

No. 30,424

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

**ROBERT FISER, INDIVIDUALLY AND AS A REPRESENTATIVE
OF A CLASS OF PERSONS WITHIN THE STATE OF NEW MEXICO**

Plaintiff/Appellant,

vs.

DELL COMPUTER CORPORATION,

Defendant/Appellee.

ON WRIT OF CERTIORARI FROM THE NEW MEXICO COURT OF APPEALS

**BRIEF OF *AMICUS CURIAE*
ATTORNEY GENERAL OF NEW MEXICO
IN SUPPORT OF PLAINTIFF/PETITIONER**

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INTEREST OF AMICUS

This matter has come to the attention of the Attorney General through Appellant, who requested, through the Consumer Protection Division of the Attorney General's Office, that the Attorney General file an Amicus Brief in this matter on behalf of New Mexico consumers. The Attorney General is charged with protecting New Mexico citizens from unfair and deceptive trade practices, in part by enforcing the New Mexico Unfair Trade Practices Act ("UPA"), NMSA 1978, § 57-12-1 *et seq.* (Repl. Pam. 2000, Cum. Supp. 2005). Further, it is the responsibility of the Attorney General to "appear before local, state and federal courts and regulatory officers, agencies and bodies, to represent and to be heard on behalf of the state when in his judgment the public interest of the state requires such actions. . . ." NMSA 1978, § 8-5-2(J) (2003). The Attorney General thus has a strong interest in participating in cases pertaining to the rights of New Mexico consumers.

In the present matter, this Court will address for the first time such issues as: (1) which state's law to apply to a contract between parties residing in different states in determining whether the parties formed a binding contract in the first instance; (2) whether a vendor can impose contractual terms on a consumer by merely making those terms available to the consumer through an internet hyperlink without requiring some act of affirmative assent by the consumer; (3) whether pre-printed forms shipped with a product can impose contract terms on a buyer if the buyer does not return the product within a specified period of time; and (4) whether a binding arbitration clause in a contract that precludes that aggregation of claims is unconscionable under New Mexico law. Because of the significance of these issues to New Mexico consumers, and based on the expertise of the Office of the New Mexico Attorney General in enforcing New Mexico law in the public interest, the Attorney General respectfully requests that this Court duly consider his participation in this matter as Amicus Curiae.

STATEMENT OF THE ISSUES PRESENTED

1. When parties to a contract agree that their contract should be interpreted according to the laws of another state, should a New Mexico court apply New Mexico law or the law of the chosen jurisdiction in determining whether a valid contract exists in the first instance?
2. Can a consumer agree to arbitration if the terms and conditions of the purchase are not provided to the consumer until after the transaction is complete?
3. Is an arbitration provision enforceable if it prohibits the aggregation of claims when those individual claims are not economically viable and can only be vindicated through aggregation?

STATEMENT OF THE CASE

Appellant purchased a computer from Dell Computer Corporation (“Dell”). Contending that the computer he purchased did not have as much storage capacity as Dell had represented it did, Appellant filed a putative class action on July 8, 2004, asserting claims under the New Mexico Unfair Practices Act, NMSA 1978 § 57-12-1, *et seq.* and the New Mexico Uniform Commercial Code, NMSA 1978 § 55-2-207. Appellant further stated claims for breach of contract, breach of warranty, misrepresentation, violations of the covenants of good faith and fair dealing, and sought restitution and injunctive relief.

Dell moved to compel arbitration pursuant to an arbitration provision contained in the terms and conditions that, according to Dell, governed the sale. The district court granted the motion on May 27, 2005. Appellant appealed to the Court of Appeals, which affirmed the district court’s order compelling arbitration.

STATEMENT OF FACTS

On November 13, 2003, Appellant made an online purchase of a computer from Dell. After the charge for the purchase had been approved by Appellant’s credit card company, Dell

sent him a confirmation email. That email contained a hypertext link to Dell's webpage that, if clicked by Appellant, would display the terms and conditions according to which Dell had sold the computer. According to Appellant, the same terms and conditions were printed on the back of the packing slip included with the computer that Dell shipped to Appellant. Dell relies on Appellant's receipt of these terms, along with his retention of the computer for at least thirty days after shipment, as evidence of his acceptance of the contractual provision.

Those terms and conditions included an arbitration provision, the relevant portion of which read:

ANY CLAIM, DISPUTE, OR CONTROVERSY . . . AGAINST DELL . . . arising from or relating to this Agreement, its interpretation, or the breach, termination or validity thereof . . . or any related purchase SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARIBTRATION FORUM The arbitration will be limited solely to the dispute between Customer and Dell.

Appellant contends that he was not aware this provision was a condition of his purchase and that he never agreed to arbitrate any claims he might have against Dell.

SUMMARY OF THE ARGUMENT

The Court of Appeals erred in three respects. First, the Court of Appeals determined that Texas, not New Mexico, law should apply when determining whether the parties formed a contract in the first instance. Second, the Court of Appeals erroneously held that the arbitration provision at issue was not procedurally unconscionable despite the fact that Appellant did not receive the contract containing the arbitration provision until after the transaction had been consummated. Third, the Court of Appeals incorrectly held that Dell could validly preclude Appellant from aggregating his claims with similar claims belonging to other consumers. All of these holdings have significant, potential consequences for New Mexico consumers.

First, the Court of Appeals seemed to ignore that New Mexico has a reasonable relationship with the contract at issue. New Mexico has a powerful interest in protecting its citizens from unfair and deceptive trade practices. Applying New Mexico law in making the determination of whether such a consumer has entered into a contract with an out of state seller is a legitimate means of affecting that interest. The Court of Appeals may have been correct in holding that New Mexico and Texas law lead to the same substantive conclusion regarding contract formation. This Court should nonetheless address the question of contract formation now to avoid repetition of the error in a case in which the law of the foreign jurisdiction would point to a different answer, with deleterious consequences for a New Mexico consumer.

Next, as the Court of Appeals noted, “[t]he question of whether a purchaser is bound by terms contained on hyperlinks in a website and electronic mail notification, coupled with identical written terms that are only delivered after purchase, is an issue of first impression in New Mexico.” *Fiser v. Dell Computer Corp.*, 2007-NMCA-087, ¶ 19. The Court of Appeals, however, then failed to answer the first half of this question, instead pinning its holding on the fact that Appellant failed to return his computer to Dell within thirty days of his receiving it. It is important, however, to answer the first question, namely, whether a New Mexico consumer making a purchase on the internet can be bound by contractual terms that the consumer does not receive until after the transaction is done. After addressing this first question, this Court should then consider whether “shrink-wrap” licensing provided with packaging upon delivery of a product is sufficient to create a contract. Next, we ask this Court to consider what standards constitute sufficiently conspicuous and adequate notice to a consumer, when the terms and conditions are provided in the packaging at delivery.

Finally, the Court of Appeals made the sweeping pronouncement that “New Mexico public policy would [not] render an arbitration clause unconscionable because it precludes class actions given our clear preference for enforcing arbitration agreements.” *Fiser*, 2007-NMCA-087, ¶ 47. It is unclear, however, whether the Court of Appeals was discussing a class action *lawsuit* or an arbitration proceeding involving the aggregation of individual claims. In the event that a consumer is bound by an arbitration clause (and therefore precluded from filing a lawsuit of any kind, class action or otherwise), and that consumer’s damages are less than the cost of arbitrating his or her claim, the only way for the consumer to vindicate his or her rights is by aggregating his or her claim with similar claims belonging to other consumers. An arbitration clause that purports to preclude class arbitration under such circumstances is unconscionable.

ARGUMENT

I. NEW MEXICO COURTS SHOULD APPLY NEW MEXICO LAW IN DETERMINING WHETHER A NEW MEXICO CONSUMER HAS ENTERED INTO A VALID CONTRACT.

The Court of Appeals noted that there were no cases “specifically addressing the issue of whether New Mexico law, instead of the law chosen in the contract, should apply to determine if there even is a contract.” *Fiser*, 2007-NMCA-087, ¶ 9. The Court of Appeals did not, however, address that issue.

Instead, the Court of Appeals noted that Texas has a reasonable relationship to the contract and stated that applying Texas law “to determine whether the parties agreed to arbitrate would [not] violate any fundamental principle[] or public policy of New Mexico.” *Id.* ¶ 12. Essentially, the Court of Appeals addressed the question by indirectly backing into it; the Court

of Appeals applied Texas law because that law does not violate New Mexico public policy.¹ This approach, however, confuses the questions of what law should apply to determine whether the parties entered into a contract, on the one hand, and whether the choice of law provision in the contract is void against public policy on the other.

This Court should take a more direct approach and answer the first question. The issue is not whether applying Texas law to the substantive interpretation of the contract violates New Mexico public policy. The issue is, instead, prior to that determination; it is whether New Mexico courts should apply New Mexico law in determining whether the parties formed a contract in the first place. Although New Mexico follows the *lex loci contractus* rule in determining which state's law will govern the substance of a contractual dispute, *see F.D.I.C. v. Hyatt*, 117 N.M. 461, 464, 872 P.2d 879, 882 (1994), no New Mexico court has examined the question identified and subsequently dodged by the Court of Appeals.

New Mexico has an obvious interest in contracts and other commercial transactions to which its citizens are a party. New Mexico's public policy should be to protect those interests as best it can. Applying New Mexico law to the question of contract formation is one way of doing so. This is not a matter of upsetting the strong public policy in favor of freedom of contract identified by the Court of Appeals. *See Fiser*, 2007-NMCA-087, ¶ 13. This is a matter of deciding whether the parties have, in fact, entered into a contract at all. When New Mexico consumers enter into contracts with out-of-state merchants, particularly adhesion contracts such as the one at issue in this case, they deserve the protection of New Mexico law.

¹ The Court of Appeals did so despite noting that New Mexico, unlike Texas, has not clearly embraced the position of Texas courts that all doubts about whether there is an agreement to arbitrate are resolved in favor of arbitration. *Fiser*, 2007-NMCA-087, ¶ 12.

Given the lack of case law on this issue, the Attorney General urges this Court to address the procedural question identified by the Court of Appeals. This Court should accordingly hold that, when New Mexico has a legitimate interest in the formation of a contract, a New Mexico court should apply New Mexico law in determining whether a contractual agreement exists.

II. A CONSUMER CANNOT BE BOUND BY CONTRACTUAL TERMS THAT THE SELLER DOES NOT PROVIDE BEFORE THE CONSUMMATION OF THE TRANSACTION.

A merchant cannot unilaterally bind a purchaser to the terms of a contract not provided to the purchaser before the completion of the transaction. The reason is simple – there has been no meeting of the minds because the purchaser has not assented to the terms of the contract. Moreover, supplying terms to a purchaser that are packaged with the product, when those terms were not made clear at the time of sale, constitutes an amendment to the sales contract and those terms are not incorporated into the contract without the purchaser’s affirmative assent. Further, any terms and conditions included with the product can only be incorporated into the contract when those terms are presented conspicuously enough to put the consumer on notice both of their substance and of the fact that failure to return the product will constitute an agreement to be bound by them.

A. The “Browse-Wrap” Agreement Used By Dell Is Insufficient to Create a Contract.

Here again, the Court of Appeals identified an issue of first impression that it declined to decide. The Court of Appeals correctly stated that “[t]he question of whether a purchaser is bound by terms contained on hyperlinks in a website and electronic mail notification, coupled with identical written terms that are only delivered after purchase, is an issue of first impression in New Mexico.” *Fiser*, 2007-NMCA-087, ¶19. The Court of Appeals, however, chose to answer only the second portion of this question by holding that Appellant was bound to the terms

provided by Dell when he failed to return the computer within thirty days of his receiving it. In light of the increasing commonality of internet purchases by New Mexico consumers, this Court should address the first question, namely whether providing “click through” terms and conditions, which require no affirmative act of assent by the purchaser, can be binding on that purchaser if they are sent in an email confirming the consummation of a transaction.

This Court should adopt the position taken by the Southern District of New York in *Specht v. Netscape Communications Corporation*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001). In *Specht*, the plaintiffs sought to avoid an arbitration provision contained in the licensing agreement for a Netscape product called SmartDownload. The court examined three different forms of licensing frequently employed in internet transactions: (1) “click-wrap” licensing, (2) “browse-wrap” licensing, and (3) “shrink-wrap” licensing.

Click-wrap licensing requires an affirmative act on the part of the purchaser or user to indicate agreement with the terms of the license. This typically takes the form of clicking on an icon or checking a box stating that the purchaser agrees to the terms or conditions, and he or she cannot obtain the product without doing so. The *Specht* court gave the following example:

For example, when a user attempts to obtain Netscape’s Communicator or Navigator, a web page appears containing the full text of the Communicator/Navigator license agreement. Plainly visible on the screen is the query, “Do you accept all the terms of the preceding license agreement? If so, click on the Yes button. If you select No, Setup will close.” Below this text are three buttons or icons: one labeled “Back” and used to return to an earlier setup of the download preparation; one labeled “No,” which if clicked, terminates the download; and one labeled “Yes,” which if clicked, allows the download to proceed. Unless the user clicks “Yes,” indicating his or her assent to the license agreement, the user cannot obtain the software.

Specht, 150 F. Supp. 2d at 594.

The court also discussed “browse-wrap” licensing, in which the purchaser or user is provided a link that, if clicked, will navigate him or her to a web page displaying the licensing

agreement. In contrast to click-wrap licensing, browse-wrap licensing does not require that the purchaser or user “click on an icon expressing assent to the license, or even view its terms,” before completing a transaction. *Id.*

The court concluded that the licensing agreement before it was more akin to a browse-wrap license than a click-wrap license, and held that the license did not create a contract. After noting that users of SmartDownload are “not made aware that [they are] entering into a contract,” the court stated:

The case law on software licensing has not eroded the importance of assent in contract formation. Mutual assent is the bedrock of any agreement to which the law will give force. Defendants’ position, if accepted, would so expand the definition of assent as to render it meaningless. Because the user Plaintiffs did not assent to the license agreement, they are not subject to the arbitration clause contained therein and cannot be compelled to arbitrate their claims against Defendants.

Id. at 596.

Mutual assent is, of course, as much a bedrock principle of New Mexico law as of California law (which the *Specht* court was applying). *Garcia v. Middle Rio Grande Conservancy*, 1996-NMSC-029, ¶ 9, 121 N.M. 728, 731, 918 P.2d 7, 10 (1996). The Court of Appeals passed on the opportunity to declare that New Mexico law requires affirmative acknowledgment of such assent in online purchases. A browse-wrap arrangement, such as that used by Dell in this case, is insufficient to show assent by the purchaser to the terms of purchase. It thus insufficient to form a binding agreement between the parties, and this Court should so declare.² The volume of commerce conducted online by New Mexico citizens will only grow in

² This Court could, of course, affirm the Court of Appeals without addressing this issue. The Attorney General brings this issue to the Court’s attention because if the Court determines that the Court of Appeals erred in holding either (1) that Appellant agreed to Dell’s terms and conditions by keeping his computer for more than thirty days after delivery, or (2) that the terms and conditions sent to Appellant were sufficiently conspicuous, the only way those terms and conditions (including the arbitration clause at issue) can be enforced is if the Court determines that the browse-wrap procedure is sufficient to create a contract.

the future, and a declaration from this Court clearly defining the law will be important to the protection of such consumers.

B. The “Shrink-Wrap” License Upon Which the Court of Appeals Relied Is Insufficient to Create a Contract.

As already noted, the Court of Appeals skipped over the issue of whether a browse-wrap licensing arrangement can give rise to a binding contract and declared that Appellant assented to Dell’s terms by virtue of having failed to return his computer to Dell within thirty days of receiving it. This involves a third form of licensing discussed by the *Specht* court, called “shrink-wrap” licensing. Under this kind of arrangement, contractual terms are provided to the purchaser as part of the shipment of the product.

The Court of Appeals followed two cases from the Seventh Circuit, *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1441 (7th Cir. 1996), and *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), and a case from the Washington Supreme Court, *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 998 P.2d 305 (Wash. 2000), in holding that Appellant agreed to the terms and conditions included in the packaging from Dell when Appellant failed to return the computer within thirty days of receiving it. The Court of Appeals declined to follow *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000), in which the court reached an opposite conclusion from that found by the *ProCD*, *Hill*, and *Mortenson* courts.

The Attorney General submits that *Klocek* (and the cases cited therein) are better reasoned than *ProCD* and its progeny. These cases differ on their determination as to *when* the contract is formed between the seller and buyer. The *ProCD* line of cases hold that the contract is not formed until the consumer has received the product. As a result, any contractual terms provided to the consumer with shipment are binding, assuming that the consumer manifests assent to those terms through some affirmative act (in each case, keeping the product). The

Klocek court, however, takes a different view: “Regardless whether plaintiff purchased the computer in person or placed an order and received shipment of the computer, the parties agree that plaintiff paid for and received a computer from Gateway. This conduct clearly demonstrates a contract for the sale of a computer.” *Klocek*, 104 F. Supp. 2d at 1337.

Because the parties had completed the transaction at the time of sale, any terms provided to the purchaser afterwards were, in the court’s view, offers of amended terms to the sales contract. The court relied principally on U.C.C. § 2-207 in concluding that the plaintiff had not agreed to the terms and conditions packaged with his computer. U.C.C. § 2-207 reads, in pertinent part:

Additional terms in acceptance or confirmation.

- (1) A definite and seasonable expression of acceptance of a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
- (2) The additional terms are to be construed as proposals for addition to the contract [if the contract is not between merchants]....

Klocek, 104 F. Supp. 2d at 1339 (brackets and ellipses in original).

The court then determined that the plaintiff was the offeror, having offered to purchase a computer, and Gateway was the offeree, having accepted plaintiff’s purchase offer: “[t]he Court therefore assumes . . . that plaintiff offered to purchase the computer . . . and that Gateway accepted plaintiff’s offer. . . .” *Id.* at 1340. Given this construction of the transaction, the court held:

Under § 2-207, the Standard Terms constitute either an expression of acceptance or written confirmation. As an expression of acceptance, the Standard Terms would constitute a counter-offer only in Gateway expressly made its acceptance conditional on plaintiff’s assent to the additional or different terms. Gateway provides no evidence that at the time of the sales transaction, it informed plaintiff that the transaction was conditioned on plaintiff’s acceptance of the Standard Terms. Moreover, the mere fact that Gateway shipped the goods with the terms

attached did not communicate to plaintiff any unwillingness to proceed without plaintiff's agreement to the Standard Terms.

Id. at 1340-41 (citations omitted).

In other words, the only contractual provisions in existence when the plaintiff purchased his computer were those involved in the sale itself – the specific computer provided by Gateway and the purchase price paid by the plaintiff. The terms and conditions Gateway included in the package containing the computer were not a part of the original deal. Because the plaintiff was not a merchant, the terms and conditions were, under § 2-207(2), “proposals for addition to the contract.” The plaintiff did not accede to those proposals, which included an arbitration provision, and the court accordingly held that the additional terms were not part of the parties’ agreement.

Gateway argued that the plaintiff had indicated his agreement to those terms by the same conduct the Court of Appeals found dispositive in this case – failing to return the computer within a specified time period after receiving it.³ The court did not find Gateway’s argument persuasive:

Gateway argues that plaintiff demonstrated acceptance of the arbitration provision by keeping the computer more than five days after the date of delivery. Although the Standard Terms purport to work that result, Gateway has not presented evidence that plaintiff expressly agreed to those Standard Terms. Gateway states only that it enclosed the Standard Terms inside the computer box for plaintiff to read afterwards. It provides no evidence that it informed plaintiff of the five-day review-and-return period as a condition of the sales transaction, or that the parties contemplated additional terms to the agreement.

Id. at 1341.

Ultimately, Gateway’s argument failed for the same reason that the additional terms were unenforceable – the “review-and-return” period had not been a part of the original bargain, and

³ In *Klocek* the term was five days as opposed to the thirty days in this case.

unless the plaintiff had affirmatively assented to that contractual provision, it was inoperative. This logic applies with the same force to the case at bar. As demonstrated above, the browse-wrap method by which Dell attempted to alert Appellant to its terms and conditions is insufficient to create a contract. They were thus not part of the transaction between the parties. Dell's assertion that Appellant would agree to the terms and conditions included in the product packaging if he kept the computer for at least thirty days was also not a part of the initial bargain, and there is no evidence that Appellant agreed to that provision.

Klocek is better reasoned than the cases upon which the Court of Appeals relied and more protective of New Mexico consumers.⁴ *Klocek* also accords with basic principles of New Mexico contract law. See *Gardner Zemke Co. v. Dunham Bush, Inc.*, 115 N.M. 260, 264, 850 P.2d 319, 323 (1993) (holding that the question of mutual assent “focuses on whether the offeree clearly and unequivocally communicated to the offeror that its willingness to enter into a bargain was conditioned on the offeror’s ‘assent’ to additional or different terms.”). If a merchant does not take affirmative steps to make a purchaser aware of all terms and conditions before the consummation of the transaction, any terms and conditions supplied at a later date constitute a counter-offer. If the purchaser does not expressly assent to that counter-offer, the terms do not become part of the agreement between the parties and are therefore unenforceable. The Court of Appeals held otherwise, and this Court should correct that error.

⁴ The Court of Appeals referred to *Klocek* as an “anomaly,” *Fiser*, 2007-NMCA-087, ¶ 29. While the *Klocek* court reached the opposite conclusion of the courts in *ProCD*, *Hill*, and *Mortenson*, that court is not alone in holding the terms of a shrink-wrap license unenforceable. See, e.g., *Step-Saver Data Sys., Inc. v. Wyse Technology*, 939 F.2d 91, 103 (3d Cir. 1991) (holding shrink-wrap license unenforceable in software purchase because it was a modification of an oral purchase agreement, which included the goods sold, the quantity, and the price); *Arizona Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 764 (D. Ariz. 1993) (refusing to enforce terms of shrink-wrap license because it constituted a proposal for additional terms to a purchase contract).

C. A Consumer Can Only Assent To Contractual Terms Included With a Product If Those Terms Are Conspicuously Displayed.

Even if this Court holds that a consumer can agree to the terms of a contract that is included in the packaging of the product by failing to return the product within a specified time, the consumer must be given adequate notice of those terms; without such notice, there can be no meeting of the minds because a party to a contract cannot agree to terms of which he or she is unaware. *DeArmond v. Halliburton Energy Serv., Inc.*, 2003-NMCA-148, ¶ 20, 134 N.M. 630, 637, 81 P.3d 573, 580 (N.M. App. 2003) (“Without proof that [the plaintiff] knew of the offer, it is impossible to conclude that there was a meeting of the minds as to the terms of the offer.”). Contractual provisions that purport to affect a waiver of a purchaser’s legal remedies must be conspicuously displayed for the consumer’s benefit. *See Berlangieri v. Running Elk Corp.*, 2003-NMSC-024, ¶ 36, 134 N.M. 341, 352, 76 P.3d 1098, 1109 (2003) (holding that an indemnity provision waiving legal rights must be conspicuously displayed). In the context of a contractual provision, “conspicuous” means “so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it.” NMSA 1978 § 55-1-201(10) (2005). A notice that *refers* a purchaser to the back side of a form may be conspicuous, *see Deaton, Inc. v. Aeroglide Corp.*, 99 N.M. 253, 256, 657 P.2d 109, 112 (1983), but a notice displayed on the back of a packing slip without such reference does not meet this threshold.

Appellant contends that this is exactly how the terms and conditions were presented to him. Oddly, the Court of Appeals refused to acknowledge this contention, stating that Appellant failed to contradict an affidavit presented by Dell stating that the terms were separately enclosed. Appellant, however, provided affidavit testimony that the terms and conditions were *only* included on the back of the packing slip. It is difficult to see how this statement is not in direct conflict with the statement in Dell’s affidavit that the terms and conditions were enclosed

separate and apart from the packing slip. A review of the record in this case indicates the Court of Appeals' assertion that "Fiser's affidavit does not rebut [Dell's] statement," *Fiser*, 2007-NMCA-087, ¶ 21, is erroneous.⁵ To the extent the Court of Appeals' holding turned on this finding, the holding is likewise clearly erroneous. Given the record, there appears to be an issue of fact for the district court to determine: did Dell separately enclose the terms and conditions or were they only printed on the back of the packing slip? If Appellant's version of the facts is correct, Dell did not provide adequate notice to Appellant of the contractual terms it now seeks to enforce.

III. A SELLER CANNOT UNILATERALLY PRECLUDE THE AGGREGATION OF CONSUMER CLAIMS WHEN THOSE CLAIMS ARE NOT ECONOMICALLY VIABLE STANDING ALONE.

The arbitration agreement to which Dell seeks to hold Appellant purports to limit Appellant's right to aggregate his claims with those of similarly situated consumers by two means. First, by its very terms the arbitration provision allows Appellant to pursue only his own individual claim in arbitration: "The arbitration will be limited solely to the dispute or controversy between Customer and Dell." By limiting the arbitration *solely* to the dispute *between Customer and Dell*, this provision necessarily excludes the aggregation of the customer's claim with those of similarly situated customers. Second, the provision requires the arbitration to occur before the National Arbitration Forum ("NAF") and according to NAF rules. Those rules prohibit the aggregation of arbitration claims.

A. Public Policy Strongly Supports the Aggregation of Small, Similar Claims.

Although there are several reasons to aggregate similar claims, such as efficiency and economizing judicial resources, the principal reason for the aggregation of claims is economic.

⁵ See *Affidavit of Robert Fiser*, RP 92-3 ("I was not aware of the existence of any paper document purportedly containing printed 'terms and conditions' containing an arbitration provision until after suit had been filed.").

Because of the cost of pursuing a claim in either litigation or arbitration, claims involving small damage amounts are often not economically viable. Thus, even when a claim has merit, if the cost of bringing the claim is greater than the damage sustained by the plaintiff, the plaintiff will likely not pursue his or her rights. If, however, several other people suffered similar damages from the same conduct, and those people are able to bring their claims as a class, the aggregated claims are viable.

Public policy in New Mexico clearly supports the aggregation of claims in such circumstances. *See Romero v. Phillip Morris Inc.*, 2005-NMCA-035, ¶ 36, 137 N.M. 229, 238, 109 P.3d 768, 777 (N.M. App. 2005) (“We also recognize that a dominant policy behind the class action procedure is the ‘vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.’”) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997)). Appellant’s claim against Dell is such a claim. He estimates that his damages may be no more than \$10, an amount significantly lower than the cost of either litigation or arbitration. As noted above, the arbitration clause Dell seeks to enforce prohibits the aggregation of claims in two ways. There can be no dispute, however, that Appellant’s claim is simply too small to be economically viable by itself. If the Court of Appeals opinion on this issue is allowed to stand, consumers in such circumstances will be discouraged from bringing legitimate claims.

The Court of Appeals stated that it was “not convinced that New Mexico public policy would render an arbitration clause unconscionable because it precludes class actions given our clear preference for enforcing arbitration agreements.” *Fiser*, 2007-NMCA-087, ¶ 47. The Court of Appeals’ analysis, however, apparently failed to take into consideration the fact that the arbitration clause at issue does not simply preclude class action *lawsuits*, but wholly bars the

aggregation of small claims in any forum. The public policy of New Mexico is to allow wronged individuals an opportunity to obtain redress for their injury, through the court system or otherwise. *See, e.g., Richardson v. Carnegie Library Restaurant, Inc.*, 107 N.M. 688, 696, 763 P.2d 1153, 1161 (1994). In those cases where such redress can only be accomplished by aggregating several individual claims, an arbitration agreement that purports to flatly preclude such aggregation runs afoul of that public policy.⁶

The Court of Appeals analyzed this question under Texas, not New Mexico, law, citing to *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190 (Tex. App. –Houston [14th Dist.] 2003), for the proposition that an arbitration provision precluding the aggregation of claims is not unconscionable. *See Fiser*, 2007-NMCA-087, ¶¶ 45, 46. The *AutoNation* court, however, noted that “there may be circumstances in which a prohibition on class treatment may rise to the level of fundamental unfairness.” *AutoNation*, 105 S.W.3d at 200. The court was simply unpersuaded by the plaintiff’s “generalizations” which did not “satisfy her burden to demonstrate that the arbitration provision is invalid here.”⁷ *Id.*

The Attorney General leaves it to Appellant to argue the specific circumstances of his case to the Court, but urges that the Court not apply *AutoNation* as broadly as did the Court of Appeals. Contrary to the Court of Appeals’ assertion, *AutoNation* does not stand for the

⁶ This is not an indictment of arbitration clauses generally. An arbitration clause will obviously preclude a class action lawsuit, because it precludes lawsuits of any kind. It need not, however, prevent a class arbitration proceeding. If an arbitration clause purports to do so, and would thus effectively prevent consumers from bringing claims for small damage amounts, the clause violates both those consumers’ rights and the public policy of New Mexico.

⁷ Specifically, the *AutoNation* court was unimpressed with the plaintiff’s evidence: “First, Leroy contends that consumers will be deterred from seeking redress against AutoNation because the costs of arbitration will far exceed the illegal \$45 fee they were charged. In support of her argument, Leroy directs us to no record evidence, but merely asserts that the American Arbitration Association’s commercial arbitration rules require an initial filing fee of at least \$650.00, and that once a consumer commits to pay the arbitrator’s fee, and attorneys’ fees to assist in the arbitration, ‘it is not unreasonable to believe the consumer’s cost will exceed \$4,500.00.’ Because Leroy did not make this argument below, we find it is waived.” *Id.* at 201.

sweeping proposition that an arbitration clause purporting to prevent the aggregation of claims is necessarily legitimate. Moreover, the Court of Appeals incorrectly stated that the threshold of unconscionability is the essentially the same in Texas and New Mexico. It is not. In Texas, as the Court of Appeals noted, a contract is unconscionable only “if it is so one-sided that no man in his senses and not under a delusion would enter into it and which no honest and fair person would accept.” *Fiser*, 2007-NMCA-087, ¶ 37. In New Mexico, by contrast, “[s]ubstantive unconscionability is concerned with contract terms that are illegal, contrary to public policy, or grossly unfair.” *Guthmann v. LaVida Llana*, 103 N.M. 506, 510, 709 P.2d 675, 679 (1985). The New Mexico standard is plainly not as exacting as that applied in Texas. And, as discussed above, an arbitration provision that would prevent wronged consumers from vindicating their claims is against New Mexico’s public policy supporting the redress of injury.

B. Preventing the Aggregation of Claims That Are Economically Unviable Standing Alone Prevents Relief From Clearly Culpable Conduct.

In addition to preventing consumers from vindicating their rights, an arbitration clause that prohibits the aggregation of claims serves as an exculpatory clause that prevents a merchant from ever being held accountable for its illegal conduct. Exculpatory clauses that unfairly limit liability, and thus immunize culpable conduct, are against New Mexico public policy, *Fort Knox Self Storage, Inc. v. Western Technologies, Inc.*, 2006-NMCA-096, ¶¶ 14-15, 140 N.M. 233, 237-38, 142 P.2d 1, 5-6 (N.M. App. 2006), and they should be. Merchants cannot, in a contract of adhesion, unilaterally set terms that will allow them to skim a few dollars from a large number of consumers with impunity. If a merchant does not live up to its end of the bargain, it must be held accountable. This Court should not countenance arbitration clauses that prevent such accountability.

CONCLUSION

For the foregoing reasons, the Attorney General of New Mexico respectfully requests that this Court reverse the holding of the Court of Appeals and remand this case for further proceedings in accordance with instructions from this Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on October 19, 2007, I served the foregoing document by United States mail

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