Supreme Court of New Jersey

Docket No. 085606

CRYSTAL POINT CONDOMINIUM ASSOCIATION, INC., Plaintiff-Respondent, v. KINSALE INSURANCE COMPANY, Defendant-Appellant.	CIVIL ACTION On Appeal from the Superior Court of New Jersey, Appellate Division, Docket No. A-4621-19 Sat Below: Hon. Carmen Messano, P.J.A.D. Hon. Karen L. Suter, J.A.D. Hon. Morris G. Smith, J.S.C. (temporarily assigned)

BRIEF OF AMICI CURIAE THE INSURANCE COUNCIL OF NEW JERSEY AND THE NEW JERSEY CIVIL JUSTICE INSTITUTE IN SUPPORT OF DEFENDANT-APPELLANT

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STATEMENT OF INTEREST OF AMICI CURIAE

The Insurance Council of New Jersey ("ICNJ") and the New Jersey Civil Justice Institute ("NJCJI") submit the following joint brief in support of Defendant-Appellant Kinsale Insurance Company. Both organizations urge this Court to issue an opinion that promotes predictability and efficiency in resolving commercial disputes. These touchstones result in less expensive litigation for all parties and, more importantly, help control insurance premiums for New Jerseyans and New Jersey businesses.

Established in 1977, ICNJ is a nonprofit New Jersey insurance trade association that represents approximately eighteen insurer members licensed to write property and casualty insurance in the State of New Jersey. ICNJ's purposes are to promote the economic, legislative and public standing of its insurer members and its members' policyholders, as well as the insurance industry at large; to provide a forum for discussing issues that are of common concern to ICNJ's members and its members' policyholders; to serve as a source of timely and credible information about regulatory and legislative developments; to serve the public interest by providing a responsible voice and educating the public on important policy questions; to encourage environments that enhance the ability of property and casualty insurers to conduct their businesses efficiently and competitively; to provide services to its member

insurers to help them serve their policyholders; and to advocate sound public policies on behalf of its members in legislative, judicial and regulatory forums at the state and federal levels.

NJCJI advocates for a civil justice system that treats all parties fairly. NJCJI has a strong interest in the clear, predictable and fair application of the law and is concerned with the broader civil justice implications that cases, such as this one, may have on the professionals, sole proprietors and businesses within this State. Founded in 2007 as the New Jersey Lawsuit Reform Alliance, NJCJI is a nonpartisan, statewide group comprised of small businesses, individuals, not-for-profit groups and many of the State's largest business associations and professional organizations. In that capacity, NJCJI participates as amicus curiae in matters of interest to its membership. In recent years, NJCJI has appeared as amicus curiae before this Court in important consumer and tort litigation, including Dugan v. TGI Fridays, Inc., 231 N.J. 24 (2017) and Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173 (2012). NJCJI and its members believe that a fair civil justice system efficiently resolves disputes based solely upon application of the law to the facts of each case.

This case is an opportunity for the Court to remind the courts of New Jersey's strong public policy in favor of arbitration and reaffirm the principles governing arbitration.

Those principles dictate that courts cannot blue-pencil valid arbitration provisions for direct-action litigants out of mere preference. Rather, third-party beneficiaries who pursue direct actions must be held to the same contractual terms they seek to enforce. A reminder from this Court will maintain the rightful place of arbitration as a favored means of resolving commercial disputes. This, in turn, will promote predictability for the businesses who use arbitration as a primary and cost-effective means of resolving disputes. This is especially true in the insurance industry, where the true beneficiaries of arbitration in this context are businesses and consumers who enjoy the lower premiums that result from efficient dispute resolution. Affordable insurance supports the smooth operation of New Jersey businesses and promotes security in consumers' lives. Accordingly, ICNJ and NJCJI respectfully ask this Court to reverse the Appellate Division's decision and to affirm the strong preference for arbitration in New Jersey.

STATEMENT OF PROCEDURAL HISTORY AND FACTS[1]

Amici curiae rely upon the Statement of the Matter Involved as set forth in Defendant-Appellant's brief at Db1 to Db5.[2] ICNJ and NJCJI respectfully ask this Court to grant their motions to appear as amici curiae in support of Defendant-Appellant and to enforce the binding arbitration provision at the center of this case.

[1] This Statement of Facts and Statement of Procedural History are, as in Defendant's brief, combined due to their interrelatedness.

[2] The following abbreviation will be used in this brief:
Db refers to the brief submitted by Defendant-Appellant Kinsale Insurance Company in support of its petition for certification.

LEGAL ARGUMENT

POINT I

NEW JERSEY HAS A STRONG PUBLIC POLICY IN FAVOR OF ARBITRATION AGREEMENTS AS AN EFFICIENT MEANS OF RESOLVING COMMERCIAL DISPUTES THAT THE DECISION AT BAR HAS DISRUPTED.

There is a well-established preference for arbitration as a preferred means of resolving commercial disputes in this state. Indeed, the New Jersey Legislature explicitly favored arbitration through enactment of the New Jersey Arbitration Act (NJAA), N.J.S.A. 2A:23B-1 to -36. This preference is also mandated by the Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1 to 16, and related federal and state caselaw. If left uncorrected, the Appellate Division's decision in this matter will cast doubt on the continued viability of arbitration agreements in New Jersey. Crystal Point Condo. Ass'n, Inc. v. Kinsale Ins. Co., 466 N.J. Super. 471 (App. Div. 2021).

As Defendant-Appellant Kinsale Insurance Company noted in its comprehensive petition for certification, New Jersey and its courts have a long-established history of endorsing arbitration as a sensible and efficient means of resolving commercial disputes like the one in this case. (Db8 to Db10) New Jersey caselaw and federal caselaw acknowledge arbitration's favored status. See, e.g., AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011) (holding that Federal Arbitration Act preempts

California state law that prohibited contracts disallowing class-wide arbitration); Skuse v. Pfizer, Inc., 244 N.J. 30, 46 (2020) (noting that the FAA and NJAA "enunciate federal and state policies favoring arbitration"); Barcon Associates, Inc. v. Tri-Cnty. Asphalt Corp., 86 N.J. 179, 186 (1981) (noting that "[c]ommercial arbitration is a long-established practice in New Jersey consistently encouraged by the Legislature.")

The appellate panel's decision in this case constitutes a radical departure from the historical preference for arbitration. The panel disregarded the clear intent of the signatories to a valid insurance contract to arbitrate all disputes arising out of that contract. Instead, the panel relied in part on the Direct Action Statute, N.J.S.A. 17:28-2, to presume that third-party beneficiaries, as endowed by that statute, were not contemplated by the parties to the insurance contract and, consequently, not bound by its arbitration provision. Based on that unwarranted presumption regarding third-party beneficiaries, the panel blue-penciled the arbitration provision, ignoring New Jersey's strong public policy in favor of arbitration.

The Appellate Division's decision suggests that only explicit mutual assent from all potential third-party beneficiaries will ensure the validity of an arbitration provision in an insurance contract. In practice, this

requirement cannot be satisfied and appears specifically designed to undercut arbitration in this context. The decision is therefore inconsistent with the historical statewide and national preference for arbitration, and, as outlined below, New Jersey's traditional principles governing contract law as applied to arbitration agreements.

POINT II

THE VALID ARBITRATION PROVISION IN THIS MATTER MUST BE ENFORCED, AS THERE IS NO STATE CONTRACT PRINCIPLE THAT WOULD PREVENT ITS ENFORCEMENT.

A non-signatory third party that seeks benefits under the terms of an insurance policy through a direct action against the insurer must be held to all contractual terms, including an arbitration provision. Indeed, such a litigant, whose losses are logically related to those covered under the policy and who seeks to stand in the shoes of the insured, is simply a third-party beneficiary of that policy. Moreover, the Direct Action Statute[3] confirms this as a universal expectation that insurance contract drafters are mindful of. Either way, third-party

[3] Amici curiae do not concede that the Direct Action Statute governs professional malpractice cases and joins Defendant-Appellant's arguments at Db15 to Db17. The plain language of the Direct Action Statute does not include professional negligence claims but specifically names other types of losses. The specificity of what claims the Direct Action Statute governs indicates that the other unnamed claims, like professional negligence claims, are not under the purview of the Direct Action Statute.

beneficiaries who seek to stand in the shoes of a policyholder must also be bound by the same contract to which the policyholder was always bound.

A. Equitable estoppel demands enforcement of a valid arbitration provision in the context of third-party beneficiaries seeking benefits under insurance contracts.

Although the appellate panel acknowledged that the principles governing contract law also govern arbitration, it did not adhere to those basic principles. Traditional contract principles, including the remedy of equitable estoppel, demand enforcement of the valid arbitration provision in this case.

Again, the Federal Arbitration Act ("FAA") demands enforcement of valid arbitration provisions. The FAA provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Supreme Court of the United States has held that no state rule may discriminate against arbitration based on the type of claim or disfavor contracts that have "the defining features of arbitration agreements." Kindred Nursing Ctrs. L.P. v. Clark, 137 S.Ct. 1421, 1427 (2017) (citing AT&T Mobility, 563 U.S. at 339, 341-42 (2011)). Arbitration agreements must exist "on an equal plane with other contracts." Kindred Nursing Ctrs., 137 S.Ct. at 1426-27 (rejecting Kentucky's judicially created rule

burdening formation of arbitration agreements compared to ordinary contracts as violative of the FAA). State rules targeting arbitration and imposing greater burdens on enforcing arbitration clauses are impermissible. The only way to invalidate an arbitration provision without violating the FAA is by finding that the arbitration provision violates a traditional state contract principle.

Similarly, the New Jersey Arbitration Act ("NJAA") provides that

> [a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.
>
> N.J.S.A. 2A:23B-6(a).

Like the FAA, the NJAA and the caselaw addressing it direct the reader to state contract-law principles to determine whether the arbitration agreement is valid. Hirsch, 215 N.J. at 187 (citing Hojnowski v. Vans Skate Park, 187 N.J. 323, 342-43 (2006)). And like the caselaw addressing the FAA, the NJAA and its caselaw are also clear that arbitration agreements cannot be subject to more burdensome requirements than those already applied to contracts generally. Id. at 188 (citations omitted).

Thus, "commercial arbitration is a creature of contract." Hirsch, 215 N.J. at 179. To determine whether an arbitration

agreement is valid, the court will "consider the contractual terms, the surrounding circumstances, and the purpose of the contract." Id. at 188 (citations omitted). Traditional principles of contract can demand enforcement of an arbitration provision, even if the dispute is between two parties who do not themselves have an explicit arbitration agreement. Id. at 179. So, while generally there must be mutual assent for a contract to be valid, equity can still compel the enforcement of a valid arbitration provision in the absence of mutual assent. Id. at 179-80.

Equitable estoppel serves to avoid the injustice of an unenforced arbitration provision here and protect Defendant-Appellant's reasonable reliance on that provision. See ibid. ("Equitable estoppel is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration."); see also Arthur Anderson, LLP v. Carlisle, 556 U.S. 624, 631 (2009) (noting that traditional state-law principles of law and equity allow a contract to be enforced by or against nonparties). It is specifically "designed to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment." Hirsch at 180 (citations omitted). To establish equitable estoppel, the party seeking to enforce the arbitration provision must demonstrate detrimental reliance. Id. at 189.

The appellate panel appeared to rely in part on the Direct Action Statute to justify blue-penciling the arbitration provision. However, the panel's conclusion that the Direct Action Statute's creation of third-party beneficiaries is a statutory one presents a distinction without difference. Crystal Point, 466 N.J. Super. at 483 (App. Div. 2021). The appellate panel offered no principled reason for why it matters that the Direct Action Statute created third-party beneficiary status for judgment creditors. And this also raises a which-came-first question: did the Direct Action Statute truly create third-party beneficiary status or did it simply codify a traditional understanding about the geometry of benefits and obligations inherent in an insurance agreement? The appellate panel did not address this, either. While the panel discussed the Direct Action Statute, it ultimately moved on to "the principles which animate our arbitration law" as the true basis of its decision. Id. at 483-84. Based on a flawed understanding of those principles, the panel then effectively decided that a third-party beneficiary should receive a better contract than the insured when it comes to arbitration.

Insurance agreements do not take place in a vacuum. Assuming, arguendo, that the Direct Action Statute even applies

here[4], New Jersey insurance agreements are written in the context of the existence of that statute and the common law governing the rights of third-party beneficiaries. In other words, Plaintiff's status as "third-party beneficiary" here is not merely statutory – it is part of the DNA of how the insurance industry functions. Sophisticated parties like the insured professionals and Kinsale Insurance Company understand that the entire reason for the insurance policy would be to ensure that a loss caused by the insured professionals will be covered. The recipient of a policyholder's professional services is an obvious potential third-party beneficiary who could seek to stand in the shoes of the policyholder if the policyholder is insolvent. It stands to reason that both signatory parties took it as a given that Plaintiff could attempt to claim benefits as a third-party beneficiary of the policy under such circumstances.

The plain language of the Direct Action Statute comports with the understanding that a judgment creditor standing in the shoes of a policyholder must abide by the same contract the policyholder entered. The Direct Action statute provides that a judgment creditor may maintain an action "against the

[4] Again, amici agree with the Defendant-Appellant's arguments that the statute is inapplicable based on the plain language of the statute.

corporation under the terms of the policy for the amount of the judgment in the action not exceeding the amount of the policy." (emphasis added) N.J.S.A. 17:28-2. There is no exception to this. There is no loophole for any alternative means of resolving a claim.

Indeed, if there were an action brought by a policyholder, the arbitration provision in the policy would apply, resulting in a remand from court to arbitration. A judgment creditor pursuing a claim "under the terms of the policy" must be held to the terms of the policy, as there is no exception to this requirement. The statutory language is clear.

Until the case at bar, judgment creditors have never had the opportunity to expand their rights under a contract. A judgment creditor's rights vis-à-vis an insurance contract between a policyholder and an insurer are "purely derivative." Dransfield v. Citizens Cas. Co. of N.Y., 5 N.J. 190, 194 (1950). The injured judgment creditor has no greater contract rights than the original policyholder, because the creditor's rights only come to fruition after recovering a judgment against the insolvent policyholder. Ibid. The insured's rights merely transfer to the creditor; they do not expand. Ibid. The creditor is, just like the policyholder whose place they took, bound by the terms of the insurance policy, with no exceptions. N.J.S.A. 17:28-2.

To the extreme extent the appellate panel valued explicit mutual assent over equitable estoppel, the panel ignored the fact that there would be no way that the remaining signatory party, the insurer, would agree to automatic litigation over arbitration. This result contradicts the principle that plaintiffs cannot "claim the benefit of the contract and simultaneously avoid its burdens[.]" E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediaries, S.A.S., 269 F.3d 187, 200 (3d Cir. 2001). The burdens imposed on the policyholder were just as assented to as the benefits the policyholder received under the contract. A court's redrafting of a contract to gift more favorable terms to a judgment creditor contravenes the original assent by the insurer and insured. This ignores the original balance of rights and obligations in favor of the judgment creditor's preference for no principled reason, while still allowing the judgment creditor to pursue other rights under the terms of the contract.

The appellate panel asks more of this arbitration provision than it would of an ordinary contract. Having created this new third-party beneficiary status, apparently influenced by the existence of the Direct Action Statute, the appellate panel appears to require explicit mutual assent between Kinsale Insurance Company and Plaintiff, and ignores equitable estoppel as a clear basis for enforcement. Crystal Point, 466 N.J. Super.

at 485 ("We reject the notion that labeling a non-signatory claimant as a third-party beneficiary of an insurance contract compels arbitration.") The panel did not look to the surrounding circumstances. The panel did not consider the common-sense conclusion that a condominium association could eventually be a plaintiff against the professionals and that the insurance contract would correlate to property losses suffered by the condominium association from alleged professional negligence. Who else would the predicted third-party beneficiary be here?

The appellate panel's decision creates a new burden for insurers seeking to enforce arbitration provisions against third-party beneficiaries by effectively accepting only explicit mutual assent to validate the provision. But that is impossible; otherwise, the third-party beneficiary would be a first party, and all potential third-party beneficiaries will have to be included in forming the contract. This outcome is bizarre, burdensome, and exceeds the requirements traditionally imposed upon the formation of contracts. Accordingly, this Court should correct course and remind the courts of the traditional state-contract and equity principles that govern these situations.

B. Allowing this decision to stand will result in uncertain application of arbitration provisions and rising litigation expenses and premium costs for customers and businesses.

Should the Crystal Point decision stand, courts will be improperly imbued with the authority to re-draft insurance contracts. Insurers, which frequently have arbitration provisions in their contracts for the predictability and efficiency, will no longer have those negotiated-for assurances. If courts continue to rely on the Crystal Point decision, they will have to also deal with the increased litigation challenging arbitration provisions, defeating the purpose of those provisions and only adding to the amount of time spent in litigation. Those costs will be absorbed by the insurers and, in turn, spread out across individual customers and businesses.

Should the appellate panel's decision stand, every arbitration provision from an insurance contract in this context will be challenged, and every court answering the challenge will stand in the place of the original contract drafters. And if guided by the Crystal Point decision, courts will create a brand-new contract that reconfigures the favorability of the original terms. In other words, despite the long-held principle that judgment creditors who sue from the position of the insured enjoy only the same rights as the insured, the judgment

creditors will enjoy new, expanded rights under the court-drafted contract.

It is important to note that insurers base their premiums on, in part, the cost of coverage litigation. The costs of such litigation is a natural extension of the risks they insure. When the costs of such disputes increase, premiums must also increase. Circumventing arbitration provisions will bear two layers of additional costs: the costs of the litigation over blue-penciling the arbitration provision to appease the judgment creditor and then the costs of full-blown litigation in the courts. Finally, in the event of a judgment or settlement, there would be a potential third layer of cost, which, frankly, the costs of litigation may dwarf.

In contrast, the benefits of arbitration are its customizability, convenience, and cost-efficiency. "Parties to a contract can contract arbitration to handle particular types of business transactions, including adopting their own procedural rules, selecting the substantive law applicable to the dispute, and appointing arbitrators with specialized expertise." Hirsch, 215 N.J. at 179. Arbitration clauses eliminate procedural disputes that often crop up during traditional litigation and forge a more direct path to resolution. As a result, "arbitration can be a cost-effective and speedy method of resolving litigation." Ibid.

The insurance industry is one, by its nature, centered on litigation, risk management and cost management. It is also an important industry in this State. It gives security to its customers and allows New Jersey businesses to function. Many insurance agreements contain arbitration provisions for the exact reasons discussed above. Arbitration controls the cost of a claim that could escalate into full-blown litigation, with written discovery, depositions, expert reports, procedural disputes, motions for summary judgment, and a trial. Arbitration is a tool insurance companies use to resolve coverage matters in a quicker way, and swift dispute resolution is generally more cost-effective. Such savings are passed on to the customers in the form of controlled premiums.

CONCLUSION

For the foregoing reasons, ICNJ and NJCJI respectfully request that this Court grant each leave to appear as amicus curiae, continue New Jersey's commitment to arbitration as an efficient means of resolving commercial dispute, and reverse the Appellate Division's decision contradicting those principles.

Respectfully submitted,

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