 1 E. Allan Farnsworth, *Farnsworth on Contracts*, § 4.28, at 585 (3d Ed.2004). A party who seeks to avoid enforcement of an arbitration provision in a contract on grounds that the provision is unconscionable bears the burden of demonstrating that the agreement is both procedurally and substantively unconscionable. *Taylor Bldg.* at ¶ 33. Whether a written contract is unconscionable is an issue of law. *Id*. at ¶ 34. As such, we review the issue de novo. *Id*. at ¶ 36.

{¶21} Finally, reviewing the instant consumer dispute, we bear in mind that this dispute involves the purchase of a vehicle. The Ohio courts have acknowledged that consumer transactions involving modern day necessities such as automobiles deserve especially close scrutiny before an arbitration clause is enforced. *Eagle v. Fred Martin*

Motor Co., 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶ 44 (9th Dist.); *Battle v. Bill Swad Chevrolet, Inc.*, 140 Ohio App.3d 185, 192, 746 N.E.2d 1167 (10th Dist.2000).

The AAA Rules and Procedures

{¶22} The arbitration agreement does not set forth applicable rules or costs of arbitration but simply refers the consumer to the rules of the American Arbitration Association ("AAA"). We therefore find it necessary to delve deeply into the voluminous rules and procedure to discern the resultant costs governing the instant consumer dispute.

{¶23} Our review of the AAA rules reflects a set of elaborate rules and procedures ("Commercial Arbitration Rules and Mediation Procedures") for commercial arbitration,[2] and a separate set of streamlined rules and procedures for consumer disputes ("Consumer-Related Disputes Supplementary Procedures"). Whereas commercial arbitration may use one or three arbitrators, consumer arbitration would typically utilize the expedited procedures and one arbitrator. AAA C-1(b) and E-4(a). The rules, however, permit three arbitrators to hear a consumer dispute; when three arbitrators are used, commercial rules and procedures govern the arbitration.[3]

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[2]The AAA's Commercial Arbitration Rules and Mediation Procedures shows three tiers of procedures: regular, expedited, or complex. One or three arbitrators may be used for commercial litigation. AAA R-16(a); AAA E-4(a); and AAA L-2(a). The parties, however, are permitted to vary the applicable procedures by written agreement. AAA R-1(a).

[3]Section C-1(b) of the "Supplementary Procedures for the Resolution of Consumer-Related disputes" states that, for consumer disputes, "[t]he Expedited Procedures will be used unless there are

{¶24} Furthermore, while in commercial arbitration the fees and expenses are borne equally by the parties (but subject to assessment by the arbitrator when appropriate),[4] in consumer arbitration the business pays the arbitrators' compensation and expenses, regardless of whether one or three arbitrators are involved; furthermore, the business's responsibility is not subject to reallocation by the arbitrator(s) (unless the consumer's claim is filed for harassment or is patently frivolous). AAA Consumer-Related Disputes Supplementary Procedures, p. 12.[5]

{¶25} The instant arbitration agreement requires three arbitrators. It would therefore be governed by commercial rules and procedures. Regardless, the business is required to pay for the fees and expenses of the arbitration.[6]

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three arbitrators. In such cases, the Commercial Dispute Resolution Procedures shall apply."

[4]AAA R-54 states: "All [expenses except for witnesses' fees] * * * shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties."

[5]In section (vii) of the "Consumer-Related Disputes Supplementary Procedures," a fee schedule shows that when three arbitrators are used in a consumer arbitration, the business will pay a filing fee of $2,000, a hearing fee of $500, and $1,500 per hearing day per arbitrator; the consumer's financial responsibility is limited to a $200 filing fee.

[6]Devito, however, contends that if the commercial procedures apply, her costs, should she lose, would be the fees charged to commercial parties: an initial filing fee of $975, a final fee of $300, and the three arbitrators' fees estimated at $15,000 (based on 15 hours at a rate of $300 per hour).

Inclusion of Loser-Pays Provision Renders the Arbitration Agreement Substantively and Procedurally Unconscionable

{¶26} The loser-pays provision embedded in this arbitration agreement sharply departs from the established consumer-related disputes procedures as it shifts the financial burden to the consumer. A consumer who files a nonfrivolous but ultimately losing claim is only required to pay a $200 filing fee under the AAA rules. By contrast, such a consumer, under the offending loser-pays provision, bears the burden of paying all costs and expenses of arbitration.

{¶27} The undisclosed, unlisted costs of the process under the loser-pays provision would result in prohibitive assessed costs for almost all vehicle buyers, most certainly for an average consumer household — the filing and hearing fees and arbitrators' compensations alone total $7,000 under the consumer fee schedule for a three-arbitrator panel. Beyond that, the consumer is also to pay for the attorney fees.

{¶28} Although the arbitration agreement refers to the rules of the AAA, even the most diligent consumer who on his or her own initiative obtains the rules from the AAA and reads them would have a most difficult time accurately assessing his or her exposure. The AAA's rules include two sets of rules: the 50-page "Commercial Arbitration Rules and Mediation Procedures," and the 14-page "Consumer-Related Disputes Supplementary Procedures." The filing and arbitrator fees for a three-panel consumer arbitration are listed on the last page of the 64-page document.

{¶29} It is also notable that the loser-pays provision even disturbs the balance provided for in the AAA rules relative to assigning responsibility for attorney fees.

Under the loser-pays provision, should the arbitrators find no merit to the consumer's claim, she must also pay ADO's attorney fees. Such an award is within the arbitrator's discretion under the AAA rules, but mandatory under the loser-pays provision.[7]

{¶30} For an especially aware consumer, the prospect of incurring these onerous costs and fees has the chilling effect of stopping cold a substantial number of potential claimants from seeking to vindicate their statutory rights under the CSPA. "[P]ractically speaking, a potential litigant, in making a decision on whether to bring a claim, 'will be inclined to err on the side of caution, especially when the worst-case scenario would mean not only losing on their substantive claims but also the imposition of the costs of the arbitration.'" *Eagle*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, at ¶ 41, quoting *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 665 (6th Cir.2003). Under ADO's loser-pays term, the risk of financial blunt trauma to a consumer is real. A fair reading of this imbalanced loser-pays provision shows that it is intended to intimidate consumers away from pursuing their CSPA claims. Arbitration is a favored dispute resolution method because it provides the parties with "a relatively expeditious and economical means of resolving a dispute." *Hayes*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, at ¶ 15. Ironically, for most persons who would utilize this disguised remedy, an adverse ruling could spell financial disaster.

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[7]Subsection (d) of R-47 of AAA Commercial Arbitration Rules and Mediation Procedures states: "The award of the arbitrator(s) *may* include: * * * an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement." (Emphasis added.)

{¶31} The built-in, grossly imbalanced unfairness of the loser-pays terms, the altering of the industry standard, the inability of a diligent consumer to readily discern the extent of potential future liability renders ADO's arbitration agreement substantively unconscionable, when the loser-pays provision is embedded.

{¶32} This loser-pays provision, if included, rendered the agreement procedurally unconscionable as well. An adhesion contract is "a standardized form contract prepared by one party, and offered to the weaker party, usually a consumer, who has no realistic choice as to the contract terms." *Taylor Bldg.*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶48 (citing Black's Law Dictionary 342 (8th Ed.2004)). The loser-pays provision is tucked into a take-it-or-leave-it, preprinted, boilerplate arbitration agreement sent in an email to the vehicle purchaser among a stack of documents. As such, it is adhesive. There was little meaningful, face-to-face opportunity for understanding, negotiating, or altering the terms.

{¶33} The Supreme Court of Ohio has held that the presumption in favor of arbitration should be substantially weaker when there are strong indications that an agreement appears to be adhesive in nature. *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 473, 700 N.E.2d 859 (1998). Given the adhesive nature of this arbitration agreement and especially the undisclosed costs a consumer will incur for in good faith bringing a valid but losing claim, it is difficult to imagine or to conclude that a true voluntary meeting of the minds existed regarding the loser-pays provision.

{¶34} We are acutely aware of the principle that "[i]f a person can read and is not prevented from reading what he signs, he alone is responsible for reading what he signs." (Citation omitted.) *Haller v. Borror Corp.*, 50 Ohio St.3d 10, 14, 552 N.E.2d 207 (1990). We also recognize that generally a consumer who is competent to contract and signs a contract without reading it is bound by its terms. Here, however, a diligent reading of the loser-pays provision would not inform or illuminate the consumer as to its actual effect. The provision itself does not put the diligent, reading consumer on notice to the extent of the burdensome costs and fees of a three-arbitrator panel that the losing party will be assessed. It is simply unreasonable. It is wrong to expect a consumer purchasing a vehicle online to research and decipher thoroughly the complex AAA commercial and consumer rules and procedures in order to know the potential costs of arbitration should she fail to prevail.

{¶35} The undisclosed costs and fees of the arbitration process imposed here by the loser-pays clause should the arbitrators rule in ADO's favor would likely exceed the cost of many of the vehicles subject to this form of arbitration, some modestly priced new vehicles, or many used vehicles. Can any fair reading of this loser-pays clause convince one that a purchaser could have known and intended to enter into such an onerous arrangement? The financial exposure set up by the clause would blindside most households. It is simply contrary to legal doctrine and precedent to hold out the loser-pays clause as a valid contractual obligation. Truly, there is not a meeting of the minds, when vital financial liability information is absent from the page. For these

reasons, the inclusion of the subject loser-pays provision rendered this aspect of the arbitration agreement procedurally unconscionable as well.

Public Policy

{¶36} We further conclude the loser-pays provision, which requires the nonprevailing party to pay attorney fees even if the consumer has not filed the action in bad faith, is against public policy.

{¶37} A court may refuse to enforce a contract when it violates public policy. *Marsh v. Lampert*, 129 Ohio App.3d 685, 687, 718 N.E.2d 997 (12th Dist.1998), citing *Garretson v. S.D. Myers, Inc*., 72 Ohio App.3d 785, 788, 596 N.E.2d 512 (9th Dist.1991). Unlike the unconscionability analysis, public policy analysis requires the court to consider the impact of such arrangements upon society as a whole. *Eagle*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, at ¶ 63. A contract injurious to the interests of the state will not be enforced. *King v. King*, 63 Ohio St. 363, 372, 59 N.E. 111 (1900). As stated in 17 Ohio Jurisprudence 3d, Contracts, Section 94, at 528 (1980),

> Public policy is the community common sense and common conscience, extended and applied throughout the state to matters of public morals, health, safety, welfare, and the like. Again, public policy is that principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good. Accordingly, contracts which bring about results which the law seeks to prevent are unenforceable as against public policy. Moreover, actual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations.

(Footnotes omitted.)

{¶38} Here, this pernicious form of the loser-pays provision, which mandates that the nonprevailing consumer pay attorney fees, attempts to modify or rewrite the rule for attorney fees under Chapter 1345, Ohio's CSPA. R.C. 1345.09(F) states:

> The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed and limited pursuant to section 1345.092 of the Revised Code, if either of the following apply:
>
> (1) The consumer complaining of the act or practice that violated this chapter has brought or maintained an action that is groundless, and the consumer filed or maintained the action in bad faith;
>
> (2) The supplier has knowingly committed an act or practice that violates this chapter.

{¶39} Under the statute, when the plaintiff consumer prevails, he or she may obtain an award of reasonable attorney fees when the defendant knowingly violated the CSPA. When the defendant is the prevailing party, however, it may obtain an award of reasonable attorney fees only when the consumer's action is groundless and the consumer files or maintains it in bad faith.

{¶40} The CSPA reflects a strong public policy that consumers who bring good faith claims against suppliers will not have to pay the supplier's attorney fees, even if the consumer loses his or her claim against the supplier. ADO's loser-pays provision, requiring the consumer who brings a good-faith claim but fails to prevail to pay ADO's attorney fees, effectively nullifies this statutory protection provided to the consumers by the CSPA. It seeks to intimidate consumers from pursuing their statutory claims through

arbitration. For these reasons, we find the loser-pays provision against the public policy embodied in the CSPA.

{¶41} Based on the foregoing analysis, this court finds that the inclusion of the loser-pays provision rendered ADO's arbitration agreement unconscionable and also against public policy.[8]

Conclusion

{¶42} The consumer has appealed to this court to use the offending loser-pays language put forth by ADO to invalidate the entire arbitration agreement. We will not do so. A strong presumption exists in favor of utilizing legally-balanced arbitration when a claim falls within the scope of an arbitration provision. *Taylor v. Ernst & Young, L.L.P.*, 130 Ohio St.3d 411, 2011-Ohio-5262, 958 N.E.2d 1203. Because of this strong presumption, "all doubts should be resolved in its favor." *Hayes*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, at ¶ 15, citing *Ignazio v. Clear Channel Broadcasting, Inc.*, 113 Ohio St.3d 276, 2007-Ohio-1947, 865 N.E.2d 18. Ohio's policy of encouraging arbitration is reflected in the Ohio Arbitration Act, codified in Chapter

[8]Devito also claims the arbitration agreement is unenforceable because its "final and binding" provision attempts to modify Ohio law under R.C. 2711.10 and 2711.11. We find no merit to this claim. Those two statutes set forth when a court may vacate or modify an arbitration award, respectively. R.C. 2711.13 provides that after an award in an arbitration proceeding is made, either party may file a motion for an order vacating or modifying the award as prescribed in R.C. 2711.10 and 2711.11. In *Miller v. Gunckle*, 96 Ohio St.3d 359, 2002-Ohio-4932, 775 N.E.2d 475, the Ohio Supreme Court explained that "'[f]or a dispute resolution procedure to be classified as "arbitration," the decision rendered must be final, binding and without any qualification or condition as to the finality of an award.'" *Id.* at ¶ 10, quoting *Schaefer,* 63 Ohio St.3d at 711, 590 N.E.2d 1242. Therefore, the very definition of arbitration requires a "final and binding" award. The arbitration agreement does not modify R.C. 2711.10 or 2711.11.

2711 of the Ohio Revised Code. R.C. 2711.01(A) provides that an arbitration agreement in a written contract "shall be valid, irrevocable, and enforceable, except upon grounds that exist in law or equity for the revocation of any contract."

{¶43} Ohio law establishes a balance for the parties as it relates to rights and responsibilities in the arbitration process. While inherently unfair language can and should be stricken, there is no authority inherent in this court to carte blanche strike down an otherwise valid arbitration agreement. Arbitration openly agreed to by the parties is strongly supported by statute and court precedent. The arbitration agreement is otherwise enforceable once the noxious provision is eliminated from the agreement. *See Eagle*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, at ¶ 36. We will not overreach by attempting to invalidate the entire arbitration agreement when excision of the offending portion will suffice.

{¶44} We conclude that the loser-pays provision of the subject arbitration contract is unconscionable and against public policy. That provision is hereby excised from the arbitration contract. The non-offending terms of the contract remain enforceable.

{¶45} The judgment of the trial court staying proceedings pending arbitration is affirmed as modified.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____
TIM McCORMACK, JUDGE

SEAN C. GALLAGHER, J., and
PATRICIA ANN BLACKMON, J., CONCUR

EILEEN T. GALLAGHER, J., and
MELODY J. STEWART, J., CONCUR IN JUDGMENT ONLY

MARY J. BOYLE J., CONCURS IN JUDGMENT ONLY WITH SEPARATE OPINION with FRANK D. CELEBREZZE, JR., A.J., CONCURRING

MARY EILEEN KILBANE, J., DISSENTS WITH SEPARATE OPINION with LARRY A. JONES, SR., J., KATHLEEN ANN KEOUGH, J., EILEEN A. GALLAGHER, J., and ANITA LASTER MAYS, J., CONCURRING

MARY J. BOYLE, J., CONCURRING IN JUDGMENT ONLY:

{¶46} I agree with the majority of the en banc court that the loser-pays provision is against public policy and that by removing the offending loser-pays provision, the remaining arbitration agreement is valid and enforceable.

{¶47} I respectfully disagree, however, with the majority's conclusion that the loser-pays provision is unconscionable. This is because "a party challenging a contract as unconscionable must prove 'a quantum' of both procedural and substantive unconscionability." *Taylor Bldg.*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶ 52. As set forth in the following analysis, it is my view that the arbitration clause in

this case was not procedurally unconscionable and, therefore, Devito's unconscionability argument fails.

{¶48} I further disagree with the dissenting opinion that the loser-pays provision renders the entire arbitration agreement unenforceable. Essentially, my view in this case is consistent with my dissenting opinion in *Hedeen*, 2014-Ohio-4200, 19 N.E.3d 957. In *Hedeen,* I agreed with the majority that the loser-pays provision was not unconscionable because the plaintiff did not establish that the arbitration agreement was procedurally unconscionable, but that it was against public policy. But I disagreed with the majority that the loser-pays provision invalidated the entire arbitration agreement. It was my view in *Hedeen*, as it is now, that by removing the offending loser-pays provision, the remaining arbitration agreement is valid and enforceable.

{¶49} Therefore, I concur in judgment only with the majority opinion.

Procedural Unconscionability

{¶50} In *Taylor Bldg.*, the Supreme Court set forth the factors when determining whether a contract is procedurally unconscionable:

> Procedural unconscionability considers the circumstances surrounding the contracting parties' bargaining, such as the parties' "'age, education, intelligence, business acumen and experience, * * * who drafted the contract, * * * whether alterations in the printed terms were possible, [and] whether there were alternative sources of supply for the goods in question.'" [*Collins v. Click Camera & Video, Inc.*, 86 Ohio App.3d 826,

> 834, 621 N.E.2d 1294 (2d Dist.1993)]. "Factors which may contribute to a finding of unconscionability in the bargaining process [i.e., procedural unconscionability] include the following: belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors." Restatement of the Law 2d, Contracts (1981), Section 208, Comment d.

Taylor Bldg., 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶ 43.

{¶51} The determination of whether a contractual provision is procedurally unconscionable is fact-dependant and requires an analysis of the circumstances of the particular case before the court. *Schaeffer v. Jim Brown, Inc.*, 11th Dist. Lake No. 2014-L-073, 2015-Ohio-1994, ¶ 12, citing *Bayes v. Merle's Metro Builders*, 11th Dist. Lake No. 2007-L-067, 2007-Ohio-7125, ¶ 6.

{¶52} In finding that procedural unconscionability exists in this case, the majority continually emphasizes factors that go to substantive unconscionability (the unfairness of the loser-pays provision), not procedural unconscionability. But the majority does not analyze the procedural unconscionability factors because it summarily finds that "a consumer" (meaning a consumer *in general*, rather than Devito) could never be expected

to decipher the "complex AAA commercial and consumer rules and procedures in order to know the potential costs of arbitration should she fail to prevail." But procedural unconscionability is a fact-sensitive question, and thus, courts must look to the specific consumer entering into the contract, which in this case is Devito.

{¶53} In this case, Devito graduated from high school and had previously worked for many years as a real estate appraiser. For the previous 11 years (before the filing of her case), she had been homeschooling her son.

{¶54} The arbitration agreement in this case was set forth on a single full page; it was not hidden in the middle of the contract, nor was it in fine print. Devito signed the arbitration agreement at the bottom of the page; she did not just initial it. At the top of the page, in all capital letters and in bold print, it states: "AGREEMENT TO ARBITRATE." At the end of the agreement, near the bottom of the page just above Devito's signature, it states in capital letters:

> BY SIGNING BELOW, THE PARTIES ACKNOWLEDGE THAT THEY HAVE READ THIS ARBITRATION AGREEMENT. THE PARTIES UNDERSTAND AND AGREE THAT THEY ARE GIVING UP THE RIGHT TO SEEK REMEDY IN A COURT OF LAW, INCLUDING FORGOING THE RIGHT TO A JURY TRIAL, AND THEY UNDERSTAND THAT THE RIGHTS TO APPEAL OR CHANGE AN ARBITRATION AWARD IN COURT ARE SIGNIFICANTLY LIMITED.

{¶55} Devito avers that when the documents were emailed to her, she felt as if she had to rush to sign them because ADO was "threatening to re-list the vehicle online." But receiving an email is not the same as someone standing over a person rushing him or her through the process. She was purchasing a $23,000 vehicle; she had a duty to read what she was signing.

{¶56} Devito further argues that her ADO salesperson did not explain the arbitration agreement to her. But the law does not require him to do so. *See ABM Farms v. Woods*, 81 Ohio St.3d 498, 503, 692 N.E.2d 574 (1998). In *ABM Farms*, the defendant argued that the terms of the arbitration agreement were not explained to her. The Supreme Court explained:

> At the center of [the defendant's] allegation of fraudulent inducement is the naked truth that she did not read the contract. It drives a stake into the heart of her claim. "A person of ordinary mind cannot be heard to say that he was misled into signing a paper which was different from what he intended, when he could have known the truth by merely looking when he signed." *McAdams v. McAdams*, 80 Ohio St. 232, 240-241, 88 N.E. 542, 544 (1909). *See, also, Upton v. Tribilcock*, 91 U.S. 45, 50, 23 L.Ed. 203, 205 (1875) ("It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written"). The legal and common-sensical axiom that one must read what one signs survives this case. To find for [the defendant] would destroy that standard.

ABM Farms at 503.

{¶57} The majority asserts that "even the most diligent consumer who on his or her own initiative obtains the rules from the AAA and reads them would have a most difficult time accurately assessing his or her own exposure." I disagree. Devito was purchasing

a vehicle online. She clearly had the wherewithal and knowhow to explore the internet. The AAA rules are readily accessible. And although the AAA rules may be "voluminous" and "elaborate" as the majority states, they are not complex.

{¶58} Devito further asserts that the contract is procedurally unconscionable because it was drafted by ADO, and she was not able to negotiate the terms of it. A contract of adhesion is one in a standardized form that is prepared by one party and offered to the weaker party, usually a consumer, who has no realistic choice as to the contract terms. *Taylor Bldg.*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶ 49. "To be sure, an arbitration clause in a consumer contract with some characteristics of an adhesion contract 'necessarily engenders more reservations than an arbitration clause in a different setting,' such as a collective bargaining agreement or a commercial contract between two businesses." *Id*. at ¶ 49, quoting *Williams*, 83 Ohio St.3d 464, 472, 700 N.E.2d 859 (1998). But according to the Ohio Supreme Court:

> [E]ven a contract of adhesion is not in all instances unconscionable per se. As the Seventh Circuit recently observed in rejecting a claim that an arbitration clause was unconscionable, "few consumer contracts are negotiated one clause at a time." *Carbajal v. H & R Block Tax Servs., Inc*., 372 F.3d 903, 906 (7th Cir.2004). Indeed, so-called "form contracts" can provide advantages to consumers. "Forms reduce transactions costs and benefit consumers because, in competition, reductions in the cost of doing business show up as lower prices[.]" *Id.*

Taylor Bldg. at ¶ 49.

{¶59} Devito claims that she "was given the impression" that if she wanted to purchase the vehicle, she had to sign all of the documents that were emailed to her

"without making any changes." But there is no evidence that she attempted to negotiate or alter any of the terms of the agreement.

{¶60} After reviewing the arbitration agreement at issue, as well as Devito's affidavit, it is my view that Devito did not meet her burden of establishing that the arbitration agreement was procedurally unconscionable. There is simply no evidence in this case that the bargaining process was so oppressive as to remove meaningful choice on Devito's part.

{¶61} Moreover, there are many, many "'alternative sources of supply'" when it comes to purchasing a vehicle. *Taylor Bldg.* at ¶ 43, quoting *Collins*, 86 Ohio App.3d at 834, 621 N.E.2d 1294 (one factor to consider in a procedural unconscionability analysis is "whether there were alternate sources of supply for the goods in question"). Indeed, car dealerships are ubiquitous.

Dissenting Opinion

{¶62} I also respectfully disagree with the dissenting opinion in this case that the loser-pays provision renders the entire arbitration agreement unenforceable. The dissent states that the arbitration agreement "improperly imposes" the AAA's commercial rules for a consumer dispute. But there is nothing improper about this under the AAA rules. Indeed, it is explicitly permissible. Specifically, the consumer rules state that for consumer disputes, "[t]he Expedited Procedures will be used unless there are three arbitrators. In such cases, the Commercial Dispute Resolution Procedures Apply." But this does not negatively impact Devito in any way. Under the commercial rules, that only means that the regular procedures would apply (because the rules for "large, complex cases" are only applicable when a claim over $500,000 is involved).[9] Thus, by requiring three arbitrators (and removing the loser-pays provision), it is only ADO that is negatively impacted, as further explained below.

{¶63} The dissent further states that "Devito is liable for the costs of commercial arbitration, which is ten times more than the cost of arbitration for consumer disputes." Without the loser-pays provision, however, this is simply not true.

{¶64} In the "Administrative Fee Schedule" of the AAA's commercial rules, the fees and costs of commercial arbitration are set forth. This section specifically states, however, that "[i]n an effort to make arbitration costs reasonable for consumers, the AAA

[9]As the majority points out, under the AAA commercial rules, there are three tiers of procedures: expedited, regular, or complex.

has a separate fee schedule for consumer-related disputes." This section then states, "[p]lease refer to "Section C-8 of the Supplementary Procedures for Consumer-Related Disputes when filing a consumer-related claim."

{¶65} "Section C-8" of the AAA's consumer rules sets forth the costs of arbitration for consumer-related disputes. Whether one or three arbitrators are used, the consumer pays the same — a $200 filing fee. It is the business that is responsible for the remaining costs, including a filing fee of $1,500 or $2,000 (depending on how many arbitrators are used), a $500 hearing fee, and the arbitrator or arbitrators' compensation.

{¶66} It is clear from reading the AAA commercial and consumer rules that the extensive fees and costs of commercial arbitration — that the dissent refers to — do not apply to consumers. Thus, by removing the loser-pays provision, Devito is only responsible for a $200 filing fee.

{¶67} Thus, I would hold that the loser-pays provision is against public policy and that by removing it from the arbitration agreement, the remaining arbitration agreement is enforceable.

MARY EILEEN KILBANE, J., DISSENTING:

{¶68} I respectfully dissent. For the reasons set forth below, I would find that the entire arbitration clause is unconscionable and, therefore, unenforceable.

{¶69} While arbitration is encouraged as a method of dispute resolution and a presumption favoring arbitration arises when the claim in dispute falls within the

arbitration provision, the circumstances surrounding *Devito* and *Hedeen*[10] are unique in that they both involve the same unconscionable arbitration clause drafted by the same defendant — ADO. In both cases, ADO made material representations regarding the condition of the vehicles it had for sale. Devito and Hedeen relied on these representations to purchase their respective vehicles, only to later discover that ADO falsely represented the condition of the vehicles causing them thousands of dollars in repairs. Devito and Hedeen each filed complaints against ADO, alleging causes of action for breach of contract, violations of the Motor Vehicle Sales Rule and the Ohio CSPA, and fraud and deceit. After making these material misrepresentations to both Hedeen and Devito, ADO sought to tether each of them to the arbitration clause by moving to stay the proceedings at the trial court. To add insult to injury, ADO sought to enforce arbitration, relying on an arbitration clause the majority has found to be unconscionable and against public policy because of the terms of ADO's loser-pays provision, yet still enforceable.

{¶70} In November 2012, Hedeen purchased a used 2011 Mercedes-Benz online from ADO for $28,000. Prior to purchasing the vehicle, her ADO salesman represented to her that the vehicle had never been in an accident. Relying on ADO's representations, Hedeen purchased the vehicle. Upon receiving the vehicle, Hedeen discovered that it was in fact in a serious accident where it sustained over $20,000 in damages, and over $7,000 in damages of which had never been repaired.

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[10] *Hedeen*, 2014-Ohio-4200, 19 N.E.3d 957.

{¶71} In May 2013, Devito purchased a used 2008 Infiniti QX56 online from ADO for $22,100. Prior to her purchase, Devito had the vehicle inspected at an Infiniti car dealership. The inspection revealed that the vehicle needed several mechanical repairs. As part of the purchase agreement, ADO agreed to complete all of the necessary repairs of the vehicle. ADO further represented that it had in fact completed all of the repairs. When Devito received the vehicle, she discovered that the agreed-to repairs had not been completed as ADO represented. The estimated cost to repair Devito's vehicle was approximately $3,000.[11]

{¶72} In *Hedeen*, 2014-Ohio-4200, 19 N.E.3d 957, this court did not find the arbitration clause unconscionable, but rather found that the loser-pays provision is against public policy, which rendered the entire arbitration clause unenforceable. Whereas in the instant case, the majority has found that the arbitration clause is both procedurally and substantially unconscionable and violates public policy. A finding of this magnitude necessitates that the entire arbitration clause is rendered unenforceable. *See Post v. ProCare Auto. Serv. Solutions*, 8th Dist. Cuyahoga No. 87646, 2007-Ohio-2106 (where this court stated "as a matter of law, an arbitration clause is not enforceable if it is found to be unconscionable"). *Id.* at ¶ 11, citing *Olah v. Ganley Chevrolet, Inc.*, 8th Dist.

[11]Both purchase agreements contained an "AS IS" provision stating that the "dealer assumes no responsibility for any repairs to the vehicle regardless of any oral statements about the vehicle." While applicable in the context of home warranty claims, it is worth noting that an "as is" clause cannot be relied upon to bar a claim for fraudulent misrepresentation or fraudulent concealment. *Kern v. Buehrer*, 8th Dist. Cuyahoga No. 97836, 2012-Ohio-4057, ¶ 5, citing *Brewer v. Brothers*, 82 Ohio App.3d 148, 151, 611 N.E.2d 492 (12th Dist.1992).

Cuyahoga No. 86132, 2006-Ohio-694, citing *Williams*, 83 Ohio St.3d at 471, 1998-Ohio-294, 700 N.E.2d 859. Instead, the majority has chosen to retain part of the arbitration clause, but strike the offending portion — the loser-pays provision.

{¶73} In discussing the loser-pays provision of ADO's arbitration agreement, the majority acknowledges that the provision drafted by ADO imposes the AAA rules for a commercial dispute in a consumer transaction. Rather than using a single arbitrator as set forth in the AAA rules for consumer disputes, the commercial disputes rules require a panel of three arbitrators, with their fees totaling approximately $15,000. Whereas, the rules for consumer disputes typically require a single arbitrator, which may be paid $1,500 per day. Hedeen and Devito could be required to pay ten times more in fees under the agreement as written by ADO. This undisclosed disparity in cost is grossly significant and, in some cases, could result in the consumers paying more for arbitration than for their vehicle. Even more troubling, nothing in ADO's arbitration clause puts the consumer on notice of the extent of the potentially significant costs and fees of the arbitration process. The majority concludes there is no meeting of the minds as to the loser-pays provision because vital terms are missing from the arbitration clause. Yet, the majority's remedy is only to remove the offending portion — the loser-pays provision.

{¶74} In its analysis, the majority cites to and upholds ADO's arbitration clause without the offending loser-pays provision. In *Eagle*, the consumer purchased a used car from the defendant-car dealer. She was told by a salesperson, who had reviewed her financial information, that she did not qualify for a purchase of a used car. The dealer

informed her that she would nevertheless be able to purchase a new car and represented to her that she would be better off purchasing the new car because it was a good automobile with an excellent warranty. After having serious problems with the car, until the point where the car stopped running altogether, the consumer filed suit. The car dealer moved to compel arbitration pursuant to the arbitration clause contained in the purchase agreement, stating that arbitration was to be conducted by the National Arbitration Forum ("NAF") in accordance with the NAF's Code of Procedure. The consumer challenged the validity of the arbitration clause, asserting that it was unconscionable and, thus, unenforceable. The Ninth District Court of Appeals agreed, finding several deficiencies within the clause and remanding the case to the trial court for a jury trial. *Eagle*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, at ¶ 85.

{¶75} In looking at the arbitration clause, the *Eagle* court noted that R.C. 1302.15(A) permits courts to strike the offending portion of an unconscionable contract provision. *Id.* at ¶ 36, citing *Lightning Rod Mut. Ins. Co. v. Saffle*, 9th Dist. Summit No. 15134, 1991 Ohio App. LEXIS 5394 (Nov. 6, 1991), citing the Restatement of the Law 2d, Contracts, Section 107 (1981). However, the *Eagle* court still found the arbitration clause was unenforceable in its entirety. *Id.* at ¶ 85. It did not choose to strike the offending portion.

{¶76} Likewise, in the instant case, I would find the circumstances compel a finding that unconscionability permeates the entire arbitration clause, rendering it unenforceable in its entirety. Devito bought a used vehicle from ADO that needed

several mechanical repairs. As part of the purchase agreement, ADO agreed to complete all of the necessary repairs of the vehicle. ADO further represented that it in fact completed all of the repairs. When Devito received the vehicle, she discovered that the repairs had not been completed as ADO represented. The estimated cost to repair the vehicle was approximately $3,000. Now ADO wants to enforce arbitration relying on an unconscionable clause that improperly imposes the AAA rules for a commercial dispute in a consumer transaction, and possibly costing Devito ten times more in fees.

> [T]he presumption in favor of arbitration should be substantially weaker in a case * * * when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation, there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration.

Williams, 83 Ohio St.3d at 473, 1998-Ohio-294, 700 N.E.2d 859.

{¶77} Moreover, by removing only the offending portion of the unconscionable arbitration clause, the majority has effectively stripped away any redress consumers have in court and any rights consumers have to the remedies afforded in consumer protections statutes. By signing ADO's arbitration agreement, Devito waived the right to sue ADO in court. This agreement, however, is based on an unconscionable arbitration clause that was entered into with no meeting of the minds. As a result, enforcing this unconscionable provision against Devito would constitute a violation of her due process right to redress under Ohio Constitution, Article I, Section 16, which provides that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person,

or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

{¶78} In addition, consumer protections statutes were enacted to protect against the commission of unfair, deceptive, or unconscionable acts or practices by sellers in the consumer transaction context. *Eagle*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, at ¶ 24. The public policy behind consumer protection statutes is frustrated when a car dealer makes a material misrepresentation to the consumer, which the consumer relies upon. Then the car dealer binds the consumer to arbitration by using an unconscionable arbitration clause that prevents the consumer from exercising the remedies provided by these statutes. *See Schaefer v. Allstate Ins. Co.*, 10th Dist. Franklin No. 90 AP-178, 1991 Ohio App. LEXIS 694, *9 (Feb. 12, 1991). As this court stated in *Hedeen*:

> "Public policy is the community common sense and common conscience, extended and applied throughout the state to matters of public morals, health, safety, welfare, and the like. Again, public policy is that principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good. Accordingly, contracts which bring about results which the law seeks to prevent are unenforceable as against public policy. Moreover, actual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations. (Footnotes omitted.)"

Hedeen, 2014-Ohio-4200, 19 N.E.3d 957, at ¶ 45, quoting 17 Ohio Jurisprudence 3d, Contracts, Section 94 (1980). "When an arbitration clause vanquishes the remedial purpose of a statute by imposing arbitration costs and preventing actions from being

brought by consumers, the arbitration clause should be held unenforceable." *Eagle* at ¶ 68.

{¶79} For the majority to conclude that there is no meeting of the minds and allow ADO to make material misrepresentations to these buyers and then tether the consumer to an unconscionable arbitration clause renders the arbitration clause wholly in ADO's favor. To add insult to injury, Devito is liable for the costs of commercial arbitration, which is ten times more than the cost of arbitration for consumer disputes. This inequity was not an intended consequence of the public policy in favor of arbitration. ADO's one-sided contract clause is injurious to the interests of the state, is against public policy, and prevents the consumer from exercising the constitutional right to redress in court. *See Hedeen* at ¶ 49, citing *Eagle* at ¶ 74.

{¶80} Accordingly, I would find that the arbitration clause is unenforceable in its entirety.