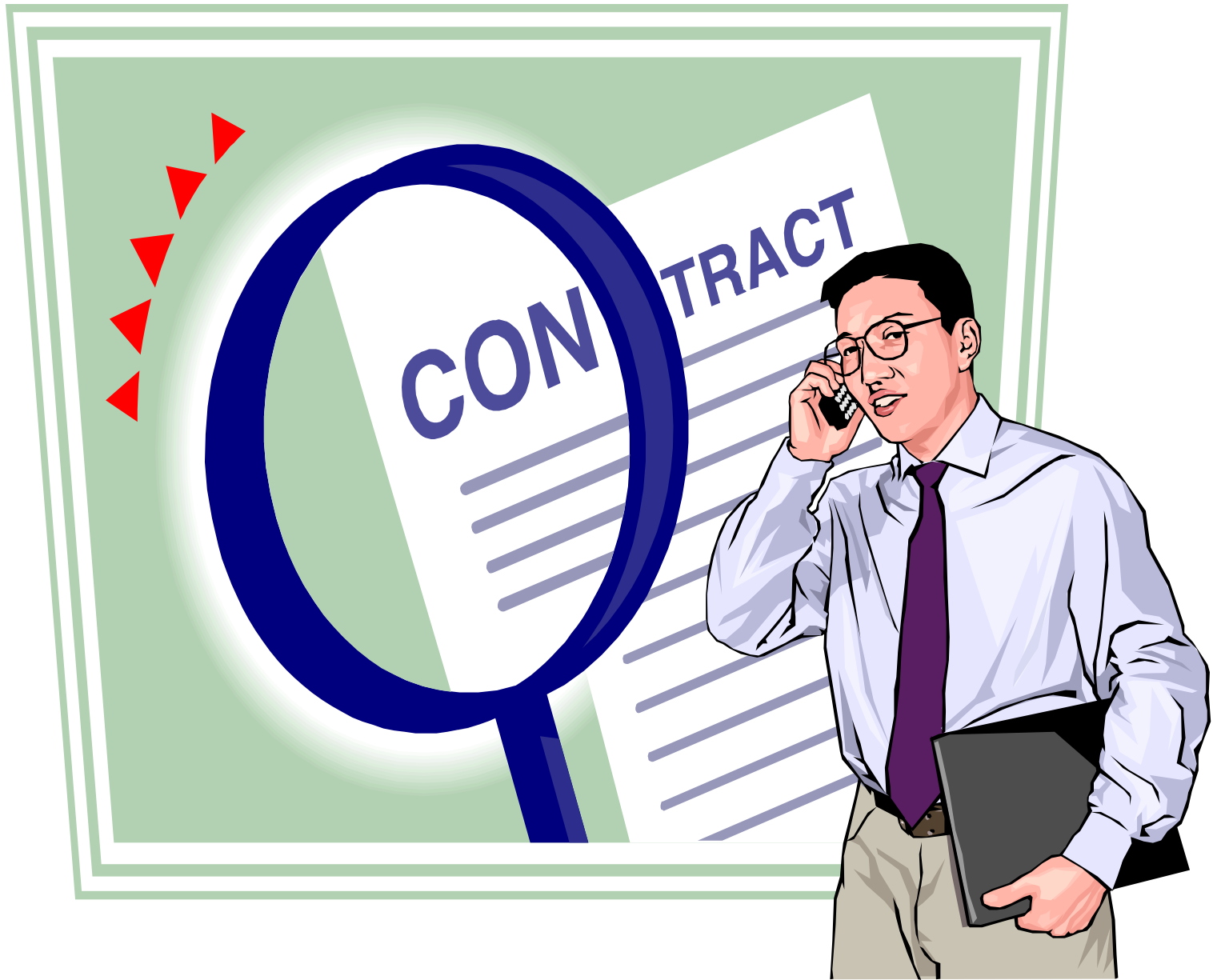


Arbitration

N.C. Conference of Superior Court Judges
October 26, 2005

W. Mark C. Weidemaier





Terms

- “Any and all claims” except collection actions
- Share costs equally, except:
 - claim < \$1000, you pay \$25
 - claim < \$25, you pay \$0
 - Pay own attorneys/witnesses
- No class actions
- Maximum liability: prorated monthly charges
- No punitive, treble, consequential etc damages
- Stat. of limits = 1 yr, “unless prohibited by law”

Governing law?

1. Federal Arbitration Act, 9 U.S.C. 1+
2. Article 45C – G.S. 1-569.1 *et seq.*
 - Agreements made on or after Jan. 1, 2004, or by agreement “in a record” by all parties.
3. Other agreements: former Art. 45A.

Federal Arbitration Act

- Applies to written arbitration provision in
 - maritime transaction or
 - “contract evidencing a transaction involving commerce.”
- Must enforce “save upon such grounds as exist at law or equity for the revocation of any contract.”
- Except: transportation industry workers
- May choose state law

Federal Arbitration Act Applies?

- Wireless agreement between N.C. customer and wireless service provider?
- Employment agreement between multi-state health care company and medical director, who lives/works only in N.C.?
- Line of credit for N.C. business from N.C. bank?
- Security guard at warehouse for international shipping company?


Federal Arbitration Act Preempts?

- Statute applicable to most contracts invalidating out-of-state forum clauses? (G.S. 22B-3)
- Rule that court decides enforceability of entire contract?
- Statute regulating arbitrator disclosure (G.S. 1-569.12)

Validity and Scope of Agreement

- Motion to compel arbitration
 - Is there a valid arbitration agreement?
 - Is the dispute within the scope of the agreement?
 - Party seeking to compel arbitration has burden of proof.

Waiver of right to arbitrate

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1. Lawsuit alleging deceptive marketing and fraudulent billing practices.
 2. Document discovery exchanged by both sides
 3. Deposition of customer's wife
 4. Motion to compel arbitration

4 months

Waiver of right to arbitrate

- Must show prejudice from adversary's delay or actions inconsistent with arbitration
- Examples of prejudice:
 - forced to bear expense of a long trial;
 - loss of helpful evidence;
 - incurred significant expense in litigation
 - obtained discovery unavailable in arbitration.

Unconscionability

e.g., class action by consumer under wireless agreement – claims for fraud, unfair/deceptive practices, breach of contract

Unconscionability

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- Unconscionability is “generally applicable” defense
- Procedural/substantive distinction
- unequal/oppressive bargain: “no reasonable person would make ... and no honest and fair person would accept ...”



Unconscionability

- Form contract
 - Collection activity exempt
 - Damages waiver & cap
 - No fee shifting
 - Class action bar
 - 1 year statute of limitations
- Limits consumer expense
 - ADR provider rules permit small claims
 - Cost benefit to consumer
 - Arbitrator decides enforceability of terms



Third parties

- *Parties to K: consumer & wireless service provider.*
 - Consumer sues provider and its affiliate (which sold the phone) for deceptive marketing
- *Parties to K: mobile home purchaser & manufacturer*
 - Purchaser's spouse sues seller/manufacturer for personal injuries
 - Purchaser's spouse sues seller/manufacturer for breach of contract/warranty

Third parties

- Can third party enforce agreement?
 - Third party beneficiary theory
 - Agency theory
 - Equitable estoppel