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## Pigs Do Fly: A New Test Limiting the Scope of Arbitration Clauses in South Carolina

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**PIGS DO FLY:  
A NEW TEST LIMITING THE SCOPE OF ARBITRATION CLAUSES IN  
SOUTH CAROLINA**

I. INTRODUCTION

In 2007, the South Carolina Supreme Court decided that arbitration clauses are unenforceable when unforeseeable, outrageous torts are committed against a party.<sup>1</sup> In so ruling, the court put defendants on notice that it would no longer allow a policy favoring arbitration to prevail over the contract and tort principles upon which both plaintiffs and defendants have depended for centuries.<sup>2</sup> In *Aiken v. World Finance Corp. of South Carolina*<sup>3</sup> and *Chassereau v. Global-Sun Pools, Inc.*,<sup>4</sup> the South Carolina Supreme Court ruled that arbitration clauses are inapplicable to acts that are outrageous and unforeseeable. In light of the overwhelming policy in both South Carolina and federal caselaw favoring arbitration,<sup>5</sup> these decisions were unexpected but welcomed by plaintiffs' attorneys throughout the state.

In these two cases, the court distinguished between outrageous torts that are factually related to the performance of the contract and the parties' contractual relationship itself.<sup>6</sup> The court used the reasonable person standard to determine whether the injured party intended to arbitrate the relevant issue, noting that the standard is "deeply rooted in tort law."<sup>7</sup> This outcome was not anticipated because prior to the holdings of these two cases, the policy favoring arbitration made it practically impossible to avoid arbitration if an agreement to arbitrate existed.<sup>8</sup> The holdings in *Aiken* and *Chassereau* provide a way to avoid arbitration for parties victimized by the opponent's tortious behavior to the point that arbitration should not be required. In the two cases, the court formulated a new test to determine whether disputes should be arbitrated when one party has committed an outrageous, unforeseeable tort: if a party has engaged in outrageous, tortious behavior "unforeseeable to the reasonable consumer," the court will disregard any agreement to arbitrate reached between the two parties.<sup>9</sup>

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1. *Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007); *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 644 S.E.2d 705 (2007).

2. *See Chassereau*, 373 S.C. at 172, 644 S.E.2d at 720; *Aiken*, 373 S.C. at 151, 644 S.E.2d at 709.

3. 373 S.C. at 151, 644 S.E.2d at 709.

4. 373 S.C. at 172, 644 S.E.2d at 720.

5. *See, e.g., Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (citing *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct. App. 2000) (noting the policy in favor of arbitration in both state and federal caselaw).

6. *Chassereau*, 373 S.C. at 172, 644 S.E.2d at 720; *Aiken*, 373 S.C. at 152, 644 S.E.2d at 709.

7. *Aiken*, 373 S.C. at 151 n.6, 644 S.E.2d at 709 n.6.

8. *See, e.g., Carolina Care Plan, Inc. v. United Healthcare Servs., Inc.*, 361 S.C. 544, 558–59, 606 S.E.2d 752, 760 (2004) (finding an arbitration clause enforceable despite the plaintiff's claims that it was fraudulent, unconscionable, and a violation of public policy); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541–42, 542 S.E.2d 360, 364–65 (2001) (finding an arbitration clause enforceable despite the plaintiffs' claims that it was unenforceable due to unconscionability and lack of mutuality, and that the clause was invalidated by the State Consumer Protection Code).

9. *See Chassereau*, 373 S.C. at 172, 644 S.E.2d at 720; *Aiken*, 373 S.C. at 151, 644 S.E.2d at 709.

In an effort to understand all the implications of the *Aiken* and *Chassereau* decisions, Part II of this Note briefly reviews the history of arbitration in the United States and South Carolina. Part III then discusses the current theories South Carolina courts use to declare arbitration agreements invalid. Following a review of the defenses to the enforceability of arbitration clauses in Part III, Part IV examines the *Aiken* and *Chassereau* decisions and explains the new method by which parties can avoid arbitration. Part V concludes with a discussion concerning the new test for arbitration of claims involving outrageous, tortious conduct, the effects the decisions will have on South Carolina arbitration law, and the reasons the court made the correct decision.

## II. HISTORICAL PERSPECTIVE ON ARBITRATION IN THE UNITED STATES AND IN SOUTH CAROLINA

In 1920, New York passed a state arbitration act that provided for the enforcement of arbitration agreements.<sup>10</sup> With the support of the newly created Arbitration Society of America, the New York enactment encouraged other states and the federal government to create their own arbitration acts.<sup>11</sup> Due to the popularity of such a policy, Congress passed<sup>12</sup> the “centerpiece of domestic American arbitration law”<sup>13</sup>—the Federal Arbitration Act (FAA)<sup>14</sup>—in 1925.

The main purpose for passing the FAA was to encourage the enforcement of arbitration clauses where courts had historically refused to do so.<sup>15</sup> This seeming manifestation of congressional intent prompted courts to enforce arbitration clauses in almost every case.<sup>16</sup> However, several commentators have argued that Congress did not intend for the FAA to sweep so broadly.<sup>17</sup> Professor Sternlight argues that Congress intended for the FAA to apply only to agreements between merchants with equal bargaining power.<sup>18</sup> During one of the committee hearings concerning the FAA, W. H. H. Piatt, Chairman of the American Bar Association Committee on Commerce, Trade, and Commercial Law, testified, “[The FAA] is purely an act

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10. Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 797 (2002).

11. *Id.* at 797.

12. Federal Arbitration Act, ch. 213, § 4, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1–14 (2000 & Supp. II 2002)).

13. Mark Berger, *Arbitration and Arbitrability: Toward an Expectation Model*, 56 BAYLOR L. REV. 753, 758 (2004).

14. 9 U.S.C. §§ 1–14 (2000 & Supp. II 2002).

15. See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

16. See, e.g., Pittman, *supra* note 10, at 889–90 (discussing how the Supreme Court has interpreted the FAA to apply to state courts although legislative history shows that Congress actually intended the Act to apply only to federal courts).

17. Zhaodong Jiang, *Federal Arbitration Law and State Court Proceedings*, 23 LOY. L.A. L. REV. 473, 483 (1990); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 334–38 (1996); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 647 (1996).

18. Sternlight, *supra* note 17.

to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it.”<sup>19</sup> Furthermore, in two early cases construing the FAA, the Supreme Court’s opinions reflect the desire to protect consumers by requiring that both parties clearly consent to arbitration of an issue in order for an arbitration clause to be enforceable.<sup>20</sup> This evidence supports Professor Sternlight’s opinion that Congress did not envision the FAA sweeping as broadly as it currently does.

In later cases, the Supreme Court has stated that in passing the FAA, Congress “was ‘motivated, first and foremost, by a . . . desire’ to change this antiarbitration rule” that had flooded the nation.<sup>21</sup> The goal was to force courts to “place [arbitration] agreements upon the same footing as other contracts.”<sup>22</sup> If this was indeed Congress’s goal, Congress certainly achieved it.

Under the FAA, the Supreme Court has stated clearly that if there is an agreement to arbitrate, a party will find overcoming the presumption in favor of arbitration practically impossible. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,<sup>23</sup> the Supreme Court stated that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”<sup>24</sup> The Court has left little room for interpretation by state courts. It has made clear that unless a court is certain that an arbitration clause does not apply to a particular dispute, an agreement to arbitrate should be enforced.<sup>25</sup>

Although arbitration provisions have appeared in South Carolina statutory law since 1896,<sup>26</sup> the South Carolina General Assembly did not pass the Uniform Arbitration Act until 1978.<sup>27</sup> Section 15-48-10 of the South Carolina Code states,

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>28</sup>

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19. *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing Before a Subcomm. of the Comm. on the Judiciary on S. 4213 and S. 4214*, 67th Cong. 9 (1923) (statement of W. H. H. Piatt, Chairman, ABA Comm. on Commerce, Trade, and Commercial Law).

20. Sternlight, *supra* note 17, at 648–49 (citing *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 200–01, 205 (1956); *Wilko v. Swan*, 346 U.S. 427, 435, 438 (1953)).

21. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270–71 (1995) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985)).

22. *Id.* at 271 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989)) (internal quotation marks omitted).

23. 460 U.S. 1 (1983).

24. *Id.* at 24–25.

25. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960).

26. 1896 S.C. Acts 193–94.

27. S.C. CODE ANN. § 15-48-10 to -240 (2005).

28. *Id.* § 15-48-10(a).

It is important to note that the South Carolina Uniform Arbitration Act does make exceptions to its applicability.<sup>29</sup> While the Act upholds the validity of arbitration agreements generally,<sup>30</sup> it does prohibit arbitration of workers' compensation or unemployment compensation claims,<sup>31</sup> prior agreements between doctors and their patients or lawyers and their clients,<sup>32</sup> and, perhaps most importantly, personal injury claims based on contract or tort.<sup>33</sup> Like the federal caselaw,<sup>34</sup> South Carolina caselaw has opined that state policy favors arbitration.<sup>35</sup> In language similar to that used by the United States Supreme Court,<sup>36</sup> the South Carolina Supreme Court has stated, "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."<sup>37</sup> Therefore, before the *Aiken* and *Chassereau* decisions in 2007, South Carolina had a policy which, apart from the noted statutory exceptions, favored arbitration over traditional litigation when a question existed as to whether a claim was subject to arbitration.<sup>38</sup>

### III. DEFENSES AGAINST ENFORCEMENT OF ARBITRATION CLAUSES IN SOUTH CAROLINA

South Carolina courts have recognized circumstances in which they will refuse to enforce arbitration agreements. The most common grounds for invalidating an arbitration agreement are general contract defenses.<sup>39</sup> However, states may not create special contract defenses specific to arbitration clauses.<sup>40</sup> Though typical contract defenses of unconscionability, fraud, and duress are always available, courts rarely invoke any of these doctrines besides unconscionability in invalidating arbitration provisions.<sup>41</sup> This Part briefly discusses some of the methods South

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29. *Id.* § 15-48-10(b).

30. *Id.* § 15-48-10(a).

31. *Id.* § 15-48-10(b)(2).

32. *Id.* § 15-48-10(b)(3).

33. *Id.* § 15-48-10(b)(4). This section also prohibits arbitration of claims regarding benefits under an insurance policy or annuity contract. *Id.*

34. See *supra* text accompanying notes 23–25.

35. See *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (citing *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct. App. 2000)).

36. Compare *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118 (noting South Carolina's clear policy favoring arbitration), with *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983) (finding that courts usually practice a "rapid and unobstructed enforcement of arbitration agreements").

37. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118 (citing *Towles v. United Healthcare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999)).

38. See *id.*

39. See S.C. CODE ANN. § 15-48-10(a) (2005) (stating that arbitration provisions are enforceable unless there are grounds "at law or in equity" for revoking the contract); *Zabinski*, 346 S.C. at 593, 553 S.E.2d at 116 (citing *Doctors Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996)).

40. *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987).

41. Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMUL. REV. 819, 851 (2003) ("[D]espite the presumably millions of arbitrations conducted under [F'AA] authority since its enactment in 1925, there are few reported cases invalidating arbitration agreements on traditional contract grounds

Carolina courts have used to invalidate arbitration provisions and then examines the new method of maneuvering around the state and federal policies in favor of arbitration.

#### A. Waiver

First, arbitration clauses may be invalidated if they are waived by the parties.<sup>42</sup> The party asserting waiver “has the burden of showing prejudice through an undue burden caused by a delay in the demand for arbitration.”<sup>43</sup> Whether a party has waived the right to arbitration is a fact-specific inquiry.<sup>44</sup> However, there are several factors that courts consider in determining whether a party has waived its right to have disputes arbitrated:

(1) [W]hether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration.<sup>45</sup>

Initially, courts will consider the amount of elapsed time between the filing of the suit and the motion to compel arbitration, along with the amount of discovery that has already taken place.<sup>46</sup> For example, in *Evans v. Accent Manufactured Homes, Inc.*,<sup>47</sup> the court found that Accent waived its rights to arbitrate where it failed to seek arbitration for nineteen months after commencing the action.<sup>48</sup> In contrast, the court in *General Equipment & Supply Co. v. Keller Rigging & Construction, SC, Inc.*<sup>49</sup> found that Keller had not waived its right to arbitrate where only eight months had elapsed between the filing of the action and the filing of the motion to compel.<sup>50</sup>

After analyzing the lapse of time between the filing of the suit and the motion to compel arbitration, a court will determine if the moving party has engaged in

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other than unconscionability.”).

42. *Toler’s Cove Homeowners Ass’n v. Trident Constr. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (citing *Gen. Equip. & Supply Co. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001)).

43. *Gen. Equip. & Supply*, 344 S.C. at 556, 544 S.E.2d at 645 (citing *Sentry Eng’g & Constr., Inc. v. Mariner’s Cay Dev. Corp.*, 287 S.C. 346, 351, 388 S.E.2d 631, 634 (1985)).

44. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999) (quoting *Hyload, Inc. v. Pre-Engineered Prods., Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992)).

45. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007).

46. *Id.*

47. 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003).

48. *Id.* at 551, 575 S.E.2d at 77.

49. 344 S.C. 553, 544 S.E.2d 643 (Ct. App. 2001).

50. *Id.* at 557, 544 S.E.2d at 645.

discovery that has resulted in prejudice to the nonmoving party.<sup>51</sup> Finally, in order to prevail on a defense of waiver, the nonmoving party must show that it will experience more than a “mere inconvenience” if the court grants the motion to compel arbitration.<sup>52</sup> To determine this, courts will analyze whether the moving party has taken “advantage of the judicial system” in ways unavailable if the party had moved to compel arbitration at an earlier point.<sup>53</sup> If the moving party has engaged in a significant amount of discovery, the court will likely find that the nonmoving party has suffered prejudice and the party seeking arbitration has waived the right, and the court will therefore deny the motion to compel arbitration.<sup>54</sup>

### B. *Unconscionability*

Another defense to the enforcement of arbitration clauses is unconscionability, which applies to arbitration clauses and contracts in general.<sup>55</sup> South Carolina caselaw defines *unconscionability* using a two part test: “the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.”<sup>56</sup>

The test’s first prong, whether there was an absence of meaningful choice by one of the contracting parties, requires the court to determine if the bargaining process between the parties was fair.<sup>57</sup> In order to make this determination, a court will look to several indicators: the disparity of bargaining power between the parties; their levels of sophistication; the nature of the plaintiff’s injuries; whether the plaintiff would be surprised by the existence of the arbitration clause; the prominence of the arbitration clause in the contract; and whether the plaintiff is a substantial business concern.<sup>58</sup> In *Munoz v. Green Tree Financial Corp.*,<sup>59</sup> the

51. *Compare Evans*, 352 S.C. at 551, 575 S.E.2d at 77 (finding waiver where one party had utilized discovery tools such as depositions, which are not traditionally available in arbitration), *with Gen. Equip. & Supply*, 344 S.C. at 557, 544 S.E.2d at 645 (finding no waiver where the parties were involved in “routine administrative matters and limited discovery which did not involve the taking of depositions or extensive interrogatories”).

52. *Rhodes v. Benson Chrysler–Plymouth, Inc.*, 374 S.C. 122, 127, 647 S.E.2d 249, 251 (Ct. App. 2007) (quoting *Evans*, 352 S.C. at 550, 575 S.E.2d at 76–77) (internal quotation marks omitted).

53. *Id.* at 127, 647 S.E.2d at 251 (quoting *Evans*, 352 S.C. at 548, 575 S.E.2d at 76) (internal quotation marks omitted).

54. *Id.*

55. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001) (citations omitted).

56. *Carolina Care Plan, Inc. v. United Healthcare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004) (citing *Fanning v. Fritz’s Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996)).

57. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007).

58. *Id.* (citing *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 295 (4th Cir. 1989)). Any party attempting to invalidate an arbitration clause for reasons of unconscionability must look to the arbitration clause itself, not the contract as a whole. *See Carolina Care*, 361 S.C. at 550–51, 606 S.E.2d at 755 (citations omitted). While it is difficult to prove unconscionability as a defense to a contract, it is even more difficult to prove unconscionability in reference specifically to the arbitration clause. If

plaintiffs argued that an arbitration clause, which appeared in their installment contract and security agreement with the defendant, should be declared unconscionable because the clause was part of an adhesion contract and because they were never informed that the arbitration clause was in the contract.<sup>60</sup> The trial court found that the arbitration clause was unconscionable, but the South Carolina Court of Appeals reversed, pointing out that adhesion contracts are not per se unconscionable.<sup>61</sup> The South Carolina Supreme Court agreed with the court of appeals and commented that a “person who can read is bound to read an agreement before signing it.”<sup>62</sup>

The second prong of the unconscionability test asks whether the clause contains “oppressive” terms.<sup>63</sup> In making this determination, a court will look to see if the clause violates “public policy, statutory laws, or provisions of the Constitution.”<sup>64</sup> In *Simpson v. MSA of Myrtle Beach, Inc.*, the arbitration clause in question contained terms barring the arbitrator from granting punitive damages to either party.<sup>65</sup> Statutes requiring the court to grant such damages governed two of the allegations in the plaintiff’s complaint.<sup>66</sup> The court found that the terms of the arbitration clause were oppressive because they violated statutory laws and their underlying public policies.<sup>67</sup> In *Toler’s Cove Homeowners Ass’n v. Trident Construction Co.*,<sup>68</sup> the court examined whether terms in an arbitration clause requiring \$11,000 in arbitration fees and a deposit by the American Arbitration Association (AAA) constituted oppressive terms for an already defunct corporation.<sup>69</sup> The court concluded that the terms were not oppressive because when the parties actually divided the arbitration fees, the petitioner would only be responsible for the \$2,500 case service fee plus any advance money the AAA required, all of which would be split among the five parties in the action.<sup>70</sup> Even though the court did not find the subject terms oppressive, this case does suggest that if the cost of arbitration is unreasonably high, or if a party cannot reasonably afford the expenses associated with arbitration, a court will consider either or both of those circumstances in determining the fairness of the terms. If the court did find terms regarding cost to be oppressive, the court could invalidate the arbitration

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the party wishing to avoid arbitration cannot prove that the arbitration clause itself is unconscionable, the defense of unconscionability will fail.

59. 343 S.C. 531, 542 S.E.2d 360 (2001).

60. *Id.* at 541, 542 S.E.2d at 365.

61. *Id.* at 537, 542 S.E.2d at 362–63.

62. *Id.* at 541, 542 S.E.2d at 365 (citing *Hood v. Life & Cas. Ins. Co. of Tenn.*, 173 S.C. 139, 143, 175 S.E. 76, 77 (1934)).

63. *Carolina Care*, 361 S.C. at 554, 606 S.E.2d at 757 (citing *Fanning v. Fritz’s Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996)).

64. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 29–30, 644 S.E.2d 663, 671 (2007) (citing *Carolina Care*, 361 S.C. at 555, 608 S.E.2d at 758).

65. *Id.* at 28, 644 S.E.2d at 670.

66. *Id.* at 28–29, 644 S.E.2d at 670–71.

67. *Id.* at 30, 644 S.E.2d at 671.

68. 355 S.C. 605, 586 S.E.2d 581 (2003).

69. *Id.* at 613, 586 S.E.2d at 585.

70. *Id.*



clause.<sup>71</sup> However, the South Carolina Supreme Court has also made it clear that it will not invalidate an arbitration clause based on a lack of mutuality in its terms.<sup>72</sup>

Unconscionability is the defense that most parties typically argue in seeking to invalidate an arbitration clause. In *Hooters of America, Inc. v. Phillips*,<sup>73</sup> Hooters drafted an arbitration agreement that greatly diminished the neutrality of the arbitration process used with employees.<sup>74</sup> One of the challenged provisions required employees to provide notice to Hooters, including a summary of all witnesses' statements, at the outset of a claim, but it did not require Hooters to make "any responsive pleadings" to the employee.<sup>75</sup> The agreement also gave Hooters control over the membership of the entire arbitration panel: the employee could only select arbitrators from a list, which Hooters created.<sup>76</sup> Furthermore, the agreement allowed Hooters, but not the employee, to do any of the following: move for summary judgment, record or videotape the arbitration proceeding, expand the scope of the arbitration to include any matter not related in the employee's claim, terminate the agreement to arbitrate with thirty days' notice, and "modify the [arbitration] rules, in whole or in part, whenever it wishe[d] and without notice to the employee."<sup>77</sup> The Fourth Circuit affirmed the district court's invalidation of the arbitration clause because the terms of the arbitration clause were so biased in favor of the employer that the company had created "a sham system unworthy even of the name of arbitration."<sup>78</sup> The court instructed that the focus in determining the unconscionability of an arbitration clause should be on whether it is evident that the

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71. *Id.* at 613, 586 S.E.2d at 585–86 (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000)) (finding that a party seeking to invalidate an arbitration clause failed to show that arbitration would be prohibitively expensive); *see also Green Tree*, 531 U.S. at 90–91 & n.2 (2000) (finding that if an arbitration clause is silent on the issue of how the parties would share arbitration costs, a court cannot invalidate the clause on the basis that it is cost-prohibitive unless the party proves it is likely to incur such prohibitive costs); Michael D. Fielding, *How to Avoid Arbitration in Bankruptcy: Six Arguments in Your Arsenal*, AM. BANKR. INST. J., July/August 2007, at 24, 25 (2007) ("In some instances, courts have held cost-shifting provisions in arbitration agreements to be cost-prohibitive and/or unconscionable and thus unenforceable.").

72. *Simpson*, 373 S.C. at 31, 644 S.E.2d at 672. *But see Hull v. Norcom, Inc.*, 750 F.2d 1547, 1549 (11th Cir. 1985) (stating that under New York law, lack of mutuality is a defense to the enforceability of an arbitration agreement); Shelly Smith, Comment, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191, 1241 (2001) (explaining that in some jurisdictions an arbitration clause that waives the rights of one party to the judicial system but leaves judicial remedies as an available option for the other party supports a finding of unconscionability, especially in adhesion contracts).

73. 173 F.3d 933 (4th Cir. 1999).

74. *Id.* at 938.

75. *Id.*

76. *Id.* at 938–39. Hooters did not exclude any potential members of its staff or management from acting as arbitrators on the panel, nor did the company exclude arbitrators who had familial or financial relationships with the company. *Id.* at 939.

77. *Id.* (internal quotation marks omitted). These provisions were so one sided that the AAA, the National Academy of Arbitrators, and the Society of Professionals in Dispute Resolution spoke out in favor of the employees and stated that they would never agree to enforce such a biased arbitration agreement. *Id.*

78. *Id.* at 940–41.

underlying goal of the agreement is to achieve an unbiased decision made by a neutral decisionmaker.<sup>79</sup>

### C. *Fraud*

Another defense to the enforcement of arbitration clauses involves fraud. In order to invalidate an arbitration clause on the basis of fraud, the party seeking to avoid arbitration must show that the opposing party fraudulently induced the signing of the arbitration agreement<sup>80</sup> by establishing the following elements:

- (1) a representation, (2) its falsity, (3) its materiality, (4) knowledge of its falsity or reckless disregard of its truth or falsity, (5) intent that the representation be acted upon, (6) the hearer's ignorance of its falsity, (7) the hearer's reliance on its truth, (8) the hearer's right to rely thereon, and (9) the hearer's consequent and proximate injury.<sup>81</sup>

Furthermore, the fraud must be specific to the arbitration clause itself.<sup>82</sup> Rescission of an entire contract does not invalidate the arbitration clause unless there is a separate challenge to the clause.<sup>83</sup>

In *South Carolina Public Service Authority v. Great Western Coal (Kentucky), Inc.*,<sup>84</sup> South Carolina Public Service Authority (Santee Cooper) entered into contracts with defendants, collectively referred to as Great Western, to purchase coal.<sup>85</sup> These contracts contained arbitration clauses.<sup>86</sup> Ten years after the parties entered into the contracts, Santee Cooper filed a lawsuit against Great Western; Clyde E. Goins, the company's president; and Joe Norman, a former employee of the company.<sup>87</sup> The lawsuit alleged "civil conspiracy, fraud, fraudulent interference with an employee contract, and breach of fiduciary duty by Norman."<sup>88</sup> Santee Cooper claimed that Great Western, through Goins and Norman, had raised the price of the coal but lowered its quality.<sup>89</sup> Goins moved to compel arbitration, but the trial court denied his motion, finding that the arbitration clause was

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79. *See id.*

80. *Carolina Care Plan, Inc. v. United Healthcare Servs., Inc.*, 361 S.C. 544, 551, 606 S.E.2d 752, 755 (2004) (citing *S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.*, 312 S.C. 559, 562, 437 S.E.2d 22, 24 (1993)).

81. *Brown v. Stewart*, 348 S.C. 33, 41, 557 S.E.2d 676, 680 (Ct. App. 2001) (quoting *Parker v. Shecut*, 340 S.C. 460, 482, 531 S.E.2d 546, 558 (Ct. App. 2000)) (internal quotation marks omitted).

82. *Great W. Coal*, 312 S.C. at 563, 437 S.E.2d at 24.

83. *Id.* at 562–63, 437 S.E.2d at 24.

84. 312 S.C. 559, 437 S.E.2d 22 (1993).

85. *Id.* at 561, 437 S.E.2d at 23.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* Santee Cooper settled with Great Western, and Norman passed away prior to trial, leaving Goins as the sole defendant in the case. *Id.* at 561 n.1, 437 S.E.2d at 23 n.1.

unenforceable because of “fraud in factum.”<sup>90</sup> The South Carolina Supreme Court reversed, holding that the trial court erred because Santee Cooper’s complaint did not contain any allegations of fraud regarding the arbitration clause specifically.<sup>91</sup> Similar to claims of unconscionability,<sup>92</sup> the court found that the party seeking to avoid arbitration must show that the fraud was specifically related to the arbitration clause.<sup>93</sup> Thus, South Carolina courts have placed plaintiffs on notice that an arbitration clause is separable from the contract, which requires the plaintiff to specifically plead that the defendant fraudulently induced the plaintiff to arbitrate.<sup>94</sup>

#### D. Duress

Plaintiffs may also seek to invalidate arbitration clauses on the basis of duress. South Carolina courts have defined duress as coercion that places a party under so much external pressure that the party executes a contract based on an improper outside influence, not free will, destroying the party’s free agency.<sup>95</sup> The defense of duress prevents a stronger party from presenting an unreasonable choice of alternatives and thereby taking advantage of a weaker party.<sup>96</sup> By exerting power and control over the terms of the agreement, the aggressor substitutes its will for the will of the other party and the agreement becomes “an agreement emanating entirely from [the aggressor’s] own mind” rather than a “mutual, voluntary agreement.”<sup>97</sup>

In *Hooters of America, Inc. v. Phillips*,<sup>98</sup> Hooters informed its employees that if they refused to sign the arbitration agreement, they would forfeit all future promotions.<sup>99</sup> The district court determined that the employee could not invalidate the arbitration agreement on the basis of economic duress because there was no evidence showing Hooters committed any kind of wrongful act.<sup>100</sup> Furthermore,

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90. *Id.* at 562, 437 S.E.2d at 24.

91. *Id.* at 563, 437 S.E.2d at 24.

92. *See supra* note 58.

93. *See Great W. Coal*, 312 S.C. at 563, 437 S.E.2d at 24 (“Fraud as a defense to an arbitration clause must be fraud specifically as to the arbitration clause and not the contract generally.”).

94. *Id.* at 562–63, 437 S.E.2d at 24 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (finding that Section Four of the Federal Arbitration Act makes arbitration clauses separable and valid)).

95. *Willms Trucking Co. v. JW Constr. Co.*, 314 S.C. 170, 178, 442 S.E.2d 197, 202 (Ct. App. 1994) (citing *Cherry v. Shelby Mut. Plate Glass & Cas. Co.*, 191 S.C. 177, 183, 45 S.E.2d 123, 126 (1939)).

96. *Troutman v. Facetglas, Inc.*, 281 S.C. 598, 602, 316 S.E.2d 424, 426 (Ct. App. 1984) (citing *Olson v. Horton*, 258 N.W.2d 610, 614 (Minn. 1977)).

97. *Willms Trucking*, 314 S.C. at 179, 442 S.E.2d at 202 (quoting *In re Nightingale’s Estate*, 182 S.C. 527, 547–48, 189 S.E. 890, 898 (1937)) (internal quotation marks omitted).

98. 39 F. Supp. 2d 582 (D.S.C. 1998), *aff’d*, 173 F.3d 933 (4th Cir. 1999).

99. *Id.* at 594.

100. *Id.* at 608 n.25 (citing *Phillips v. Baker*, 284 S.C. 134, 137, 325 S.E.2d 533, 535 (1985)).

Hooter's refusal to promote Phillips if she failed to sign the arbitration agreement did not constitute a wrongful threat.<sup>101</sup>

As the employee did in *Hooters*, parties will most often use duress as a defense to an arbitration provision when they feel that, because of financial pressure, they have no other choice but to sign an agreement. In South Carolina, a party can prove duress by establishing the following elements:

- (1) he has been the victim of a wrongful or unlawful act or threat,
- (2) such act or threat must be one which deprives the victim of his unfettered will, (3) as a direct result the coerced party must be compelled to make a disproportionate exchange of values or give up something for nothing, (4) the payment or exchange must be made solely for the purposes of protecting the coerced party's business or property interests, and (5) the coerced party must have no adequate legal remedy.<sup>102</sup>

Similar to the defenses of unconscionability<sup>103</sup> and fraud,<sup>104</sup> in order for a court to invalidate an arbitration provision, the duress must relate to the arbitration provision itself and not to the contract in general.<sup>105</sup>

#### *E. Outside the Scope of the Arbitration Agreement*

A final common way for a party to avoid enforcement of an arbitration clause is to prove that the clause does not encompass a particular dispute.<sup>106</sup> In determining whether this is a valid defense, the court must consider "whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim."<sup>107</sup> Because the policy of both the federal and South Carolina courts favors arbitration,<sup>108</sup> parties struggle to defeat the

101. *Id.* at 608. This case demonstrates that the threshold for economic duress is very high. In *Hooters*, the volition of the employee was not destroyed because her employment was not conditioned on signing the arbitration agreement, only her ability to receive a promotion. *Id.* at 608 n.25.

102. *Troutman v. Facetglas, Inc.*, 281 S.C. 598, 602–03, 316 S.E.2d 424, 427 (Ct. App. 1984) (citing 13 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1617 (Walter H.E. Jaeger ed., 3d ed. 1970)).

103. *See supra* note 58.

104. *See supra* notes 93–94.

105. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 (1967)); Linda Alle-Murphy, Comment, *Are Compulsory Arbitration Clauses in Consumer Contracts Enforceable? A Contractual Analysis*, 75 TEMP. L. REV. 125, 147 (2002) ("The *Prima Paint* decision should be read to require a preliminary finding of fraud or unconscionability, duress, or waiver in the arbitration clause itself by the court and not the arbitrators.").

106. *See S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.*, 312 S.C. 559, 563–64, 437 S.E.2d 22, 25 (1993) (citing *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 622 n.9 (1985); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir. 1988)).

107. *Id.*

108. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (citing *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct. App. 2000)).

presumption that a claim should be arbitrated. A court must find “with positive assurance that the arbitration [agreement] is not *susceptible* to an interpretation that covers the dispute before the court can find that a dispute falls outside the scope of the agreement.”<sup>109</sup> Furthermore, if a South Carolina state law invalidates an arbitration provision, the party seeking to enforce the agreement receives additional judicial protection. The South Carolina Supreme Court has stated that the FAA preempts state arbitration laws where interstate commerce is involved.<sup>110</sup> Thus, preemption may make particular agreements enforceable on both the federal and state levels in cases where state law would otherwise deem the agreement unenforceable.<sup>111</sup>

A phrase that has appeared in cases concerning the scope of an arbitration clause states that “[a]rbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.”<sup>112</sup> If read literally, this phrase may sound like a way to avoid arbitration; however, in most cases, South Carolina courts will find that an arbitration clause encompasses every dispute that could possibly arise between the parties. When a contract contains a broadly worded arbitration provision, South Carolina courts have found that the parties have agreed to submit all of their disputes to arbitration, not just those disputes arising from the contract containing the arbitration clause.<sup>113</sup> In fact, courts have interpreted from such expansive provisions that even disputes arising from prior contracts are subject to arbitration because of the existence of the arbitration clause in the later, disputed contract.<sup>114</sup> However, where the arbitration clause is narrowly drawn, courts have required that the dispute relate to the underlying contract in order to be subject to arbitration.<sup>115</sup>

109. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118 (citing *Great W. Coal*, 312 S.C. at 564, 437 S.E.2d at 25) (emphasis added).

110. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538 n.2, 542 S.E.2d 360, 363 n.2 (2001) (citations omitted).

111. *See id.*

112. *See Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118 (citing *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977); *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 843–44 (Ct. App. 1999)).

113. *See Vestry & Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co.*, 356 S.C. 202, 207–08, 588 S.E.2d 136, 139 (Ct. App. 2003) (citations omitted).

114. *See Cara's Notions, Inc. v. Hallmark Cards, Inc.*, 140 F.3d 566, 568, 571 (4th Cir. 1998) (interpreting an arbitration clause requiring arbitration of “[a]ny controversy or claim arising out of or relating to . . . any aspects of the relationship” to mean that conflicts between the parties were subject to arbitration, not just conflicts arising under the contract containing the arbitration clause).

115. *Vestry*, 356 S.C. at 208–09, 588 S.E.2d at 139. In *Vestry*, both defendants sought to compel arbitration. *Id.* at 206, 588 S.E.2d at 138. The plaintiff entered into a contract, which did not contain an arbitration clause, with defendant Orkin for the inspection and treatment of termites in the church building. *Id.* at 205, 588 S.E.2d at 137. Orkin terminated the contract several years later because the plaintiff failed to make two consecutive payments. *Id.* at 205, 588 S.E.2d at 138. The church subsequently entered into a second contract with Orkin nearly fifteen years later, which contained a narrowly worded arbitration clause stating that “ANY DISPUTE ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE SERVICES PERFORMED UNDER THIS AGREEMENT OR TORT BASED CLAIMS FOR PERSONAL OR BODILY INJURY OR DAMAGE TO REAL OR PERSONAL PROPERTY SHALL BE FINALLY RESOLVED BY ARBITRATION.” *Id.* at 210, 588 S.E.2d at 140 (internal quotation marks omitted). Unlike the motion to compel from the defendant

The leading case in South Carolina on the scope of arbitration clauses is *Zabinski v. Bright Acres Associates*.<sup>116</sup> In *Zabinski*, the South Carolina Supreme Court set forth the test for determining whether a disputed issue falls within the scope of an arbitration provision. The court stated that a broadly worded arbitration clause will subject a dispute to arbitration even when the dispute does not arise from the underlying contract if “a ‘significant relationship’ exists between the asserted claims and the contract in which the arbitration clause is contained.”<sup>117</sup> Stated differently, if a contract containing a broadly worded arbitration clause exists, both parties may be bound to arbitrate any and all claims that arise between them, perhaps even if the disputes relate only peripherally to the underlying contract. The analysis in *Zabinski* seems to add yet another layer of protection for arbitration provisions, thus making it even less likely that a court will find that a dispute is beyond the scope of an arbitration clause. The “significant relationship” test the *Zabinski* court set forth, which had existed in prior Fourth Circuit caselaw,<sup>118</sup> played a vital role in Justice Pleicones’s dissent in *Chassereau v. Global-Sun Pools, Inc.*<sup>119</sup>

Since 2001, South Carolina state courts have used the significant relationship test to determine the scope of broadly worded arbitration clauses.<sup>120</sup> In *Zabinski*, four men had created a partnership in order to buy, renovate, and sell apartments.<sup>121</sup> The partnership agreement required “arbitration of all controversies or claims arising out of the partnership agreement.”<sup>122</sup> Upon dissolution of the partnership, two of the partners moved to compel arbitration in order to settle disputes involving the distribution of partnership assets.<sup>123</sup> However, the parties also asserted third party complaints regarding attorney malpractice and a purchase agreement made between two of the partners for an interest in the partnership.<sup>124</sup> The court found

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Terminix, whose initial contract contained a broadly worded arbitration clause, *id.* at 213, 588 S.E.2d at 142. Orkin’s motion to compel arbitration failed because “[t]he terms chosen by Orkin to define the scope of its arbitration agreement are wholly ineffective to broaden its application to pre-existing claims involving unrelated real property,” *id.* at 211, 588 S.E.2d at 141. This case underscores the importance of an attorney’s word choice in creating what is intended to be a binding arbitration clause.

116. 346 S.C. 580, 553 S.E.2d 110 (2001).

117. *Id.* at 598, 553 S.E.2d at 119 (quoting *Long v. Silver*, 248 F.3d 309, 316 (4th Cir. 2001)) (emphasis added).

118. See *Long*, 248 F.3d at 316–17.

119. 373 S.C. 168, 173–75, 644 S.E.2d 718, 721–22 (2007) (Pleicones, J., dissenting) (citations omitted).

120. See *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119.

121. *Id.* at 585–86, 553 S.E.2d at 112. Each of the four partners owned an equal share of the partnership. *Id.* When Leutwiler, one of the partners, died, one of the three remaining partners, Massey, decided to purchase the decedent’s quarter of an interest in the partnership. *Id.* at 586, 553 S.E.2d at 113. Westmoreland—the attorney for Leutwiler’s estate who also created the partnership agreement—drew up the purchase agreement, which Massey eventually breached by failing to make all of the required payments. *Id.* When the partnership dissolved, there was disagreement as to the extent of Massey’s interest in the partnership. *Id.* *Zabinski* and Brainard, the other remaining partners, brought an action to compel arbitration of the dispute, based on the existence of the arbitration provision in the partnership agreement. *Id.*

122. *Id.* at 586, 553 S.E.2d at 112–13.

123. *Id.* at 586, 553 S.E.2d at 113.

124. *Id.* at 586–87, 553 S.E.2d at 113.

that the issues regarding the distribution of assets were within the scope of the arbitration clause;<sup>125</sup> however, the claims concerning attorney malpractice and the purchase agreement between two of the partners were not subject to arbitration.<sup>126</sup> Using the significant relationship test, the court found that these latter issues did not arise out of the partnership agreement and that the facts surrounding the claims were independent of the partnership agreement.<sup>127</sup> Thus, there was no significant relationship between the claims and the underlying contract.<sup>128</sup> Based on *Zabinski*, the use of the significant relationship test in South Carolina caselaw before *Aiken v. World Finance Corp. of South Carolina* and *Chassereau* stood on solid ground. However, in these two recent decisions, the South Carolina Supreme Court has developed an additional opportunity for parties seeking to avoid arbitration.

#### IV. NEW DEVELOPMENTS IN ARBITRATION LAW: *AIKEN V. WORLD FINANCE CORP. OF SOUTH CAROLINA* AND *CHASSEREAU V. GLOBAL-SUN POOLS, INC.*

*Aiken* and *Chassereau* represent new developments in the field of arbitration. In these two decisions, the South Carolina Supreme Court has done what the United States Supreme Court has been reluctant to do<sup>129</sup>—limit the enforceability of all arbitration clauses when the party seeking arbitration of a dispute has committed an outrageous tort that caused the dispute.

##### A. Background of *Aiken* and *Chassereau*

In *Aiken v. World Finance Corp. of South Carolina*,<sup>130</sup> Richard Aiken acquired personal loans from World Finance Corporation of South Carolina (World Finance) between 1997 and 1999.<sup>131</sup> Upon entering into each loan, Aiken and World Finance also entered into a broad arbitration agreement.<sup>132</sup> Two years after Aiken had paid off his last loan in 2000,<sup>133</sup> employees of World Finance began using Aiken's personal information to obtain fraudulent loans that they embezzled.<sup>134</sup> When Aiken learned about the "misuse of his personal information," he sued World Finance seeking damages for negligence, negligent hiring and supervision, unfair trade practices, and outrage and emotional distress.<sup>135</sup> World Finance subsequently sought to compel arbitration of the dispute.<sup>136</sup>

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125. *Id.* at 597–98, 553 S.E.2d at 119.

126. *Id.* at 598, 553 S.E.2d at 119.

127. *Id.* (citing *Long v. Silver*, 248 F.3d 309, 316 (4th Cir. 2001)).

128. *Id.*

129. See *supra* text accompanying notes 21–25.

130. 373 S.C. 144, 644 S.E.2d 705 (2007).

131. *Id.* at 146, 644 S.E.2d at 707.

132. *Id.* at 147, 644 S.E.2d at 707.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

While the facts in *Chassereau v. Global-Sun Pools, Inc.*<sup>137</sup> are different from those in *Aiken*, the underlying torts are equally offensive. Vicki Chassereau purchased an above-ground pool from defendant Global-Sun Pools, Inc. (Global-Sun).<sup>138</sup> Soon thereafter, problems began to arise with the pool, and Global-Sun allegedly refused to repair them.<sup>139</sup> As a result, Chassereau stopped making payments on the pool.<sup>140</sup> Ken Darwin, an employee of Global-Sun, then allegedly began harassing her.<sup>141</sup> Chassereau alleged that Darwin repeatedly called her at her workplace; revealed private information to her friends, family members, and coworkers; and made defamatory statements about her to those same people.<sup>142</sup> Based on these events, Chassereau sued Darwin and Global-Sun Pools for defamation, intentional infliction of emotional distress, and the criminal offense of unlawful communication.<sup>143</sup> Global-Sun moved to compel arbitration and argued that two of the documents executed during the course of sale required the parties to arbitrate all claims.<sup>144</sup>

### B. A New Standard for Arbitration Cases

In both *Chassereau* and *Aiken*, the court determined that because the torts committed were outrageous and unforeseeable, the plaintiffs could not have possibly agreed to arbitrate those issues; thus, the arbitration clauses were unenforceable with respect to the claims made.<sup>145</sup> In *Aiken*, the court stated that it would “refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.”<sup>146</sup>

In *Zabinski*, the court used the significant relationship test and declared that under a broadly worded arbitration clause, a dispute should be arbitrated as long as a significant relationship existed between the dispute and the agreement to arbitrate.<sup>147</sup> However, in *Aiken* and *Chassereau*, the scope of the arbitration clauses differed significantly from each other. If the court had continued to apply the

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137. 373 S.C. 168, 644 S.E.2d 718 (2007).

138. *Id.* at 170, 644 S.E.2d at 719.

139. *Id.* Chassereau had requested that Global-Sun provide her with a part that the pool needed to function properly, but Global-Sun neither replaced the part nor repaired the pool. *Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 630, 611 S.E.2d 305, 306 (Ct. App. 2005), *aff'd*, 373 S.C. 168, 694 S.E.2d 718 (2007).

140. *Chassereau*, 373 S.C. at 170, 644 S.E.2d at 719.

141. *Id.*

142. *Id.*

143. *Id.*; see also S.C. CODE ANN. § 16-17-430 (2003) (defining the crime of unlawful communication).

144. *Chassereau*, 373 S.C. at 170, 644 S.E.2d at 719.

145. *Id.* at 172–73, 644 S.E.2d at 720–21; *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007).

146. *Aiken*, 373 S.C. at 151, 644 S.E.2d at 709. The court repeated this statement in *Chassereau*, 373 S.C. at 172, 644 S.E.2d at 720 (quoting *Aiken*, 373 S.C. at 151, 644 S.E.2d at 709).

147. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 598, 553 S.E.2d 110, 119 (2001) (quoting *Long v. Silver*, 248 F.3d 309, 316 (4th Cir. 2001)); see also *supra* text accompanying notes 116–19 (discussing the significant relationship test).



significant relationship test in the same manner, the outcomes might have been different, especially in *Aiken*.<sup>148</sup> The clause at issue in *Aiken* was broad in nature and attempted to cover all prior and future dealings between the parties.<sup>149</sup> However, the language in the arbitration agreement in the *Chassereau* case was much narrower and required the parties to arbitrate any disputes related to the agreement.<sup>150</sup> In both cases, the court determined that the plaintiffs' claims were not subject to arbitration despite the differences in the scope of the two arbitration provisions.<sup>151</sup>

In *Aiken*, the court concluded that there was no significant relationship between the claims and the underlying contract.<sup>152</sup> However, in *Chassereau*, the court did not even mention the significant relationship test; only Justice Pleicones discussed the test in his dissenting opinion.<sup>153</sup> While purporting to use the significant relationship test in *Aiken*, the court seemed to utilize a new test that replaced the significant relationship test.<sup>154</sup> Under the arguably new test, a court must determine if the claims are tortious, outrageous, and unforeseeable to a reasonable consumer.<sup>155</sup> If the claims are outrageous and unforeseeable, the court will refuse to compel arbitration.<sup>156</sup> Presumably, the reasoning behind such a refusal is that absent intention a court would not force a party to forego a traditional judicial forum in favor of an arbitration proceeding where many procedural techniques will be unavailable.<sup>157</sup>

There is a much stronger argument for the application of the foreseeability test and the conclusion that a significant relationship did not exist based on the facts of

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148. See *Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 634–35, 611 S.E.2d 305, 308 (Ct. App. 2005), *aff'd*, 373 S.C. 168, 644 S.E.2d 718 (2007); *Aiken*, 373 S.C. at 151–52, 644 S.E.2d at 709.

149. *Aiken*, 373 S.C. at 147, 644 S.E.2d at 707. The clause stated,  
ALL DISPUTES, CONTROVERSIES OR CLAIMS OF ANY KIND AND  
NATURE BETWEEN LENDER AND BORROWER ARISING OUT OF OR IN  
CONNECTION WITH THE LOAN AGREEMENT, OR ARISING OUT OF  
ANY TRANSACTION OR RELATIONSHIP BETWEEN LENDER AND  
BORROWER OR ARISING OUT OF ANY PRIOR OR FUTURE DEALINGS  
BETWEEN LENDER AND BORROWER, SHALL BE SUBMITTED TO  
ARBITRATION AND SETTLED BY ARBITRATION . . . .

*Id.*

150. *Chassereau*, 363 S.C. at 632–33, 611 S.E.2d at 307. The arbitration provision stated, “ANY DISPUTES ARISING IN ANY MANNER RELATING TO THIS AGREEMENT THAT CANNOT BE RESOLVED BY NEGOTIATION BETWEEN THE PARTIES SHALL BE SUBJECTED TO MANDATORY, EXCLUSIVE AND BINDING ARBITRATION.” *Id.* at 632, 611 S.E.2d at 307.

151. See *Chassereau*, 373 S.C. at 172–73, 644 S.E.2d at 720–21; *Aiken*, 373 S.C. at 151, 644 S.E.2d at 709.

152. *Aiken*, 373 S.C. at 150, 644 S.E.2d at 708.

153. See *Chassereau*, 373 S.C. at 173–74, 644 S.E.2d at 721–22 (Pleicones, J., dissenting) (citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 598, 553 S.E.2d 110, 119 (2001)).

154. The court does not refer to the foreseeability test for outrageous torts as a new test but rather as “a more definitive rule for determining whether a significant relationship exists between a dispute between parties to a contract and the underlying contract.” *Aiken*, 373 S.C. at 151, 644 S.E.2d at 709.

155. *Id.*

156. *Id.*

157. See *id.*

*Aiken*<sup>158</sup> rather than on those facts in *Chassereau*. The loan contracts between Aiken and World Finance had been satisfied in full, and hence terminated, when the defendant began engaging in the tortious and criminal conduct.<sup>159</sup> However, the court found that the timing issue was not relevant to the arbitration determination.<sup>160</sup> Instead, the majority focused on whether a reasonable consumer could have foreseen that the contract would give rise to such outrageous behavior in the ordinary course of business.<sup>161</sup> The court concluded that no reasonable borrower could foresee, based on the contract, that personal information would be stolen.<sup>162</sup> Because the tortious and criminal conduct occurred after the parties fulfilled the terms of the contracts, the actions seem especially unforeseeable and outrageous. The fact that the defendant's agents engaged in criminal conduct further demonstrates the outrageous and unforeseeable nature of the underlying actions. Under both the new test requiring outrageous and unforeseeable conduct and the significant relationship test, the behavior underlying Aiken's claims would have placed the claims outside of the scope of the arbitration clause.

*Chassereau*'s facts make the application of the foreseeability test for outrageous torts a little more difficult.<sup>163</sup> In his dissent in *Chassereau*, Justice Pleicones argued, "Under any conceivable definition of the word 'significant,' actions taken in seeking to collect a debt *must* be significantly related to the debt."<sup>164</sup> While the majority did not seem to disagree that a significant relationship existed, it stressed that the plaintiff would not have expected someone from whom she purchased a pool to commit acts amounting to the tort of outrage.<sup>165</sup> Clearly, a person should foresee that nonpayment of a bill could result in a call from the bill collector to remind the person of the bill's due date and to discuss payment options. These actions would be the foreseeable results of nonpayment. However, one can distinguish these hypothetical results from the results in *Chassereau*, which were considerably more disturbing.<sup>166</sup> Using the foreseeability test established in *Aiken*, the court had to determine whether Chassereau would have foreseen that Global-Sun would call her at work and release her private information to her friends and family. While Chassereau should have expected the bill collector to contact her at work, she should not have expected Global-Sun to release her private information. Perhaps the majority in *Chassereau* barely alluded to the original significant

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158. See *supra* text accompanying notes 130–36 (discussing the facts underlying the claims in *Aiken*).

159. *Aiken*, 373 S.C. at 146–47, 644 S.E.2d at 707.

160. *Id.* at 150–51, 644 S.E.2d at 709.

161. *Id.* at 151, 644 S.E.2d at 709.

162. *Id.* Justice Pleicones disagreed with the majority on this point, arguing that identity theft was a foreseeable consequence of the loan agreement, even though he agreed with the majority that parties to a loan agreement do not intend for such behavior to be "within the ambit of the contract." *Id.* at 152–53, 644 S.E.2d at 710 (Pleicones, J., concurring).

163. See *supra* text accompanying notes 138–44 (discussing the facts relevant to the court's decision in *Chassereau*).

164. *Chassereau*, 373 S.C. at 175, 644 S.E.2d at 722 (Pleicones, J., dissenting).

165. *Id.* at 172, 644 S.E.2d at 720 (majority opinion).

166. See *supra* text accompanying notes 141–42 (discussing the behavior of Global-Sun in response to Chassereau's nonpayment).

relationship test because there *was* a significant relationship between Chassereau's claims and the underlying contract, which, under *Zabinski*, arguably could subject the claims to arbitration.<sup>167</sup> However, using the foreseeability test for outrageous torts from *Aiken*, the court easily concluded the plaintiff could never have intended to arbitrate such outrageous, unforeseeable claims.<sup>168</sup> Arguably, Chassereau's claims would have been subject to arbitration under the significant relationship test but were not subject to arbitration under the apparently new foreseeability test, which requires the claims to be foreseeable by a reasonable consumer.

## V. CONCLUSION

By requiring that torts be reasonably foreseeable to fall within arbitration clauses, the South Carolina Supreme Court has limited the reach of arbitration provisions where the dispute involves an outrageous tort. While this requirement may confuse some sellers of consumer goods and services, the court's decision is likely a fair and logical decision that "promote[s] the procurement of arbitration in a commercially reasonable manner."<sup>169</sup>

South Carolina has taken a bold step in the decisions of *Aiken* and *Chassereau*, and other jurisdictions should follow this state's new approach to determining the scope of arbitration clauses. By providing another method of protecting parties trying to defeat enforcement of arbitration clauses in cases involving outrageous torts, the South Carolina Supreme Court has established a more equitable doctrine concerning the scope of arbitration agreements. Fearing that they would offend both the state and federal policies favoring arbitration, courts throughout the nation have made it virtually impossible<sup>170</sup> for parties to receive judicial redress if the contract between them contains an arbitration clause. The recent cases of *Aiken*<sup>171</sup> and *Chassereau* should demonstrate to attorneys in this state that South Carolina has decided that there is a limit to the scope of arbitration clauses—foreseeability of the dispute from the viewpoint of the reasonable consumer.

*Stephanie R. Lamb*

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167. Pleicones emphasizes this point in his dissenting opinion. See *Chassereau*, 373 S.C. at 175, 644 S.E.2d at 722 (Pleicones, J., dissenting).

168. *Id.* at 172, 644 S.E.2d at 720 (majority opinion).

169. *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 152, 644 S.E.2d at 705, 710 (2007).

170. See, e.g., *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (explaining that the federal policy in favor of preemption may force a person who has not even signed a contract to engage in arbitration); *Univ. of Alaska v. Modern Const., Inc.*, 522 P.2d 1132, 1138 (Alaska 1974) (explaining that because of the policy in favor of arbitration, ambiguous contract terms can be construed in favor of arbitration).

171. The Supreme Court recently denied World Finance's petition for writ of certiorari. *World Fin. Corp. of S.C. v. Aiken*, 128 S. Ct. 497 (2007).