Law's Attic sheds light on remarkable historical events whose anniversary is upon us. This month our authors examine a noteworthy case two decades old this year.

Broemmer v. Abortion Services of Phoenix, Ltd.

Arizona's Curious Contribution to the Law of Contractual Arbitration

BY BARRY D. HALPERN & SARA J. AGNE

October 2012 marked the 20th anniversary of the Arizona Supreme Court's opinion in *Broemmer v. Abortion Services of Phoenix, Ltd*. In the two decades since Broemmer was decided, it has been featured in nearly a dozen legal textbooks for contracts and arbitration courses. As one scholar notes, *Broemmer* is historic in that it marked the first time the Arizona Supreme Court applied the "reasonable expectations" doctrine of Section 211(3) of the Restatement (Second) of Contracts to a contract that was not an insurance policy. *Broemmer* is part of a lineage of decisions that made Arizona a legal laboratory for the court-led implementation of Section 211(3).

Despite that lineage, the authors respectfully argue that the case undermined the appropriate use of mediation and furthered Arizona's retreat from personal responsibility in contract law.

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Problem 3-9

Melinda Kay Broemmer entered a Phoenix clinic to obtain an abortion. While she was in a visibly disturbed emotional state prior to the abortion, she signed three standard forms, one of which required that any dispute with the clinic be subject to binding arbitration by "licensed medical doctors who specialize in obstetrics/gynecology." During the abortion, she suffered a punctured uterus that required medical treatment. ***If Broemmer brings a malpractice lawsuit, will the clinic be able to use the form to compel arbitration?***[1]

So query Professors Frier and White in the first edition of their textbook *The Modern Law of Contracts*. Arizona attorneys may know that those are no dummy facts dreamed up to stump credulous law students.[2] In fact, *Broemmer v. Abortion Services of Phoenix, Ltd.*[3] is featured in more than half a dozen casebooks, treatises and outlines, and it's cited by dozens more.[4] Why have so many authors chosen to exercise future lawyers with the *Broemmer* decision?

Because few expect the case to come out the way it did. (The ultimate answer to the professors' query is an emphatic "No.")

Twenty years ago this October 13, the Arizona Supreme Court handed down what has become a seminal opinion in *Broemmer*. The decision held that the clinic could not use its form to compel arbitration of Ms. Broemmer's suit: The agreement to arbitrate was unenforceable against her because it fell outside of her "reasonable expectations."[5]

The case marked the first time the Arizona Supreme Court applied the "reasonable expectations" doctrine of Section 211(3) of the Restatement (Second) of Contracts ("Section 211(3)") to a non-insurance contract.[6] This article examines *Broemmer* in view of its anniversary, discusses Arizona's exceptional, wholehearted adoption and broad interpretation of Section 211(3), and takes the position that *Broemmer* ultimately undermined the appropriate use of mediation and represented a retreat from personal responsibility in contract law.

Before we address the elements of Section 211(3), a more detailed review of *Broemmer*'s facts is in order. Those facts ostensibly compelled the Court to reverse the Court of Appeals decision[7] that had affirmed summary judgment in favor of the defendants based on the binding arbitration clause.

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Facts & Procedural History

In December 1986, Ms. Broemmer, a 21-year-old high school graduate from Iowa, was 16 or 17 weeks' pregnant and seeking an elective abortion at the direction of the father-to-be, while her parents advised against it.[8] The day before the procedure, she was given three forms to complete and sign, including an agreement to arbitrate, which provided that "any dispute aris[ing] between the Parties as a result of the fees and/or services" would be settled by binding arbitration and that "any arbitrators appointed by the AAA [American Arbitration Association] shall be licensed medical doctors who specialize in obstetrics/gynecology."[9] The agreement stated at its top in bold capital letters: "**PLEASE READ THIS CONTRACT CAREFULLY AS IT EFFECTS** [sic] **YOUR LEGAL RIGHTS**," followed by "**AGREEMENT TO ARBITRATE.**"[10] A recital of the agreement stated, "The Parties deem it to be in their respective best interest to settle any such dispute as expeditiously and economically as possible."[11] Ms. Broemmer completed all the paperwork, including writing her name on the arbitration agreement and signing it, in fewer than five minutes, and returned the forms to the clinic reception desk.[12]

After sustaining a punctured uterus during the procedure the next day, Ms. Broemmer later sued Abortion Services of Phoenix, Ltd. ("ASP"), and the physician who performed the procedure, for malpractice.[13] The trial court granted summary judgment in favor of defendants, who contended that the trial court lacked subject matter jurisdiction because arbitration was required.[14]

The Court of Appeals affirmed, holding that though the arbitration agreement was "part of an adhesion contract,"[15] the agreement did not "fall outside Broemmer's reasonable expectations nor [was] it unconscionable."[16] Citing precedent, its decision noted that Arizona courts "expressed broad support for arbitration"—"a preferred mode of resolution because it is efficient regarding time and finances"—and that the "mere inclusion of an arbitration clause in a contract does not favor either party."[17]

The Court of Appeals described an adhesion contract as being "offered on a take it or leave it basis to a consumer who has no realistic bargaining strength and cannot obtain the desired services or goods elsewhere without consenting to the identical contract terms."[18] Though the Court of Appeals noted the absence of two classic characteristics of adhesion contracts—the arbitration provision was not hidden in fine print in boilerplate language in a lengthy agreement and was "not favorable to the drafting party"—it still found a contract of

adhesion.[19] This finding brought the agreement within the purview of Section 211(3), which addresses standardized agreements.

Interestingly, the Court of Appeals found "nothing in the record from which an inference can be drawn that ASP had reason to know that Broemmer would have rejected the agreement had she known that it provided for arbitration of medical malpractice claims."[20]

The Supreme Court's *Broemmer* Decision

The Arizona Supreme Court reversed, in a decision comprising just 21 paragraphs. It concurred that the agreement was an adhesion contract but found it compelling that Ms. Broemmer was under much emotional stress, had only a high school education, was inexperienced in commercial matters and unsure what arbitration was, and that the medical provider had failed to explain that only similar doctors would hear a dispute she might have with her doctor.[21] Through the words of Vice Chief Justice Moeller, the Court focused not on whether ASP, the clinic and the drafter of the agreement had reason to believe Ms. Broemmer would not have signed the arbitration agreement had she known what it was, but instead on "whether it was beyond [Ms. Broemmer's] reasonable expectations to expect to arbitrate her medical malpractice claims."[22] Chief Justice Feldman and Justices Corcoran and Zlaket concurred.

The Court noted that Ms. Broemmer's signing of the agreement involved "waiving her right to a jury trial" and that "there was no conspicuous or explicit waiver of the fundamental right to a jury trial or any evidence that such rights were knowingly, voluntarily and intelligently waived."[23] Directly contrary to the Court of Appeals finding of "nothing in the record," the Arizona Supreme Court held that the "only evidence presented compels a finding that waiver of such fundamental rights was beyond the reasonable expectations of" Ms. Broemmer.[24]

Citing a 20-year-old law review article, the Court opined that it was required to "view the 'bargaining' process with suspicion" due to the defendants–appellees' "failure to explain to plaintiff that the

agreement required all potential disputes, including malpractice disputes, to be heard only by an arbitrator who was a licensed obstetrician/gynecologist."[25] The Court found it "unreasonable to enforce such a critical term against plaintiff when it is not a negotiated term and defendant failed to explain it to her or call her attention to it."[26]

Justice Martone's Dissent

The Court so held over a strong dissent from Justice Martone, who wrote that the Court's conclusion lacked "basis in law or fact" and attached the actual agreement to arbitrate as an exhibit to his dissent to highlight the "undisputed facts that the court ignores."[27]

"I fear today's decision reflects a preference for litigation over alternative dispute resolution that I had thought was behind us," he wrote, adding that he would have affirmed the Court of Appeals decision.[28] Citing state and federal law favoring arbitration, Justice Martone asked "Where is the harm?" in enforcing Ms. Broemmer's agreement to arbitrate her claims.[29] He pointed out that the United States Supreme Court had recently "expressly rejected the 'outmoded presumption' and 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law.'"[30] And he criticized the majority's reliance on authorities, including Section 211(3).[31] For Justice Martone, the compelling facts were that:

> There were no prior negotiations that were contrary to arbitration. An agreement to arbitrate is hardly bizarre or oppressive. It is a preferred method of alternative dispute resolution that our legislature has expressly acknowledged in A.R.S. § 12-1501. Arbitration does not eviscerate any agreed terms. Nor does it eliminate the dominant purpose of the transaction. The plaintiff here had an opportunity to read the document, the document was legible and was hardly hidden from plaintiff's view. This arbitration agreement was in bold capital letters.[32]

Ultimately he observed that, despite long-standing Arizona public policy supporting arbitration "as good, not evil," "we are left to conclude that people reasonably expect litigation over arbitration."[33]

The majority opinion included an unusual "Comment on the Dissent," disputing Justice Martone's concern that the holding sent a "mixed message" regarding the favorability of arbitration as a means of dispute resolution.[34] The Court emphasized that it was only deciding "*this* case" and that its "enthusiasm for arbitration in general does not permit us to ignore the realities present in *this* case."[35] In its Comment, the *Broemmer* majority noted that it declined "to write a sweeping, legislative rule concerning all agreements to arbitrate."[36] However, the practical effect of the decision did just that, strongly discouraging arbitration between doctors and patients in Arizona, and ultimately, throughout the United States.

> **The opinion exemplifies a thread of judicial decisions that have led a retreat from the classical legal protections of the right to contract.**

"Slumbering" Section 211(3)

So what is it about Arizona that gives us *Broemmer*'s curious and anomalous result?

For starters, outside of Arizona, Section 211(3) is a little-known and seldom-used provision of the Restatement (Second) regarding standardized agreements. Section 211 declares:

> (1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.
> (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.
> *(3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.*[37]

The "reasonable expectations" doctrine has its genesis in Section 211(3)'s comment f, which provides in part that while "customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation."[38]

Arizona courts were early adopters of Section 211(3) and that comment.[39] And Arizona has remained exceptional in its embrace of those provisions. Of the roughly 120 United States cases that reference Section 211(3), more than half (65) come from Arizona.[40] No other jurisdiction is in danger of eclipsing Arizona in that category, either. So, while in most places, Section 211(3) has "slumbered peacefully" in the Restatement (Second) without much notoriety,[41] in this state it has been trumpeted, including in *Broemmer*, as a long-held "basic principle in the law of contracts."[42]

But *Broemmer*'s holding gives even greater weight to comment f to Section 211(3) than to the Restatement (Second) provision itself. Instead of evaluating, from ASP's perspective, whether there was reason to believe Ms. Broemmer would not manifest assent to the arbitration agreement if she knew what it contained, the Court simply assumed, with no basis in the record, that such an agreement was beyond Ms. Broemmer's expectation.[43] The Court directly quotes comment f, but only refer-

ences Section 211(3), while noting its view that the "Restatement focuses our attention on whether it was beyond plaintiff's reasonable expectations to expect to arbitrate her medical malpractice claims."[44] One has to read Justice Martone's dissent to appreciate the controlling implication of the actual language of Section 211(3).[45]

Broemmer Effects, Academic Treatment

The authors respectfully submit that, by purporting to stand in the shoes of Ms. Broemmer—a novel judicial posture not contemplated by Section 211(3)—the Court strongly discouraged binding arbitration in Arizona and subverted the concept of personal responsibility in contract law. The Court's multiple protestations that it was only deciding "*this* case" are ironic in view of the predictable cascade of commentary that followed the decision's publication.

Justice Martone's dissent noted an irony 20 years ago: The majority expresses apparent preference for "litigation, in which the plaintiff would lose her right to trial by jury by failing to know about it and demand it under Rule 38, but then somehow assumes that" the agreement to arbitrate with its bold-faced, capitalized type denominating it as such "is insufficient warning."[46] While, as the Court observed, there was no explicit waiver of the right to a jury trial in the arbitration agreement, it remains unclear today whether Ms. Broemmer would have been better off with a jury.

A comprehensive review of empirical studies in 2007 concluded that patients lose twice as many medical malpractice verdicts as they win, and it found that juries find for physicians 73 percent of the time when such cases go to trial.[47] Even in cases with strong evidence of negligence, plaintiffs win only about 50 percent of the time.[48] As Professor White pointed out, Ms. Broemmer may well have fared better in arbitration, even before the physician panel: "It is possible that the physicians on the arbitration panel might have been embarrassed by the botched abortion and might have chosen to give Melinda substantial damages."[49] That hypothesis is bolstered by the fact that state medical licensing boards, composed largely of physicians, regulate, investigate and frequently impose discipline for physician negligence.

Some scholars, like Professor White, have criticized *Broemmer* and its lineage as reminiscent of the "activist decisions of the 1960s and 1970s written by Justice Traynor in California."[50] Others cast in efficiency and economic terms the Court's adherence to its version of the reasonable expectations doctrine.[51] Professor Braucher cited the "prohibitive" transaction costs that would accompany customers who actually read and understood standard forms or tried to negotiate their terms.[52] In 2008, she wrote, "Although customers may pay a small amount more if unexpected clauses are not enforceable, most might prefer to do so rather than, for example, have a less promising forum in which to pursue a claim of serious medical malpractice."[53] Finally, she added, judicial policing of standard forms provides desirable insurance to consumers against unexpected boilerplate and cuts down on the prohibitive expenses of attempting to "communicate effectively the meaning of a large number of complex form terms."[54] Professor Braucher's views appear to ignore the massive societal costs of litigation[55] and to posit an inaccurate assessment of the efficacy of jury trials in medical litigation.[56]

Although Section 211(3) was intended to provide protection in extreme cases, it is unclear that the *Broemmer* "boilerplate" was unexpected or that Ms. Broemmer required protection from it. The one-page "**AGREEMENT TO ARBITRATE**," which Ms. Broemmer had a day to consider, contains just 10 short sentences.[57] Judicial intervention with a simple agreement between provider and patient treads heavily on the freedom and ability of those parties to streamline their relations through contract.

The *Broemmer* majority acknowledged, "Important principles of contract law and of freedom of contract are intertwined with questions relating to agreements to utilize alternative methods of dispute resolution," yet they still went on to hold as they did.[58] The opinion exemplifies a thread of judicial decisions that have led a retreat from the classical legal protections of the right to contract.[59] Unwarranted judicial intervention into the affairs of contracting parties fails to promote security of exchange and drives up costs. Particularly now, when

consumers have "constant real-time access to information about the places, goods, people, firms, and contracts around them," such intervention is outmoded.[60] Even in *Broemmer*'s day, the right to contract would have been best protected by enforcing the arbitration agreement as written. Because when "the answer to the question of whether a contractual term was within the reasonable expectations of the contracting parties may just depend on the judge who is hearing the case,"[61] neither certainty nor consistency prevails.

Certainty, consistency and judicial economy are among the reasons supporting national and state policies favoring arbitration and its "essential virtue of resolving disputes straightaway."[62] As Justice Martone noted at the time of *Broemmer*, the "Federal Arbitration Act, 9 U.S.C. § 2, is just like Arizona's, A.R.S. § 12-1501."[63] Both provide that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The difficulty of reconciling *Broemmer* with the language of and public policy behind those statutes may explain why so many scholars view the decision as an academic conundrum.

Section 211(3) Since *Broemmer*

Since *Broemmer*, Section 211(3) has continued to germinate in Arizona case law, though courts have generally returned to applying the text of the Restatement (Second) provision, rather than comment f alone. For example, *Harrington v. Pulte Home Corp.*[64] set out a seven-factor test, taken in part from comment f, under which courts may determine whether a party had reason to believe that the non-drafting party would not have accepted the agreement if he or she had known that the agreement contained a particular term.[65] Recent decisions have analyzed both *Broemmer* and that seven-factor test to determine whether arbitration agreements in the non-insurance context were beyond plaintiffs' reasonable expectations.[66]

In the recent unpublished *Day v. Kindred Hosps. W., LLC*,[67] the plaintiff, Gloria Day, at 80, was at the opposite end of the age spectrum from Ms. Broemmer, but similarly recalled signing paperwork including an arbitration agreement during a time of considerable emotional stress.[68] There, the Arizona Court of Appeals noted that it was aware of no authority "for the proposition that a patient or his representative is not bound by an arbitration provision simply because he was unfamiliar with alternative dispute resolution and did not pause to read the arbitration agreement before signing."[69] Still, the court left to the trial court to decide the question posed by Section 211(3) and *Broemmer*—whether mandatory arbitration provisions in a provider–patient agreement were beyond a plaintiff's reasonable expectations.[70] It found genuine issues of material fact existed and remanded the case to superior court for an evidentiary hearing regarding whether the agreement was a contract of adhesion and, if so, whether the arbitration provisions were within Ms. Day's reasonable expectations.[71]

In the 20 years since *Broemmer*, Arizona courts have continued to grapple with real facts like the hypotheticals that vex fledgling lawyers in contracts courses across the country. Although the answer to Professors Frier and White's Problem 3-9 is a most definite "No," Arizona's peculiar spin on Section 211(3) continues, increasing the likelihood that *Broemmer* will persist in defying the reasonable expectations of legal commentators and proponents of alternative dispute resolution. AZAT

endnotes

1. Bruce W. Frier & James J. White, The Modern Law of Contracts 207 (2005) (emphasis added).
2. The professors may have taken one liberty with the facts: Nowhere does the record of published decisions indicate that Ms. Broemmer was "visibly disturbed" while filling out the paperwork.
3. 840 P.2d 1013 (Ariz. 1992).
4. *See, e.g.*, John Philip Dawson et al., Contracts: Cases and Comment 676 (2008); Christopher R. Drahozal, Commercial Arbitration: Cases and Problems 107 (2002); Daniel V. Davidson et al., Business Law: Principles and Cases in the Legal Environment 176 (1998).
5. *Broemmer*, 840 P.2d at 1017.
6. *See* James J. White, *Form Contracts Under Revised Article 2*, 75 Wash. U. L.Q. 315, 335 (1997).
7. *Broemmer v. Otto*, 821 P.2d 204 (Ariz. Ct. App. 1991).
8. *Broemmer*, 840 P.2d at 1014.
9. *Id.*
10. *Id.* at 1018 (Martone, J., dissenting).
11. *Id.*
12. *See id.* at 1015.
13. *Id.*
14. *Id.*
15. *Broemmer v. Otto*, 821 P.2d at 211.
16. *Id.*
17. *Id.* at 206.
18. *Id.* at 207.
19. *Id.*
20. *Id.* at 208.
21. *Broemmer*, 840 P.2d at 1017.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* (citing Stanley Henderson, *Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice*, 58 Va. L. Rev. 947, 995 (1972)). The Court of Appeals relied on this article, as well, in determining that the agreement was an adhesion contract. *Broemmer v. Otto*, 821 P.2d at 207.
26. *Broemmer*, 840 P.2d at 1017.
27. *Id.* at 1018.
28. *Id.*
29. *Id.* at 1019.
30. *Id.*
31. *Id.* at 1020.
32. *Id.*
33. *Id.* at 1021-22.
34. *Id.* at 1017-18.
35. *Id.* at 1018 (emphasis in original).
36. *Id.*
37. Emphasis added.
38. Restatement (Second) of Contracts § 211 cmt. f.
39. *See Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 394-96 (Ariz. 1984).
40. *See, e.g.*, *id.*; *Broemmer*, 840 P.2d at 1018; *Harrington v. Pulte Home Corp.*, 119 P.2d 1044, 1050 (Ariz. Ct. App. 2005). Cases on Section 211(3) were counted using Westlaw searches. When Professor White conducted a similar analysis for a 1997 article, he found that of the approximately 43 cases that had interpreted Section 211(3) at that time in the United States, 25 were from Arizona. White, *supra* note 6, at 324-35.
41. White, *supra* note 6, at 323.
42. *Darner Motor Sales*, 682 P.2d at 394; *see also Broemmer*, 840 P.2d at 1018.
43. *Broemmer*, 840 P.2d at 1017.

44. *Id*.
45. *Id*. at 1020.
46. *Id*. at 1021.
47. Philip G. Peters, Jr., *Doctors & Juries*, 105 MICH. L. REV. 1453, 1459-60 (2007).
48. *Id*. at 1492.
49. White, *supra* note 6, at 338.
50. *Id*. at 327. Professor White cites *Darner Motor Sales*, 682 P.2d at 388 in particular, as reminiscent of the Traynor court. Ironically, Justice Martone's dissent in *Broemmer* cites a 1965 decision in which Chief Justice Roger J. Traynor of the California Supreme Court wrote, in relation to a medical malpractice claim, that the "arbitration provision in such contracts is a reasonable restriction, for it does no more than specify a forum for the settlement of disputes." *Broemmer*, 840 P.2d at 1019 (citing *Doyle v. Giuliucci*, 62 Cal. 2d 606, 610 (Cal. 1965)). So it might be said that even Justice Traynor wouldn't have gone as far as the *Broemmer* majority.
51. Jean Braucher, *Cowboy Contracts: The Arizona Supreme Court's Grand Tradition of Transactional Fairness*, 50 ARIZ. L. REV. 191, 217 (2008).
52. *Id*.
53. *Id*. The authors are still not convinced that arbitration can fairly be described as "a less promising forum" for medical malpractice claims.
54. *Id*.
55. Towers Watson estimated that the U.S. commercial tort costs, including all medical malpractice tort costs, topped $168 billion in 2010. Towers Watson, *2011 Update on U.S. Tort Cost Trends*, at 6, Fig. 5, *available at* www.towerswatson.com/assets/pdf/6282/Towers-Watson-Tort-Report.pdf. The Court of Appeals in *Broemmer v. Otto*, 821 P.2d at 209, noted that the arbitration fees "are well below the costs of litigating the same claim." And the premise behind state and federal law favoring the use of arbitration is "an assumption that the arbitration process may be more expeditious and less costly than ordinary litigation." *Hall Street Assocs., LLC v. Mattel, Inc*., 552 U.S. 576, 594 (2008) (Stevens, J., Kennedy, J., dissenting).
56. *See* Peters, *supra* note 47, at 1459-60.
57. *Broemmer*, 840 P.2d at 1023, Appendix A.
58. *Id*. at 1015.
59. Scott R. Peppet, *Freedom of Contract in an Augmented Reality: The Case of Consumer Contracts*, 59 UCLA L. REV. 676, 708 (2012) ("Classical contract law assumed that contracting parties were best positioned to arrange their affairs and that judicial intervention into those affairs was largely unwarranted.").
60. *See id*. at 745.
61. Jay S. Goldbaum, Comment, *Katrina and Beyond: Judicial Treatment of Boilerplate Language in Standardized Insurance Contracts*, 2007 MICH. ST. L. REV. 453, 466 (2007).
62. *See Hall Street Assocs.*, 552 U.S. at 588.
63. *Broemmer*, 840 P.2d at 1019.
64. 119 P.3d 1044, 1050-51 (Ariz. Ct. App. 2005).
65. *Id*.
66. *See, e.g., Coup v. Scottsdale Plaza Resort, LLC*, 823 F. Supp. 2d 931, 946 (D. Ariz. 2011) (finding that plaintiffs have "failed to create a question of fact that arbitration of their disputes with Defendants were beyond Plaintiffs' reasonable expectations," in part because the agreement was in the context of an employer-employee at-will relationship.)
67. 2011 WL 6141282 (Ariz. App. Dec. 8, 2011).
68. *Id*. at *1.
69. *Id*. at *4.
70. *Id*. at *5.
71. *Id*.