

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 PACIFICARE HEALTH SYSTEMS, :
4 INC. , ET AL. , :
5 Petitioners :
6 v. : No. 02-215
7 JEFFREY BOOK, ET AL. , :
8 - - - - -X
9 Washington, D. C.
10 Monday, February 24, 2003
11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:02 a.m.
14 APPEARANCES:
15 WILLIAM E. GRAUER, ESQ. , San Diego, California; on behalf
16 of the Petitioners.
17 JOE R. WHATLEY, JR. , ESQ. , Birmingham, Alabama; on behalf
18 of the Respondents.
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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	WILLIAM E. GRAUER, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	JOE R. WHATLEY, JR. , ESQ.	
7	On behalf of the Respondents	
8	REBUTTAL ARGUMENT OF	
9	WILLIAM E. GRAUER, ESQ.	
10	On behalf of the Petitioners	
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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in Number 02-215, Pacific Health Care Systems v.
Jeffrey Book.

Mr. Grauer.

ORAL ARGUMENT OF WILLIAM E. GRAUER
ON BEHALF OF THE PETITIONERS

MR. GRAUER: Mr. Chief Justice, and may it
please the Court:

For three reasons, the important Federal policy
favoring arbitration would be seriously undermined if
courts become entangled in speculative litigation over
arbitration remedies. First, the enforceability of a
limitation on remedies in arbitration ought to be decided
in the first instance by the arbitrator, since that's not
a gateway issue of arbitrability.

Second, it's unlikely in this case that the
arbitrator would have found that the limitations on
remedies agreed by the parties would have precluded the
award of RICO treble damages, and third, there is simply
no reason why parties found by the district court to be
sophisticated cannot mutually agree to limit remedies.

Turning, then, to --

QUESTION: Mr. Grauer, on the second point that

1 you made, you said it's unlikely that the arbitrators
2 would find that treble damages are inconsistent with
3 the -- with the contracts. Would you, supposing this case
4 were to be before the arbitrator, would you concede that
5 the contracts in question permit treble damages awards on
6 a RICO claim? Would you make that contention?

7 MR. GRAUER: Yes.

8 QUESTION: Thank you.

9 MR. GRAUER: Yes.

10 QUESTION: On your first point, suppose you have
11 a contract that is very clear that there can be no triple
12 damages under RICO, that's right in the contract, is it
13 your position that that goes to the arbitrator and it's
14 for the arbitrator to say that this violates public policy
15 and I'm going to -- well, I mean, what would happen in
16 that case?

17 MR. GRAUER: Yes, we believe that it's for the
18 arbitrator to decide. We believe that there's essentially
19 a 40-year tradition of allowing arbitrators to make
20 decisions of that nature and of allowing issues of the
21 remedies that can arise in arbitration to be decided by
22 the arbitrator.

23 QUESTION: The arbitrator, I take it, on the
24 face of the contract simply could not award the damages,
25 or are you saying that he might?

1 MR. GRAUER: Yes. The arbitrator --

2 QUESTION: He'd say, this is against public
3 policy and I'm giving you triple damages? I don't care
4 what the contract says, I go beyond the scope of the
5 arbitration contract?

6 MR. GRAUER: Well, the arbitrator is bound first
7 and foremost, under both the law and under the arbitration
8 clauses in this case, to comply with the controlling law.
9 This Court has held several times, in Mitsubishi, in
10 Vimar, in Gilmer, and in other cases that we should not
11 suppose that the arbitrator will not follow the law. We
12 should assume that the arbitrator will follow the law and,
13 therefore, if the law requires the award of treble
14 damages, even if the parties have agreed otherwise, the
15 arbitrator is bound to follow that law.

16 QUESTION: What's our best case, or is there
17 one, for the proposition that if the contract says the
18 arbitrator may not do X, and X violates public policy,
19 that the arbitrator goes ahead and does it anyway? What's
20 our case that says that?

21 MR. GRAUER: I believe that that would be found
22 in Mitsubishi, in the Vimar y Seguros case at page 541, in
23 the McMahon case at page --

24 QUESTION: Well, but I'm not sure in any of
25 those cases it was clear that the contract in very

1 explicit terms said, you cannot do this. I -- I -- I
2 recognize that in those cases it does say if there's
3 important public policy it can't be overturned by the
4 arbitration.

5 MR. GRAUER: I think the -- one example -- there
6 are several examples, but one that comes to mind is that
7 in the Vimar case the COGSA prevented the arbitrator
8 from -- the COGSA prevented any reduction in liability in
9 a bill of lading, and -- and there was a concern that the
10 law in Japan which had been selected to conduct the
11 arbitration had a different set of rules that could have
12 allowed the stevedores to be -- to have liability laid off
13 on the stevedores, and yet the Court said, we will not
14 indulge in the presumption that the arbitrator will not
15 follow the appropriate law and, therefore, even though
16 Japanese law was different, the arbitrator, we assumed,
17 would follow the controlling law.

18 Now, in this particular case, it's -- it's not
19 only true that the -- that the Court has held several
20 times that we should not assume that an arbitrator will
21 fail to follow the controlling law, but all of the
22 arbitration agreements, and I would cite the Court to the
23 joint appendix, pages 84, 147, 168, and 212, in each of
24 the arbitration agreements in this case, the arbitrator is
25 admonished to follow the controlling law.

1 QUESTION: Well, but in one of the arbitration
2 clauses, I think, it says the arbitrator shall not vary or
3 ignore the terms of this agreement, shall have no
4 authority to award extracontractual damages at any time,
5 including punitive or exemplary damages.

6 Now, what's the arbitrator to do with a
7 provision like that? Is that not the kind of thing that
8 courts have looked at and determined whether that's a
9 valid public policy or not?

10 MR. GRAUER: I wouldn't agree with the Court
11 looking at that, and here's why. I agree that what you
12 read, Justice O'Connor, is, in fact, what's in that
13 agreement, but if you read on in that sentence it says,
14 and the arbitrator shall follow the controlling law. At
15 best, there is a conflict or a tension between those
16 terms, and this is what arbitrators do all the time.

17 There are all these agreements that are -- that
18 every day are presented to arbitrators that have a number
19 of provisions that could step on each other, and -- and
20 the arbitrator has to interpret the contract. That's what
21 we bargained for in entering an arbitration agreement,
22 that if there was some tension, or some confusion or
23 dispute, that the arbitr --

24 QUESTION: Have we ever allowed a prospective
25 waiver of a statutory right --

1 MR. GRAUER: Prospective --

2 QUESTION: -- in these arbitration contexts?

3 MR. GRAUER: The prospective waivers -- yes, I
4 believe that that, for example, in our brief we cited a
5 number of cases such as Mezzanatto that create a
6 presumption that a statutory right is waivable unless
7 Congress has said otherwise.

8 Now, in the arbitration context, again, to get
9 back to the Vimar y Seguros case, the party was agreeing
10 to arbitration even though there was a concern before the
11 arbitration that the arbitrator might not follow the
12 correct law.

13 The guiding principle of -- that -- that has
14 guided this Court's jurisprudence for -- for years, and
15 it's been reiterated in Mitsubishi, and McMahon, and --
16 and Vimar, and Gilmer, is that we should assume that the
17 arbitrator will apply -- will apply the correct law, but
18 if --

19 QUESTION: Mr. Grauer, on the question of
20 waiver, you have represented, and I want to make this
21 clear, that waiver would be academic in this situation,
22 since you say you will concede that all of these contracts
23 allow the arbitrator to award treble damages. Is -- am I
24 correct in understanding that waiver would be academic
25 because you're not going to make the argument of waiver,

1 you're going to make -- you're going to concede that
2 treble damages are available if a RICO violation is found?

3 MR. GRAUER: Absolutely. I agree with that,
4 Justice Ginsburg, and as a matter of fact for two reasons,
5 not only because we've made that concession, but also
6 because we agreed to arbitrate. That means we agreed to
7 submit any issues to the arbitrator and therefore, even if
8 we had not made that concession, we would believe that the
9 arbitrator ought to be asked in the first instance to
10 decide the validity of a waiver.

11 QUESTION: But suppose the arbitrator gets it
12 wrong. Suppose the arbitrator thinks that the provision,
13 no punitive damages, excludes treble damages, and that
14 that prevails. Could that be corrected by post award
15 review?

16 MR. GRAUER: To the extent -- yes, I think it
17 could, and here's why. The one thing that this Court has
18 said, no fewer than four times, and -- and has emphasized
19 I think those four times, is that when a statutory claim
20 is arbitrated, there -- the -- we assume that post
21 arbitration review is sufficient to ensure the vindication
22 of statutory interests, and the Court mentioned that not
23 only in McMahon at page 232, in Gilmer at footnote 4, and
24 also in Vimar and in Mitsubishi. In all four of those
25 cases, this Court has specific -- excuse me -- this Court

1 has specifically said that -- that, while limited, post
2 arbitration review is sufficient to ensure that statutory
3 interests are vindicated.

4 QUESTION: In other words, it's quite simple. I
5 don't see what's so complicated about this. I thought
6 what you were saying, and I thought that's what the law
7 was, but tell me if I'm not right, please, is,
8 interpreting the contract is a matter for the arbitrator,
9 but once we know what the contract means, then whether
10 that contract, as interpreted, provides sufficient remedy
11 to be valid as an arbitration contract is for the judge.

12 MR. GRAUER: I would -- I would agree with the
13 first part of that, Justice Breyer, and that is --

14 QUESTION: Well, why not the second? I mean,
15 after all, if I have a contract which says, Jones and
16 Smith agree to arbitrate all damage claims, but no damages
17 shall ever be awarded, no matter what, okay, that's pretty
18 clear that the enforcement of that would invalidate that
19 arbitration agreement because it can't be enforced. The
20 person who should say that is the judge, because the judge
21 says, look, you people don't have an arbitration contract.

22 Now, why you'd leave that to the arbitrator -- I
23 guess you could, but I think that is a gateway matter that
24 I think you'd have to be quadruple clear about that
25 somebody wanted that point decided by an arbitrator.

1 Now, that's how I'm understanding it, so I'd
2 like you to correct me if I'm wrong.

3 MR. GRAUER: I'm not sure I followed the first
4 part of the hypothetical.

5 QUESTION: The first part's very simple. What
6 the contract means is for the arbitrator. The parties
7 have agreed to that. But once we know what it means,
8 whether it is an enforceable arbitration contract or
9 violates some anti -- some statute that says -- or some
10 public policy and the -- which means, you two cannot
11 arbitrate this kind of thing with this kind of agreement,
12 that question of arbitrability is for the judge, because
13 it is a gateway matter.

14 If, in fact, this contract for arbitration is
15 unlawful, as against public policy or whatever, then there
16 is no arbitration contract, and that matter is a matter
17 for the judge, unless the parties clearly indicate that
18 they want it to be decided by an arbitrator. And I read
19 through those cases a little while ago, and that seemed to
20 me what they said, and so I wrote it into an opinion which
21 I think every member of this Court but one agreed to.

22 MR. GRAUER: Justice Breyer, I agree with the
23 first part, and that is this, that the gateway issue of
24 arbitrability involves the determination of, did the
25 parties make a valid agreement to arbitrate and, if they

1 did, is the dispute within the scope of that agreement,
2 but that should end, in our view, the inquiry, because if
3 you don't end the inquiry at that point, you're -- you're
4 opening the door to questions about remedies and legal
5 issues and what are the elements of the cause of action
6 and what have the parties agreed to, and let me give you
7 an example.

8 The parties -- I sell you 10,000 widgets for a
9 dollar each, as is, and no -- and liquidated damages of \$1
10 and no other liability, and we agree to that, okay. Now,
11 the person then sues for RICO because they want to get
12 around that. Well, the only issue ought to be, did the
13 parties make a valid agreement to arbitrate and, if so, is
14 the dispute in the scope of that agreement, and the fact
15 that there may be a downstream dispute about the validity
16 of the remedies and the validity of the waiver of the
17 remedies should not, under any circumstances, spill over
18 into the gateway --

19 QUESTION: I didn't say when you would decide
20 it. I said, the matter is a matter for the judge. If we
21 don't know what the contract means, then I guess we have
22 to go to the arbitrator to find out before we know, before
23 we can present the judge. That's Vimar, or Vimar, isn't
24 it?

25 MR. GRAUER: Vimar y Seguros, and I agree,

1 Justice Breyer, that post arbitration --

2 QUESTION: I thought you probably would end up
3 agreeing.

4 (Laughter.)

5 MR. GRAUER: Well, post, as long as the
6 agreement is that it's post arbitration. The post
7 arbitration review has been held four times by the Court
8 to be sufficient to clean up matters at the margin that
9 could come up.

10 QUESTION: But if the contract is completely
11 cleared at the outset, why not pre-arbitration review?

12 MR. GRAUER: If the con --

13 QUESTION: Why march up the hill and then march
14 down again?

15 MR. GRAUER: Well, the courts -- I would
16 disagree with approaching it that way, because
17 unfortunately what's clear to a plaintiff's lawyer is
18 often not clear to a defense lawyer, and there are many
19 elements of a cause of action, there are many remedial
20 limitations --

21 QUESTION: So you're saying that nothing is ever
22 clear to the bar?

23 (Laughter.)

24 MR. GRAUER: My good friend, Mr. Whatley and I
25 agree on very little in the case, and that's the problem

1 QUESTION: Well, do you say that this provision
2 in one of the arbitration clauses that the arbitrator
3 shall have no authority to award extracontractual damages
4 of any kind is not clear enough for a judge to determine
5 whether that's --

6 MR. GRAUER: We feel that -- we --

7 QUESTION: -- against public policy?

8 MR. GRAUER: Yes, I do, and here's why.

9 QUESTION: Why?

10 MR. GRAUER: Because we believe that we
11 bargained to have an arbitrator make that decision, and
12 there are many words in this case that may seem like it's
13 clear what they mean, but may in some contexts not be so
14 clear.

15 The word racketeering is used to describe a case
16 where a doctor is seeking to be paid more for treating a
17 patient. There are a lot of words in this case, and we
18 feel that we bargained to have an arbitrator interpret
19 them, and as I indicated to Justice Ginsburg, it was
20 conceded some time ago that the term, extracontractual was
21 not in -- was intended to be noneconomic damages and was
22 not intended to be primarily remedial RICO treble damages,
23 but --

24 QUESTION: Well, what you're arguing for
25 basically is that it should go to the arbitrator for a

1 decision of almost everything except what we have held to
2 be gateway issues, and that if it doesn't, it's just going
3 to kind of get bounced back and forth like a ping pong
4 ball.

5 MR. GRAUER: I agree, Mr. Chief Justice. I -- I
6 believe that the importance of the Court's recent
7 pronouncement in *Howsam* about gateway arbitrability as we
8 read that case is that you determine, did the parties
9 intend to subject themselves to the power of an
10 arbitrator? Did they make an arbitration agreement, and
11 is the dispute within the scope of that agreement, and if
12 the answers to those questions are yes, the only
13 additional issue that comes up, and the one that
14 unfortunately became conflated in the Eleventh Circuit
15 below, is where there is a statutory claim, there is an
16 additional analysis that this Court has traditionally
17 done, and that is, did Congress, by enacting that statute,
18 intend to override or preempt the Federal Arbitration Act,
19 and that's the issue that has come up, and unfortunately
20 what's happened in the Eleventh and the Ninth Circuits is
21 that they have taken that concept of simply making a
22 determination of whether another statute is -- preempts
23 the Federal Arbitration Act, and they've used it to create
24 essentially a floating analysis of effective vindication
25 that's untethered to the statutory conflict analysis.

1 QUESTION: Okay, how -- how clear has it got to
2 be before there is some kind of a tether? Let's assume
3 you had a simpler case than this one in which the
4 arbitration agreement provided -- this is silly, but for
5 the sake of a point, that no damages will be awarded by
6 the arbitrator for the violation of any statutory claim,
7 as distinct from a tort claim, common law tort claim, or a
8 contract claim. Would you say that in that case there
9 was, in fact, a threshold question of arbitrability
10 because that provision went so clearly to the validity of
11 the agreement that it should be treated as a, could be
12 properly treated as a threshold matter for a court?

13 MR. GRAUER: It would depend, Justice Souter. I
14 believe that there could be a situation where an
15 agreement --

16 QUESTION: Well, how about my situation?

17 MR. GRAUER: In -- in -- in your situation, the
18 reason I say your situation would depend is that there are
19 many contracts where that would be a perfectly legitimate
20 understanding. For example, I -- I'll sell you 10,000
21 widgets, \$1 each, I haven't checked them over, they may be
22 no darned good, but you want them for \$1 each, and I don't
23 want to be sued for this, so I want liquidated damages of
24 \$1. That type of commercial arrangement --

25 QUESTION: Yeah, but in that case you're --

1 well, and again, maybe -- maybe this is where it gets
2 theoretical. In -- in that case, in effect, you're --
3 you're waiving any statutory claim at the beginning. In
4 -- in the case I gave, maybe it's the same point, I just
5 said you waive damages. I -- I suppose you wouldn't
6 waive -- on that theory you wouldn't be waiving equitable
7 remedies if there were any, so -- so let's just take my
8 case. You waive the damages -- you don't waive the claim.
9 You waive the damages. You don't waive the right to
10 equitable remedy.

11 Is -- is that -- is the -- is the -- in effect
12 the -- the waiver of the right to damages in the
13 arbitration agreement sufficient to raise a serious enough
14 question about the enforceability of the arbitration
15 agreement to qualify that question as a gateway question?

16 MR. GRAUER: I believe the answer is no, with
17 one exception. In general, anything relating to remedies
18 should be dealt with by the arbitrator, and we should
19 assume that -- that if there is something improper about
20 that remedial limitation, that the arbitrator will -- will
21 do what he or she is supposed to do, follow the law, get
22 it right.

23 QUESTION: Okay, but you're saying, I think
24 you're saying, and -- and correct me if I'm wrong,
25 that -- that no remedial question can ever rise to the

1 level of a -- a potential threat to the potential -- to --
2 to vindication of statutory rights. Whatever that phrase
3 may mean, as we have employed it, a mere question of -- of
4 waiver of remedies will never rise to that level and,
5 hence, will never get to the threshold question status, is
6 that correct?

7 MR. GRAUER: As a general premise, I believe
8 that's correct. I think we could envision situations
9 where a variety of factors, including that, are linked
10 together such that the plaintiff might make a motion to
11 revoke the arbitration agreement itself on the, on
12 traditional contract grounds should there be a whole
13 series of things that make a contract unconscionable or
14 onerous, but that did not occur in this case.

15 In fact, the court found that it was not
16 unconscionable or onerous. It was negotiated between
17 sophisticated parties, and so the court declined to do
18 section 2 revocation of the contract for generally
19 applicable contract grounds, but there could be a case
20 where a remedial limitation, combined with other factors,
21 could rise to that level, not -- certainly not this case.
22 The problem --

23 QUESTION: And I take it you would say that if
24 at least the -- the details of the agreement that would
25 raise the issue to that level are specifically pleaded in

1 -- in -- in -- in the request, in -- in -- in the action
2 that takes it into court, that at least the -- the -- the
3 breadth of the frustration doctrine would not stand in the
4 way of -- of a court's adjudicating it?

5 MR. GRAUER: Well, that's correct. If I
6 understood you correctly, I -- I -- I believe in
7 arbitration cases there's frequently a motion by a
8 plaintiff to revoke the arbitration agreement on grounds
9 of unconscionability --

10 QUESTION: Yes.

11 MR. GRAUER: -- and judges deal with those from
12 time to time. This is certainly not such a case.

13 QUESTION: But I think you're simply saying
14 they've got to be specific in telling us right at the
15 outset what it is that makes it unconscionable. They
16 can't just come up and say, oh well, there's a potential
17 for frustration here.

18 MR. GRAUER: Right, and -- and it's very
19 important to note an additional distinction, and that is,
20 the -- the attack on unconscionability cannot be on the
21 contract as a whole, because if it is, under Prima Paint
22 that, too, should be decided by the arbitrator. The only
23 unconscionability, the only type of attack that could be
24 made would be on the arbitration clause itself.

25 QUESTION: Uh-huh.

1 QUESTION: May I ask --

2 QUESTION: Under what law is unconscionability
3 decided? Is -- is it State law?

4 MR. GRAUER: In this case, because there's a
5 Federal claim, and the case is in Federal court, the Court
6 has said a number of times that there is a Federal
7 substantive law of arbitrability, but the contract itself
8 was entered between people governed by State law, and so
9 the revocability question would be a decision about
10 whether that contract either as a whole, or the
11 arbitration clause itself, are revocable under the
12 applicable State law subject to the overlay, so to speak,
13 that's created by the Federal Arbitration Act in not
14 allowing States to have unconscionability laws that
15 would --

16 QUESTION: Vitate --

17 MR. GRAUER: -- vitiate an arbitration clause.

18 QUESTION: May I ask, I just want to -- I may be
19 missing what's perfectly obvious, but if you have a
20 contract in which the only remedy authorized to be
21 provided is an illegal remedy for some reason that could
22 not be taken away from the plaintiff, does the
23 arbitrator -- is that agreement immediately nonarbitrable,
24 or do you arbitrate the issues and then saying that
25 there's no remedy?

1 MR. GRAUER: I don't believe either of those
2 would be the case. I believe that if -- if the -- you
3 would arbitrate the issue, and you would expect the
4 arbitrator to follow the law.

5 QUESTION: Even if, on the face of the contract,
6 a judge could say, the only remedy offered to a successful
7 complainant is one that may not be submitted to
8 arbitration?

9 MR. GRAUER: There's only -- I -- I don't agree
10 with that.

11 QUESTION: The waiver of a statutory right of
12 some kind.

13 MR. GRAUER: There would be one way that the
14 plaintiff's lawyer could raise that issue, which is not
15 one of the -- what occurred in this case, but I suppose
16 you could argue that the entire arbitration agreement is
17 illusory and unconscionable, but --

18 QUESTION: Then if that's true, what if you have
19 a case in which there are two remedies available, one of
20 which is clearly impermissible as a matter of Federal law,
21 the other of which is permissible, but there's no
22 severability clause in the contract? What do you do
23 there?

24 MR. GRAUER: I believe in that case, as in the
25 prior one, you should send the matter to arbitration, you

1 should assume that the arbitrator will correctly apply the
2 law, that if there is a provision in the contract that's
3 unlawful, that the arbitrator will disregard it.

4 QUESTION: I guess you'd have to -- the
5 arbitrator would have to decide whether implicit in the
6 terms of the contract is a decision by the parties that
7 would permit him to waive the thing. I mean, Justice
8 Stevens' hypothetical will, I think -- I'd like the
9 answer, anyway. If we assume in the contract it says, and
10 the parties agree that this contract is exclusive in
11 respect to remedy, and the arbitrator does not have the
12 power to strike out some remedies and put in others, okay,
13 so now they've done that, now I take it the answer to his
14 first hypothetical is, you go to the judge, and the
15 agreement's no good. Isn't that right?

16 MR. GRAUER: No. I don't agree, if I understood
17 you correctly, and the reason --

18 QUESTION: The -- the contract has only one
19 remedy. The remedy is clearly illegal. There is a
20 sentence in the contract saying the arbitrator has no
21 power to add a new remedy or to strike the old one. Now
22 we have it absolutely clear that this is an unlawful
23 arbitration agreement, and the judge would say that
24 without sending it to arbitration, wouldn't he? That's
25 the same question I asked before --

1 MR. GRAUER: Right.

2 QUESTION: -- and I thought your answer was, of
3 course.

4 MR. GRAUER: Well --

5 QUESTION: Maybe I'm wrong. That's why I'm
6 asking.

7 MR. GRAUER: If -- if there is a ground under
8 section 2 to revoke the arbitration clause for generally
9 applicable grounds, not because it's an arbitration
10 clause, then a party could make a motion of that nature
11 and the court, of course, would have to address that
12 motion, and -- but -- but I didn't want to get away from
13 the fact that I think is important, is that when you're
14 dealing with remedies, and when you're dealing with
15 arbitrators, we really need to assume that the arbitrator
16 will follow the law.

17 And -- and in this particular case, for example,
18 the arbitration clause does contain a limitation on
19 remedies, but that limitation on remedies could have been
20 put elsewhere in the contract, and if it were somewhere
21 else in the contract, or it might have been -- the parties
22 might not have agreed to arbitrate. They might have
23 agreed that we'll litigate in Florida, but the Court will
24 not have the power to award punitive damages. Now, you
25 would not say that the limitation on punitive damages

1 prevents the parties from having to go to Florida, and you
2 need to treat an arbitration clause, we think, the same,
3 or the parties might have had the remedial limitation in
4 this case, and no arbitration clause.

5 Now, what would a court do? It would -- the
6 court would evaluate the validity of the remedial
7 limitation and make a decision. Well, an arbitrator is
8 exactly the same. It's simply selecting a different
9 forum

10 I see my light's on. Unless there's an
11 additional question, I would reserve my time for rebuttal.

12 QUESTION: Very well, Mr. Grauer.

13 Mr. Whatley, we'll hear from you.

14 ORAL ARGUMENT OF JOE R. WHATLEY, JR.

15 ON BEHALF OF THE RESPONDENTS .

16 MR. WHATLEY: Mr. Chief Justice, and may it
17 please the Court:

18 We start with the principle that arbitrability
19 is to be determined by the court, as this Court has said
20 many times, including in AT&T and First Option, and that
21 there is no -- no presumption, or no liberal policy in
22 favor of giving that issue of arbitrability to the
23 arbitrator. It's exactly the opposite.

24 You go one step further, since this case
25 involves an issue of public policy, and in both W. R.

1 Grace, and later in *Misco* and in *Eastern Associated Coal*
2 *Corporation*, this Court said that questions of public
3 policy are for the court, not for the arbitrator.

4 QUESTION: We also said that that kind of
5 question that would affect an arbitration is fairly rare,
6 didn't we?

7 MR. WHATLEY: You did, Your Honor, and in fact I
8 think this case shows that it -- that it's rare, and I
9 think the various amicus briefs that have been submitted
10 shows that an effort to put limits on remedies, which this
11 Court has attacked many times, is rare. I mean, other
12 defendants didn't do that here. The *Well Point* didn't --

13 QUESTION: You say -- you say this Court has
14 attacked what many times?

15 MR. WHATLEY: This Court -- within the context
16 of arbitration, Justice O'Connor's question, this Court
17 has never allowed the waiver of statutory remedies in the
18 context of an arbitration, enforcing an arbitration
19 provision. If you go back to *Mitsubishi* and follow every
20 case right through *Waffle House*, this Court over and over
21 and over again has quoted the portions of *Mitsubishi*, and
22 footnote 19 from *Mitsubishi*, saying that you're only
23 changing the forum when you're arbitrating.

24 QUESTION: Mr. Whatley, Mr. Grauer has conceded
25 that there is no waiver here, that treble damages are

1 available, so why are we engaging in this academic
2 exercise?

3 MR. WHATLEY: Well, the concern I have with
4 that, Your Honor, is if -- if you read the question
5 presented in his brief, that's not what it says.

6 QUESTION: Well, he's made the concession right
7 now --

8 MR. WHATLEY: He has made the --

9 QUESTION: -- and he has five arguments for
10 saying, any good lawyer would, that these words that you
11 read punitive damages, extracontractual damages, do not
12 prevent the arbitrator from awarding treble damages, so he
13 has one interpreting the thing, two, if the interpretation
14 fails he concedes it, three, there's nothing in the
15 contract says he can't concede it, and so why don't we
16 send this to the arbitrator to find out what the contract
17 means before we decide that it must mean something that
18 would bar its enforcement?

19 MR. WHATLEY: Well, the problem with that -- the
20 problem with that is, doing it after the fact has some
21 pretty severe policy implications.

22 QUESTION: But didn't we, the Court hold
23 precisely, do it after the fact, in Vimar?

24 MR. WHATLEY: Well --

25 QUESTION: It's precisely the same circumstance.

1 MR. WHATLEY: In that case, Your Honor, you were
2 dealing with the international context, where you said,
3 starting in Mitsubishi is a -- is a special situation
4 concerning, where you've got to be concerned with
5 international law. That's number one.

6 Number two, especially when you use the United
7 language that Justice O'Connor quoted, you couldn't get
8 much more clear than United was in its provision, no
9 extracontractual damages, including --

10 QUESTION: This contract doesn't cover a tort
11 action.

12 MR. WHATLEY: It doesn't cover a tort action.

13 QUESTION: In other words, what they wanted to
14 have is an arbitration between doctors and hospitals, and
15 the single most likely, or a very, very likely kind of
16 dispute they call tort disputes, aren't even covered by
17 the arbitration agreement, and it's impossible for an
18 arbitrator to come to a different conclusion.

19 MR. WHATLEY: That is -- that is -- that is our
20 position, Your Honor.

21 QUESTION: I know that's your position. It's
22 just, as I said it with my tone of voice, I'm suggesting
23 it sounds implausible.

24 MR. WHATLEY: Well --

25 QUESTION: So what I'd like is an argument for

1 that position.

2 MR. WHATLEY: Well, the argument for that
3 position is, you start with the language, and you don't
4 only start with the language that says, no
5 extracontractual damages and, in fact, the issue you get
6 in arbitration, and -- and -- and you go to arbitration,
7 and I know we assume arbitrators are going to follow the
8 law, absolutely, the Court has said that many times,
9 although many arbitrators are not lawyers, but I've
10 handled many arbitrations, and --

11 QUESTION: Well, many judges who are lawyers end
12 up not following the law.

13 (Laughter.)

14 MR. WHATLEY: Your Honor, you can say that, but
15 I don't think I can.

16 (Laughter.)

17 MR. WHATLEY: And -- and the arbitrators almost
18 invariably say, you know, this is -- this is what created
19 me, the contract is my Bible, where I get my directions,
20 and if the contract says very plainly, no extracontractual
21 damages, even if later on it says, and follow the law, and
22 if it says -- says that you can't vary or ignore the terms
23 of this agreement, which this agreement says, that is a
24 strong impediment against an arbitrator awarding
25 appropriate relief where you've got a Federal statute that

1 creates tort-like damages.

2 QUESTION: Every one of these contracts says the
3 arbitrator will follow the law, the arbitrator has no
4 power to commit errors of law. Mr. Grauer, I think, said
5 that those provisions may be intention, but when they are,
6 the one that controls is the one that says the arbitrator
7 must follow the law.

8 MR. WHATLEY: Well, that's good, and now that
9 the issue has been specifically raised, and after the
10 fact, after it's raised they come in and waive it. The
11 concern we have is, what about the times when it's not
12 specifically raised? What about the times when you go
13 forward through arbitration and perhaps --

14 QUESTION: That's another case. We're deciding
15 this case.

16 MR. WHATLEY: Well, it's not -- it's this
17 language, though, Your Honor. It's this language.

18 QUESTION: But you don't litigate this language.
19 You're litigating a particular case before us.

20 MR. WHATLEY: But -- but Your Honor, they didn't
21 come in and waive that position until it got before Judge
22 Moreno, and Judge Moreno was going to hold it illegal,
23 going to hold this arbitration agreement unenforceable
24 because of the overreaching they engaged in by limiting
25 the remedies that could be awarded.

1 It was only then, having been caught, that they
2 say, okay --

3 QUESTION: Mr. Whatley, they were never before
4 an arbitrator, were they?

5 MR. WHATLEY: Well, they were never before an
6 arbitrator, that's true, Your Honor. They were never
7 before an arbitrator, but that's when it was finally
8 waived, after the issue was specifically presented, and
9 the judge was not going to enforce it, and that's when
10 Judge Moreno said no, we're not going to allow this after
11 the fact waiver.

12 QUESTION: After the fact -- when did he think
13 it should have been waived in order to -- to assist the
14 petitioner here?

15 MR. WHATLEY: Well, in truth, I think he thought
16 it should never -- if they're going to take --

17 QUESTION: Well then, if he thought it should
18 never be, then what does after the fact mean?

19 MR. WHATLEY: It means, after the issue was
20 presented to the trial court.

21 QUESTION: Well, but that happens all the time.
22 An issue is presented to the trial court, and you say,
23 well, on second thought I'm not going to do that.

24 MR. WHATLEY: Well, but the problem with that
25 is, Your Honor, it means that that provision is still

1 there. It's still addressed.

2 QUESTION: Well, that's true if parties settle a
3 case.

4 QUESTION: Yes, absolutely.

5 MR. WHATLEY: Well, if parties settle a case,
6 that's a very different question, because this is a
7 prospective provision that applies out into the future,
8 and that's the difference. The way -- that's the whole
9 difference about our argument about waiver that's
10 presented to you.

11 Of course people waive things in settlements all
12 the time, but they don't waive things prospectively, and
13 this Court hasn't allowed the waiver of statutory rights
14 prospectively. That's the big difference.

15 QUESTION: The big question for arbitration is,
16 was there a violation of RICO, and I think one of the
17 questions from the bench suggested that the scope of
18 remedy doesn't rise to the same level as, is there a
19 violation of the act, and if in this case the arbitrator
20 should find that if there is no violation of RICO on the
21 part of care organizations, then there would never be any
22 issue of remedy.

23 MR. WHATLEY: Well, that --

24 QUESTION: And, but you want to take that issue,
25 which the parties did agree to arbitrate, and put that in

1 the courts, because you say there's something defective in
2 the remedy provision of the arbitration.

3 MR. WHATLEY: That's true, but if -- if -- if a
4 court or an arbitrator can't grant the remedies that
5 Congress has authorized for a violation, including for a
6 criminal violation, if the court can't grant that relief,
7 then there is a serious public policy problem with putting
8 the parties into that forum to make that decision.

9 QUESTION: And just what is that public policy
10 problem?

11 MR. WHATLEY: The public policy problem is
12 that -- is that the arbitrator then cannot remedy it.

13 QUESTION: Well --

14 QUESTION: Well, do you take the position that
15 the arbitrator in a case like this could not even --
16 could -- let's assume -- let's assume the arbitrator took
17 the position that he couldn't award treble damages. Do
18 you take the position that under this contract the
19 arbitrator could not award simple compensatory damages?

20 MR. WHATLEY: Under the plain language of the
21 United contract, yes, Your Honor, because it says no
22 extracontractual damages.

23 QUESTION: And do you take the position that he
24 couldn't even determine liability?

25 MR. WHATLEY: No, Your Honor, I don't take

1 that --

2 QUESTION: Well, who --

3 QUESTION: Then why isn't this premature? I

4 mean, as Justice Ginsburg says, suppose he finds no

5 violation? That's the end of it.

6 MR. WHATLEY: It -- it -- it's premature because

7 it -- it is a -- it is -- it is a wasted process if you

8 can go through a proceeding --

9 QUESTION: You mean it's not premature.

10 MR. WHATLEY: To go through the arbitration

11 process, when you know in advance that -- that the

12 arbitrator can't fully remedy the violation --

13 QUESTION: But maybe the arbitrator will run --

14 reach a conclusion that is consistent with the contract,

15 say simple contract damages, and then it is not a waste of

16 time.

17 MR. WHATLEY: But Your Honor, that's exactly

18 what Judge Moreno did.

19 QUESTION: Why doesn't --

20 MR. WHATLEY: Judge Moreno said that the

21 contract claim goes to the arbitrator.

22 QUESTION: Well, so then you're splitting the

23 thing up.

24 MR. WHATLEY: But -- but Your Honor, you split

25 things up in Byrd.

1 QUESTION: Well --

2 MR. WHATLEY: You split things up in Volt. And
3 -- and I mean, that is not -- there are many cases where
4 some cases go to arbitration and some cases --

5 QUESTION: Well --

6 MR. WHATLEY: And some claims stay in court.

7 QUESTION: But what you're saying is, one issue
8 goes to arbitration, the other one doesn't.

9 MR. WHATLEY: And then the parties decide, do
10 they want to pursue that issue in arbitration.

11 QUESTION: That just really complicates the
12 procedure.

13 MR. WHATLEY: Actually, it did not. In this
14 instance, it really simplified the situation, because here
15 what you're dealing with, and what the focus of the claims
16 are on, is -- is the automatic adjudication of claims the
17 way they -- the way they adjudicate claims of doctors
18 through computerized processes that by computerization
19 automatically down-code a bundle.

20 You're dealing with claims that are \$5, \$10,
21 \$15, that frankly can't be resolved through an arbitration
22 process or any process on a claim by claim basis, but the
23 judge said, you've got to go forward in arbitration on the
24 breach of contract claims and, since those weren't
25 practical to pursue in any forum, we made the decision,

1 and the -- and the doctors, the individual doctors made
2 the decision not to pursue them. Those are over. It was
3 resolved very efficiently in the district court on whether
4 the claims should be arbitrated or not arbitrated, and
5 that dispute ended, and -- and so it was done very, very
6 efficiently in this instance.

7 QUESTION: When you wrote that word, or whoever
8 wrote it, the word extracontractual, no extracontractual
9 damages, now, I guess it could mean one of two things. It
10 could mean what you think it means, which is, you can't
11 bring any tort cases, all you can bring are contract
12 cases, you can't bring any statutory cases in arbitration,
13 or it might mean, if you happen to have a contract case,
14 if that's the nature of the case, you cannot give damages
15 for mental suffering or other kinds of punitive damages in
16 a contract case.

17 Now, if you were drafting this, and you wanted
18 it to mean the first, rather than meaning the second, why
19 didn't you just write the words, there won't be a tort
20 case?

21 MR. WHATLEY: Well --

22 QUESTION: Why didn't you just write the words,
23 there won't be a statutory case?

24 MR. WHATLEY: Well --

25 QUESTION: Why did you run all around Robin

1 Hood's barn in order to -- whatever they -- my -- Rob --
2 whatever you say. I mean, why did you get such a
3 complicated way just to tell people, we don't want tort
4 cases in -- or this arbitration?

5 MR. WHATLEY: Your Honor, first of all, I didn't
6 write this.

7 QUESTION: Of course you didn't.

8 (Laughter.)

9 QUESTION: I'm sorry, I didn't mean to suggest
10 it's your fault.

11 MR. WHATLEY: This is -- this is -- this is in
12 the form contract that United presented to -- to doctors
13 and medical groups and had them sign under a section that
14 says, resolution of disputes, that only refers to
15 arbitration when you get down into the print. It's not
16 even -- it's not even entitled arbitration, but -- but --
17 but I mean, could I have written it differently to say --
18 of course I could.

19 But I mean -- I mean, they wrote it, and -- and
20 -- and it's really our position that they wrote it to
21 discourage doctors from being able to -- to -- to recover
22 claims in arbitration, and to limit what doctors could
23 recover, not only to send them to arbitration, but then
24 also to place limits on what they could get once they got
25 there, because they didn't limit, they didn't have a

1 provision, like they seem to say in their briefs, we
2 waive, each party waives punitive damages against the
3 other, and then you would have to consider under State
4 law, can you do that, depending on where you are.
5 Instead, they say --

6 QUESTION: That is not an objection, in its --
7 in itself, that goes to the question presented here, the
8 fact that you think it's a one-sided contract. I mean,
9 there are lots of one-sided contracts that are enforced.

10 MR. WHATLEY: Well, that's true, but I think it
11 has to be taken into the mix. That -- that's absolutely
12 right, there -- there are one-sided contracts that are
13 enforced, and -- and lots of one-sided arbitration
14 contracts that are enforced, but --

15 QUESTION: I'm not clear on what you lose at the
16 end of the day if you let the arbitrator decide whether
17 there was a RICO violation, and if there is such a
18 violation, then you reach the remedy issue, and if the
19 arbitrator were somehow to take the position that treble
20 damages were not available, I assume that could then be
21 resolved in court, could it not? I mean, what do you lose
22 at the end of the day?

23 MR. WHATLEY: Well, here's -- here's the problem
24 with that, especially if you read the -- the Eleventh
25 Circuit RICO decisions. The issue of remedy --

1 QUESTION: Uh-huh.

2 MR. WHATLEY: -- and -- and in cases like Sykes,
3 and I apologize, this is going beyond what's in the
4 briefs, but I'm trying to answer your question.

5 QUESTION: Uh-huh.

6 MR. WHATLEY: And -- and in cases like Sykes,
7 the issue of damages, either to the individual plaintiffs,
8 or the damages to the class --

9 QUESTION: Uh-huh.

10 MR. WHATLEY: -- are so wound up in the question
11 of RICO violation that what you're left with, then, is
12 trying the case twice if you do it the way you suggest.

13 Now --

14 QUESTION: I don't understand that. If the
15 damages initially are compensatory, I mean, the difference
16 between punitive damages and these treble damages is, you
17 get a number that's compensatory, and then you multiply it
18 by three. It's not, you send it to the jury and the sky's
19 the limit, so I don't understand your answer about it
20 being bound up with anything -- it's -- it's an ordinary
21 measure of compensatory damages that the judge, the
22 arbitrator or the judge, whichever forum you're in,
23 triples.

24 MR. WHATLEY: I'm sorry, Justice Ginsburg, I
25 thought I was answering the question of -- of what's the

1 problem with trying violation first, assuming the
2 arbitrator couldn't award damages, and then trying damages
3 later.

4 QUESTION: But I thought that you were answering
5 that question, but you're saying the reason you can't try,
6 was there a RICO violation first, is that the remedy is
7 inextricably bound up with --

8 MR. WHATLEY: That's right.

9 QUESTION: -- the answer to that question.

10 MR. WHATLEY: That's right, so if the arbitrator
11 couldn't award damages in the first place, you would be
12 trying damages in the first instance. You would only get
13 a determination of violation, and then you would go back
14 somewhere else, presumably, and try the question of
15 remedy, and you would retry the question of damages.

16 QUESTION: I don't follow that.

17 QUESTION: No, but if the arbitrator can award
18 simple damages --

19 MR. WHATLEY: If the arbitrator --

20 QUESTION: -- one times one damages, then that
21 objection doesn't apply.

22 MR. WHATLEY: Then that takes away that
23 objection, but I didn't understand that to be the question
24 I was asked.

25 QUESTION: And that may -- and that may be what

1 the arbitrator decides.

2 MR. WHATLEY: Well, it -- it -- it could be what
3 the arbitrator decides. Under our reading of what United
4 wrote out there, and under our reading of no punitive
5 damages, after this Court has developed the concept of
6 punitive damages in Gore, so -- I mean, there's almost a
7 presumed trebling issue there, that if you get much below
8 that, beyond that, there become constitutional questions.

9 With -- with the development of that, then --
10 then we don't see there -- we see severe problems,
11 especially as that law developed, and especially as the
12 tax, your -- your -- based on your tax decisions, saying
13 treble damages are punitive damages.

14 QUESTION: And we've also said that --

15 QUESTION: It seems to me that what you're --
16 you're -- you're doing is, you're saying that it's
17 necessary for us to declare the -- the scope of the
18 arbitration in court before the arbitration proceeds.
19 That's what the argument amounts to --

20 MR. WHATLEY: No --

21 QUESTION: -- and I think that's inconsistent
22 with the whole idea of the efficiencies to be obtained by
23 the arbitral process.

24 MR. WHATLEY: What -- what I'm saying is much
25 more limited than that, Your Honor. What I'm saying is

1 that in instances where someone like United or Pacificare
2 decides not only to insist on an arbitration agreement but
3 also to place limits on what the remedies are that the
4 arbitrator can award, and that's what they did here, in
5 those instances, the Court should look at what those
6 limitations are on remedies and make a public policy
7 determination if there's a Federal statutory claim out
8 there.

9 QUESTION: Well, then you're opening up --
10 you're really expanding the gateway concept. In other
11 words, you're no longer talking about, did the parties
12 agree to submit this to arbitration. You're talking about
13 remedial terms.

14 MR. WHATLEY: Well, Your Honor, remedy is
15 different than procedure, and -- and -- and -- and as I
16 read Howsam -- and obviously, I mean, you know, it's a
17 fresh opinion. You all are all much closer to it than I
18 am, but as I read Howsam, it draws the procedural,
19 substantive distinction. Remedies are not procedural
20 issues, and remedies can have a direct impact on public
21 policy questions, and so for that limited area --

22 QUESTION: Well, but of course, you can say
23 procedural issues will have an impact on public policy
24 issues, too.

25 MR. WHATLEY: Well, you certainly can, and if

1 they go far enough, and I think that's what you were
2 saying in Green Tree, had the record gone far enough in
3 Green Tree, what the Court -- the court said, there could
4 be instances where the limitations that are placed on,
5 procedurally on getting to arbitration go far enough that
6 they void the arbitration clause --

7 QUESTION: We --

8 MR. WHATLEY: -- but the record there didn't go
9 far enough.

10 QUESTION: Well, and we didn't -- we did not
11 express a view as to what the situation would be if the
12 record had been different. We simply said, conceivably it
13 might.

14 MR. WHATLEY: That -- that -- that's true, Your
15 Honor, which I assume, and courts below I think are now,
16 there are situations where records are being developed
17 further to determine, so that the trial courts can make
18 that determination, has the remedy, has the arbitration
19 process been so impeded by those procedural issues that
20 you can't enforce it.

21 QUESTION: Could two parties agree in advance
22 that if a RICO violation comes up they will only have
23 double damages, nothing about arbitration, just in court?

24 MR. WHATLEY: No, Your Honor.

25 QUESTION: They cannot?

1 MR. WHATLEY: No.

2 QUESTION: Can -- can you do it in an antitrust
3 case?

4 MR. WHATLEY: No.

5 QUESTION: Can you ever do it?

6 MR. WHATLEY: In -- in our judgment, Your Honor,
7 you -- you cannot do it.

8 QUESTION: Can two parties agree in a tort suit
9 that -- before there's a tort committed, that if there is
10 a tort, no damages greater than a million dollars in
11 punitives will be collected?

12 MR. WHATLEY: It depends on the State law.

13 QUESTION: So why doesn't it --

14 MR. WHATLEY: That's a State law question.

15 QUESTION: -- but under Federal law you
16 cannot -- it's void against public policy to limit in any
17 way any possible damages in a future lawsuit?

18 MR. WHATLEY: Your Honor, in Mc --

19 QUESTION: Is there -- has that been decided?
20 I --

21 MR. WHATLEY: In McMahon you said that -- that
22 parties cannot waive securities, future securities
23 violations even if there was a deal so that you got a
24 lower -- a lower payment for the transaction.

25 In Barrentine you said, either parties or unions

1 can't respectively waive Fair Labor Standards Act
2 violations in the future.

3 QUESTION: The question didn't go to waiving the
4 violations.

5 MR. WHATLEY: I --

6 QUESTION: It went only to the remedy.

7 MR. WHATLEY: It went to remedy, and what you've
8 got, Your Honor, I think is, Congress has established what
9 that remedy is, and I think it would be void as against
10 public policy. I mean --

11 QUESTION: But you then want us to adopt a
12 specific gateway rule when any arbitration agreement
13 limits a statutory remedy, and that statutory violation
14 would be arbitrable, and as I understand it, your rule is,
15 any limitation in an arbitration agreement of statutory
16 remedy raises a question of public policy, a question of
17 public policy is a gateway arbitrability question, and it
18 always goes to the court first. Is --

19 MR. WHATLEY: Yes, sir.

20 QUESTION: Is that a fair statement --

21 MR. WHATLEY: Yes, sir. For that --

22 QUESTION: -- your position?

23 MR. WHATLEY: For that limited issue of, did the
24 -- did the limitation, is there a limitation on the remedy
25 authorized by Congress.

1 QUESTION: And that's, I guess you want to say
2 for -- leaving arbitration out of it, that sounds very
3 far-reaching, because I would have thought the matter
4 might have varied, depending upon the statute. I mean, I
5 would have thought Congress could sometimes pass a statute
6 with remedies, that it would not be against public policy
7 for two private persons to limit --

8 MR. WHATLEY: Your Honor, Congress --

9 QUESTION: Was it always -- in your view,
10 always, no matter what the statute, two people cannot say
11 in advance, we will, if there should -- should a violation
12 arise, we will agree that, in advance, that the limitation
13 will not exceed \$10 million -- or the damages won't
14 exceed -- put in some reasonable amount?

15 MR. WHATLEY: I suppose in theory Congress could
16 say, in the act, parties can waive this respectively.

17 QUESTION: It's only waiving, putting a
18 limitation on damages.

19 MR. WHATLEY: Congress -- Congress has not done
20 that, and yes, Your Honor, that is our position. If
21 Congress establishes a remedy for a violation, and I think
22 this is discussed in much more detail in the Public
23 Citizen amicus brief that's submitted than it was in our
24 briefs, because we were trying to address the specific --

25 QUESTION: Yeah, yeah, yeah.

1 MR. WHATLEY: -- arbitration issues and
2 limitations within arbitration, which is the issue before
3 this Court.

4 QUESTION: Well, but that's -- I think Vi mar
5 cuts the other way, so the COGSA -- COGSA was certainly a
6 statute enacted by Congress.

7 MR. WHATLEY: And -- and the Court said, it's
8 not clear here whether that's going to be followed or not
9 followed.

10 QUESTION: Yes.

11 MR. WHATLEY: I think you said, it is not clear
12 to us whether that will be followed or not followed in
13 this instance, and that's --

14 QUESTION: If --

15 MR. WHATLEY: That's why you allowed it to
16 proceed.

17 QUESTION: If your view was correct, that whole
18 issue should have gone to a judge beforehand.

19 MR. WHATLEY: Well, except that there's no -- I
20 don't read that. There are two issues --

21 QUESTION: You don't what?

22 MR. WHATLEY: I don't read that as saying
23 specifically that that act would not be followed, number
24 one, their contract.

25 Number two, there is the separate consideration

1 there, as in Mitsubishi, of the concerns about
2 international, of international relations, where you have
3 said you've got to be especially hands off, and that issue
4 is not involved here.

5 QUESTION: Well, but what's involved, which is
6 identical, is the kind of prudential consideration for
7 courts, don't decide a difficult issue unless you have to.
8 Now, in Vimar it just said, look, we may never have to
9 decide this. Send it to the arbitrator and see.

10 Now what you've suggested is to my mind a pretty
11 tough issue.

12 MR. WHATLEY: Well --

13 QUESTION: And we may never have to decide it,
14 or at least not soon.

15 MR. WHATLEY: Well, you might not..

16 QUESTION: Yes.

17 MR. WHATLEY: You might not, but it's not just,
18 it's a tough issue, send it to the arbitrator and let the
19 arbitrator decide.

20 QUESTION: The arbitrator will interpret the
21 contract to see if it really arises.

22 MR. WHATLEY: But Number 2, it's also in an
23 international setting, where we've got to be, be, you
24 know, be concerned about that and grant all possible
25 deference to that situation.

1 If there are not other questions --

2 QUESTION: I have one question, and it's about
3 something that the petitioner represented in the
4 petitioners' brief at note 12, page 23.

5 The petitioner represented to us that you
6 represented to this Court that if any issue is sent to
7 arbitration you simply will give up the claim, that you
8 will not arbitrate any issue in this case. Do you still
9 take that position, that -- is this representation
10 correct, that you have disclaimed any intention to
11 arbitrate any claim sent to arbitration?

12 MR. WHATLEY: Your Honor, that gets back to the
13 problem that I was addressing before. The claims here on
14 a claim by claim basis are so small that you cannot take
15 them to arbitration.

16 QUESTION: Well, let's take the RICO claim. If
17 you lose on where that goes first, if it goes to
18 arbitration first, are you -- are you saying that you will
19 not -- that you will abandon the case anyway?

20 MR. WHATLEY: Well, it's not abandoning the
21 case, Your Honor, because there is a separate conspiracy
22 and aiding and abetting claim that is going forward that
23 is not up before this Court.

24 QUESTION: But I mean the --

25 MR. WHATLEY: And the claim here, if we have to

1 -- have to resolve those, even the RICO claims, even if
2 you treble \$5 to get \$15, if we have to try those on a
3 claim by claim basis, in terms of what the doctors'
4 damages are, it can't be done, and we will not proceed.

5 QUESTION: But why would the trial be different
6 in court versus arbitration on that?

7 MR. WHATLEY: Well, because -- and -- and -- and
8 I know you're going to address this issue in Basil to some
9 extent, but the issue in court, the issues have been
10 certified in the court, so they're proceeding as a class
11 action, which is the only way that -- that claims of this
12 magnitude can be handled, and so that's our problem. If
13 we could proceed in arbitration on a class-wide basis,
14 sure we would do it, and -- and doing that in the Federal
15 system has limits thus far, but -- but proceeding on a
16 claim by claim basis, where the damages are \$5, \$10, \$15,
17 \$50 for the bundling down claim --

18 QUESTION: Have you gotten a certification of
19 anything in the district court? Did you --

20 MR. WHATLEY: Yes, Your Honor.

21 QUESTION: You did?

22 MR. WHATLEY: Yes. Yes. The trial court has
23 certified the claims that -- that -- that are -- that are
24 -- that -- that -- that -- that were not referred to
25 arbitration. The -- that currently is on appeal, on a

1 23(f) appeal to the Eleventh Circuit. We've moving
2 forward with discovery on those claims that are certified.

3 QUESTION: How broad is it? Is it Nationwide?

4 MR. WHATLEY: Yes, Your Honor, it's Nationwide.

5 QUESTION: Thank you, Mr. Whatley.

6 MR. WHATLEY: Thank you, Your Honors.

7 QUESTION: Mr. Grauer, you have 3 minutes left.

8 REBUTTAL ARGUMENT OF WILLIAM E. GRAUER

9 ON BEHALF OF THE PETITIONERS

10 MR. GRAUER: Mr. Whatley's argument about \$5
11 here and \$10 there is flatly inconsistent with what the
12 district judge found, and you can note at page A25 of our
13 cert petition that the court found that these cases were
14 negotiated by sophisticated groups of doctors, that the
15 claims were not small, that in fact the doctors were
16 enlarging an ongoing pattern -- that's about midway
17 through page A25 of our cert petition, that that is an
18 ongoing pattern of instances.

19 Mr. Whatley's comment about the -- the
20 conspiracy claim has been certified and is going forward
21 is exactly an example of the problem. Conspiracy is
22 simply a remedy that's -- that -- a way of creating
23 liability for an underlying cause of action, and the
24 arbitration clauses in this case require the doctors to
25 arbitrate all of their disputes with the managed care

1 companies, and they're trying to circumvent that on a mass
2 basis both in this appeal and by trying to say that the
3 conspiracy claims are not part of the arbitration clause,
4 and we don't think that's appropriate, and we think when
5 we talk about remedies in our cert petition, that would
6 include methods of holding someone liable for a claim, and
7 the Court ought to take a look at that in the record of
8 the case.

9 But I would agree fundamentally with a point
10 that I -- I thought I heard Justice Souter making a moment
11 ago, and that is that if Mr. Whatley's premise that any
12 remedial limitation becomes a gateway issue of
13 arbitrability, we are throwing -- we are overruling *Howsam*
14 after only a few weeks, because the whole point of *Howsam*
15 was, you look to whether the parties made an agreement to
16 arbitrate, and you look to whether the dispute is in the
17 scope of the agreement.

18 And here, at page A40 of our petition, the Court
19 finds this is an exceptionally broad arbitration
20 agreement. It includes any and all controversies, and the
21 Court found that. That has never been appealed. Every --
22 all of the claims are within the scope of it, and it is
23 complete speculation to suggest that that, that any of
24 these claims are not within the scope of the arbitration
25 agreement.

1 The -- the -- with re -- a final point with
2 reference to the intent of the parties. The parties would
3 intend an arbitrator to decide remedial limitations, and
4 the reason why the parties would intend the arbitrator to
5 decide that is because the parties have agreed to
6 arbitrate. They have a dispute in the scope. They would
7 never intend to go to court at all. They would intend to
8 go to arbitration and comply with their agreement, and the
9 question of remedies would be the last thing that would
10 come up in the event, on a speculative basis, that they
11 prevail, and they ought not to be able to get away from
12 that basic principle by labels, the label of punitive
13 damages, the label of RICO, the label of conspiracy.
14 Those labels are being used to take away the rights of
15 managed care companies on a wholesale, nationwide basis to
16 have these types of disputes resolved by arbitrators, as
17 the parties have agreed, and instead they're trying to
18 turn it into a nationwide class action.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Grauer.

20 The case is submitted.

21 (Whereupon, at 11:01 a.m., the case in the
22 above-entitled matter was submitted.)

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