IN THE SUPREME COURT OF THE STATE OF OREGON

COUCH INVESTMENTS, LLC, an Oregon limited liability company,
Plaintiff-Respondent,
Respondent on Review,

v.

LEONARD PEVERIERI, an individual; JUDITH PEVERIERI, an individual; and PEVERIERI INVESTMENTS, LLC, an Oregon limited liability company
Defendants-Appellants,
Petitioners on Review.

Court of Appeals
A155483

S063209

Amicus Brief of Oregon Trial Lawyers Association

Review of the decision of the Court of Appeals on
appeal from a judgment of the Circuit Court for
Deschutes County, Honorable Michael Adler, Judge.

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Decision of Court of Appeals filed: April 1, 2015.
Opinion by Tookey, J, joined by Sercombe, PJ, and Hadlock, J

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I.

INTRODUCTION

The parties to this case mutually negotiated an agreement to arbitrate after a dispute had arisen and litigation had commenced. Petition for Review ("PFR"), 1. The issue for this Court's decision is whether that agreement waived remedial powers otherwise given the arbitrator by ORS 36.695(3).

The Oregon Trial Lawyers Association ("OTLA") urges this Court, in rendering its decision, to be mindful that many arbitration clauses are created much differently. In consumer and employment contracts, arbitration clauses are typically imposed by the dominant party at the outset, before any disputes have arisen. The weaker party is often given no option but to agree to the dominant party's arbitration terms.[1]

As OTLA will explain in section IV, express waivers of remedies in contracts of adhesion are subject to court scrutiny for unconscionability. It is not settled whether a claim that an arbitration clause impliedly waives remedies

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[1] *E.g.*, *Motsinger v. Lithia Rose-FT, Inc.*, 211 Or App 610, 615, 156 P3d 156 (2007) (arbitration clause in employment agreement was "a standardized printed form as part of the hiring process, and plaintiff had to accept the arbitration clause on a 'take-it-or-leave-it' basis if she wanted the job"); *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 210 Or App 553, 558, 567, 152 P3d 940 (2007) (arbitration rider in loan agreement was "a standard form 'take it or leave it' contract drafted by defendant a classic contract of adhesion").

is to be addressed initially by a court or an arbitrator. Should an arbitrator decide first and hold that an implied waiver of remedies is not unconscionable, also unsettled is the standard for judicial review of that determination. OTLA therefore urges this Court, however it decides this case, to reaffirm that it strongly disfavors arguments seeking to imply terms favorable to the dominant party to an adhesion contract that the dominant party failed to expressly state in that contract.

In section II, OTLA will set forth the relevant portions of the statutory scheme. Then in section III, OTLA will demonstrate that the Court of Appeals properly treated the provisions of ORS 36.695(3) as "requirements" subject to ORS 36.610(1).

II.

RELEVANT STATUTORY SCHEME

The first three subsections of ORS 36.695 are related and provide:

> "(1) An arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim."
>
> "(2) An arbitrator may award reasonable attorney fees and other reasonable expenses of arbitration as may be specified in the arbitration agreement if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding."

> "(3) As to all remedies other than those authorized by subsections (1) and (2) of this section, an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under ORS 36.700 or for vacating an award under ORS 36.705."
>
> ORS 36.610(1) provides that:
>
> "Except as otherwise provided in this section, a party to an agreement to arbitrate or to an arbitration proceeding may waive, or the parties may vary the effect of, the requirements of ORS 36.600 to 36.740 to the extent permitted by law."

ORS 36.610 creates no exception applicable to ORS 36.695. Hence, if the remedy provisions in ORS 36.695(1)-(3) are "requirements" as that term is used in ORS 36.610, ORS 36.610(1) expressly authorizes a party to an arbitration agreement to waive those remedy provisions "to the extent permitted by law."

III.

AS USED IN ORS 36.610, "REQUIREMENTS" INCLUDE PERMISSIVE PROVISIONS OF THE UNIFORM ARBITRATION ACT

Petitioner argues ORS 36.695(3) does not create a requirement subject to ORS 36.610(1)'s waiver provisions because "ORS 36.695(3) merely states that an arbitrator 'may' order such remedies," so that "[n]othing is 'required' of either the parties or the arbitrator." Brief on the Merits of Petitioners on Review ("O Br"), 16. Applicable principles of statutory construction show the legislature intended "requirements" as used in ORS

36.610 to include such permissive provisions.

Portions of ORS 36.610 expressly designate permissive portions of the Uniform Arbitration Act as requirements. For example, ORS 36.610(3) provides in part:

> "A party to an agreement to arbitrate or arbitration proceeding may not waive, or the parties may not vary the effect of, the requirements of * * * ORS * * * 36.715 * * * (2)."

The language of ORS 36.715(2) is entirely permissive: "A court may allow reasonable costs of the petition and subsequent judicial proceedings." ORS 36.690(4) is another entirely permissive section of the Uniform Arbitration Act listed in ORS 36.310(3).

"[U]se of the same term throughout a statute indicates that the term has the same meaning throughout the statute." *PGE v. BOLI*, 317 Or 606, 611, 859 P2d 1143 (1993). It follows that ORS 36.610(1)'s reference to "the requirements of ORS 36.600 to 36.740" includes entirely permissive statutes like ORS 36.695(3).

Additionally, ORS 36.610(1) is based on and is materially identical to section 4(a) of the Revised Uniform Arbitration Act (2000) ("RUAA").[2] *See*

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[2] Section 4(a) provides: "Except as otherwise provided in subsections (b) and (c), a party to an agreement to arbitrate or to an arbitration proceeding may waive or, the parties may vary the effect of, the requirements of this [Act] to the extent permitted by law." http://www.uniformlaws.org/shared/docs/ arbitration/ arbitration_final_00.pdf, 13. This section can also be found at PFR, App-1.

Snider v. Production Chemical Manufacturing, Inc., 348 Or 257, 261, 230 P3d 1 (2010) ("In 2003, the Oregon legislature adopted the Revised Uniform Arbitration Act. Or Laws 2003, ch 598.") Comment 3 to section 4 of the RUAA makes clear that the provisions of ORS 36.695(1)-(3)[3] constitute "requirements" as that term is used in section 4(a):

> "The phrase 'to the extent permitted by law' is included in Section 4(a) to inform the parties that they cannot vary the terms of an arbitration agreement from the RUAA if the result would violate applicable law. This situation occurs most often when a party includes unconscionable provisions in an arbitration agreement. * * * For example, although parties might limit remedies, such as recovery of attorney's fees or punitive damages in Section 21, a court might deem such a limitation inapplicable where an arbitration involves statutory rights that would require these remedies." http://www.uniformlaws.org/shared/docs/ arbitration/arbitration_final_00.pdf, 14, visited October 19, 2015.[4]

In *Snider*, *supra*, this Court made clear that comments to the RUAA "might shed light on what the legislature intended." 348 Or at 267 (citing *Datt v. Hill*, 347 Or 672, 682, 227 P3d 714 (2010) as an example where "the commentary to another uniform act" had been used "to determine the Oregon legislature's intent"). The above-quoted comment thus confirms

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[3] The first three subsections of section 21 of the RUAA are materially identical to ORS 36.695(1)-(3). See http://www.uniformlaws.org/shared/docs/ arbitration/arbitration_final_00.pdf, 69-70.

[4] This comment can also be found at PFR, App-1.

permissive provisions like ORS 36.695(3) are among the "requirements" that ORS 36.610(1) permits the parties to waive "to the extent permitted by law."

IV.

IMPLIED WAIVERS ARE STRONGLY DISFAVORED IN CONTRACTS OF ADHESION

A. Express and Implied Waiver of Arbitration Remedies in Adhesion Contracts

Often the dominant party in a contract of adhesion seeks through a mandatory predispute arbitration clause to force the weaker party to surrender statutory protections or benefits. For example, in *Graham Oil Co. v. ARCO Products Co.,* 43 F3d 1244, 1247 (9th Cir 1994), the oil company's franchise agreement expressly sought to take away, among other things, the franchisee's statutory rights to punitive damages and attorney fees. Similarly, in *Vasquez-Lopez, supra*, the mortgage company's arbitration rider imposed most of the costs of arbitration on the requesting party, which was "sufficiently onerous to act as a deterrent to plaintiffs' vindication of their claim." 210 Or App at 575. Such express provisions are subject to judicial scrutiny for unconscionability. *See generally id.* at 566-577.[5]

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[5] The parties in *Vasquez-Lopez* agreed that arbitration rider was subject to the Federal Arbitration Act. 210 Or App at 560. Under section 2 of that statute, "an arbitration agreement may be challenged in state court 'upon such grounds as exist at [state] law or in equity for the revocation of any contract,' including unconscionability." 210 Or App at 560, alteration in original. ORS 36.620(1) similarly provides that an arbitration agreement may be challenged "upon a

Sometimes, the dominant party acts indirectly in trying to take away statutory protections or benefits. For example, the argument used to be made that no punitive damages were available if an arbitration agreement contained a New York choice of law clause because New York precedent precludes an arbitrator from awarding punitives. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 US 52, 55 (1995). Ultimately, the United States Supreme Court rejected this argument. *Id.* at 63-64.

More recent United States Supreme Court precedent creates uncertainty about the respective roles of court and arbitrator in addressing implied waivers of remedies. In *Pacificare Health Systems, Inc. v. Book*, 538 US 401 (2003), the issue was whether an express prohibition of punitive damages also barred treble damages under the federal RICO statute. Since "the application of the disputed language to respondents' RICO claims is, to say the least, in doubt," the Court held "the proper course is to compel arbitration" to find out "how the arbitrator will construe the remedial limitations." *Id.* at 406-407. The Court left unresolved whether limiting RICO damages "render[s] the parties' agreements unenforceable and whether it is for courts or arbitrators to decide enforceability in the first instance." *Id.* at 407.

To the extent developments in arbitration jurisprudence assign

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ground that exists at law or in equity for the revocation of a contract."

decisions about implied waivers of remedies initially to an arbitrator, it is uncertain if a court can plenarily review such determinations. There thus is the potential that courts in the future may be limited in their review of claims that language in a non-negotiable arbitration clause impliedly, and permissibly, waives remedies such as those referred to in ORS 36.695(1) and (2), attorney fees and punitive damages.

B. This Court's Strong Disapproval of Implied Waivers in Adhesion Contracts

OTLA agrees with the parties that "'to make out a case of waiver of a legal right there must be a clear, unequivocal, and decisive act of the party showing such a purpose.'" O Br, 14, *quoting Johnson v. Swaim*, 343 Or 423, 431, 172 P3d 645 (2007); Brief on the Merits of Respondents on Review, 18. A waiver need not always "include[ ] an express provision to that effect." *Estey v. Mackenzie Engineering Inc.*, 324 Or 372, 378, 927 P2d 86 (1996).

However, nearly four decades ago, this Court announced a rule whose import is to view with suspicion a claim by the dominant party to an adhesion contract that the weaker party has by implication waived a legal right:

> "Silence on the subject of a right which the drafter later contends he has is usually fatal to his contention unless such right is one which necessarily results from the other terms of the contract. * * *. Construction against the drafter of the contract is particularly appropriate * * * where the contract is one of adhesion with the [weaker party] having no opportunity to negotiate its terms." *Derenco, Inc. v.*

> *Benj. Franklin Federal Savings & Loan Ass'n*, 281 Or 533, 552, 577 P2d 477 (1978).

More recently, in *Estey, supra*, 324 Or at 378-379, this Court focused on two considerations in rejecting the argument that by implication the contract there "clearly and unequivocally expresses an intent to limit defendants' liability for the consequences of their own negligence to the contract sum." First, this Court held that "a lay consumer" could "reasonably * * * have interpreted" the contract language more narrowly. *Id.* Additionally, in the context of the transaction, "plaintiff most likely would not have understood the limitation of liability clause to effectively immunize defendants from liability for negligen[ce]." *Id.* at 379.

Thus, regardless of how this Court decides this case involving a negotiated post-dispute arbitration agreement, OTLA requests that this Court expressly note how the rules discussed in this subsection would apply to a claimed implied waiver in a mandatory pre-dispute arbitration clause imposed by the dominant party to a contract of adhesion. These well-established Oregon rules of contract construction will create incentives for contractually dominant parties imposing arbitration requirements to make waivers of ORS 36.695's

remedies provisions explicit. This in turn will ensure that questions of whether such waivers are unconscionable are for judicial resolution.

Dated this 21st day of October, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 2181 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(g).

Dated this 21st day of October, 2015

/s/ Phil Goldsmith
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Attorney for *Amicus Curiae*,
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CERTIFICATE OF SERVICE AND FILING

I certify that on October 21, 2015, I filed the foregoing Amicus Brief of Oregon Trial Lawyers Association with the Appellate Court Administrator in PDF, text-searchable format using the Oregon Appellate eCourt filing system in compliance with ORAP 16, as adopted by the Supreme Court.

Participants in this case are registered eFilers who will be served via the electronic mail function of the eFiling system:

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