> seller under certain circumstances. The Court finds that this type of state imposed liability significantly interferes with a national bank's ability to negotiate promissory notes and lend money. As defendants point out, the RISA provision essentially requires national banks to become insurers for sellers vis a vis consumers.

Id. at 727. As a decision of a sister court, the *Abel* decision was not binding upon the present court.

Abel cited cases involving state laws that were either significantly more burdensome or more directly controlling than in the present case. In the instant case, the state law did not directly control the federal bank activity. While the statute could impose additional liability on national banks, altering the terms of liability did not constitute "obstruct[ing], impair[ing], or condition[ing] a national bank's ability to fully exercise its powers' to negotiate promissory notes. If, as Defendant seemed to urge, the National Bank Act preemption were interpreted to include any action that merely burdens the bank's business operations, it would also make invalid other state and local regulations (such as state laws prohibiting discrimination in lending) that encumber bank's ability to negotiate commercial transactions. Congress did not intend to preempt these laws. Several well-established court decisions hold that the federal bank law does not preempt other state laws that incidentally affect national banks' business transaction. Where, as in this case, a state law has only incidental effect on the operation of a national bank, the National Banking Act does not preempt the applicable state law.

In areas traditionally governed by state law, courts must assume that "the historic police powers of the States were not to be superceded by [federal law] unless that was the clear and manifest purpose of Congress." *Gen. Motors Corp. v. Abrams*, 897, F.2d 34, 41 (2d Cir. 1990) (quoting *Pacific Gas & Elec. Co. v. Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 206 (1983)). Further, "Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required…" Indeed, the OCC regulations provided that state laws in the areas of "rights to collect debts" and "acquisition and transfer of property," are valid and not subject to preemption to the extent that they "only incidentally affect the exercise of national bank powers." 69 Fed. Reg. 1904, 1917.

The Plaintiff posited an argument not raised in *Abel*. He argued that the Federal Trade Commission "holder rule" should be used to interpret the preemptive scope of the National Bank Act narrowly. The FTC Holder Rule required sellers to inform buyers to the buyer's right to assert claims and defenses against the holder that the buyer has against the seller. It was designed to ensure that "creditors will be responsible for seller misconduct" because "customers [should not have] to assume all risk of seller misconduct, particularly where creditors who profit from consumer sales have access to superior information combined with means and capacity to deal with seller misconduct…" 40 Fed. Reg. 53524.

The Plaintiff claimed that RISA cannot conflict with federal law because the FTC intended the FTC holder rule to do precisely what RISA also does, that is, to make a holder liable for a seller's misconduct. The court held plaintiff's argument as persuasive. The agency's reference to the availability of state remedies is difficult to reconcile with an approach that precludes such remedies. Although national banks are not directly subject to the FTC's authority, the federal agency's discussion of state remedies for violation of the FTC holder rule suggests that the holder rule was not intended to preempt state regulation.

ARBITRATION

A NONPARTY MAY BE COMPELLED TO ARBITRATE IF IT SEEKS, THROUGH THE CLAIM, TO DERIVE A DIRECT BENEFIT FROM THE CONTRACT CONTAINING THE ARBITRATION PROVISIONS

In re Weekley Homes, L.P., 176 S.W.3d 740 (Tex. 2005).

FACTS: Vernon Forsting ("Forsting") contracted with Weekley Homes, L.P. ("Weekley") for the construction of a house. His intention in purchase of the home was to live with his only child, Von Bargen, her husband, and their three sons. Von Bargen negotiated directly with Weekley on many issues before and after construction. However, only Forsting executed the various financing and closing documents, including the Real State Purchase Agreement that contained an arbitration clause. Shortly after closing, Forsting transferred the home to a trust whose sole beneficiary was Von Bargen.

After completion, numerous problems arose with the home. After a brief move and while repairs were made to the home, Von Bargen requested and received reimbursement. Unsatisfied with the repairs, Forsting, Von Bargen, and the Turst filed suit against Weekley asserting various claims for breach of contract, negligence, and other causes of action. Von Bargen sued for personal injuries that allegedly resulted from Weekley's negligent repairs.

Weekley moved to compel arbitration of all claims under the Federal Arbitration Act ("FAA"). The trial court refused to compel arbitration of Von Bargen's claim because she did not sign the Purchase Agreement. Accordingly, Weekley sought mandamus relief to compel the trial judge to enforce the arbitration agreement.

HOLDING: Writ of mandamus granted.

REASONING: The court reasoned that a nonparty may seek to compel arbitration if it deliberately sought and obtained substantial benefits from the contract itself. Not only did Von Bargen resided in the home, she directed how Weekley should construct many of the homes features, demanded repairs, received financial reimbursement for expenses, and conducted settlement negotiations with Weekley. The court reasoned that while Von Bargen never based her personal injury claim on the contract, her prior exercise of other contractual rights and her equitable entitlement to other contractual benefits prevented her from avoiding the arbitration clause here. The court held that since Von Bargen obtained substantial actions from Weekley by demanding compliance with provisions of the contract, she cannot equitably object to the arbitration clause attached to them.

NON-APPEALABILITY CLAUSE IN AN ARBITRATION AGREEMENT THAT FORECLOSES JUDICIAL REVIEW OF AN ARBITRATION AWARD BEYOND THE DISTRICT COURT LEVEL IS ENFORCEABLE

Mactec, Inc. v. Gorelick, 427 F.3d 821 (9th Cir. 2005).

FACTS: Defendant Steven Gorelick and Haim Gvritzman developed a new method for removing volatile organic contaminants from groundwater. The defendants assigned "any right, title, and interest" in the technology to Stanford, including the right to seek a patent. In return for the assignment, each received a one-sixth share of net royalty income, with the remaining two-thirds royalty going to the university. Gorelick, formed a company called NoVOCs, Inc., with the intention of developing profitable wells that used the NoVOCs technology. NoVOCs obtained an exclusive license from Stanford to use the patented technology in exchange for a series of annual royalties. Gorelick then sold his shares to a company called EG&G, pursuant to a stock purchase agreement. After an upfront payment, EG&G agreed to give Gorelick installment payments of (1) twenty-five percent future revenue derived from licenses or sub-licenses of the NoVOCs technology, and (2) $3000 for each well EG&G drilled using the technology. Therefore, EG&G became the exclusive license holder of Stanford's patent and thereby assumed NoVOCs' obligations to pay royalties to the university. The stock purchase agreement provided that all disputes arising under the agreement would be governed by California law and would be subject to arbitration. The stock purchase agreement specifically excluded from the scope of arbitrable issues any disputes relating to patent invalidity or infringement. Second, the agreement provided that any judgment upon the award rendered by the arbitrator would be final and nonappealable. MACTEC, the plaintiff, bought EG&G's stock in NoVOCs. MACTEC became the successor-in-interest to the stock purchase agreement between EG&G and Gorelick, expressly assuming all of EG&G's payment obligations to Stanford and Gorelick. MACTEC approached Gorelick with the intention of re-negotiating the royalty payments which was later agreed upon. After this agreement, Gorelick learned from Stanford that MACTEC had canceled its licensing agreement for the NoVOCs technology. Gorelick then called the executives at MACTEC, who stated that since their relationship with Stanford had terminated, they no longer had royalty obligations to Gorelick. Gorelick responded that his agreement with MACTEC was a separate legal obligation which he expected MACTEC to honor. Gorelick asked MACTEC for specific information regarding remediation wells for which he was entitled to receive payment because he felt there had been inadequate reporting throughout the whole process. Gorelick filed a demand for arbitration to recover payments under the stock purchase agreement. After a hearing, the arbitrator found in favor of Defendant Gorelick and awarded $4.5 million. Plaintiff MACTEC, Inc. filed an application in district court to vacate the arbitration award pursuant to Federal Arbitration Act and also filed a declaratory judgment on grounds the disputed terms constituted illegal patent misuse. District Court denied application to vacate and dismissed declaratory judgment action.

The stock purchase agreement specifically excluded from the scope of arbitrable issues any disputes relating to patent invalidity or infringement.

HOLDING: Affirmed in part and appeal dismissed in part.

REASONING: The court reasoned that the arbitration clause in the stock purchase agreement that provided the district court's judgment was final and nonappealable, deprived the court of appeals of jurisdiction to review such judgment.The declaratory judgment action was barred by res judicata.

LEGAL MALPRACTICE CLAIM IS SUBJECT TO ARBITRATION

Taylor v. Wilson, ____ S.W.3d ____ (Tex. App.—Houston [14th Dist.] 2005).

FACTS: Valerie Wilson retained Appellants as legal counsel to represent her on a claim against an investment firm and its broker. Wilson and Appellants entered into an agreement that included an agreement to arbitrate disputes. The brokerage firm ceased doing business and claimed financial deficits. Appellants entered into settlement discussions with the brokerage firm and ultimately entered into a binding settlement agreement without Wilson's authority. Wilson sued Appellants, alleging legal malpractice, breach of fiduciary duty, and breach of contract, and seeking fee forfeiture. Appellants moved to compel arbitration pursuant to the agreement, and the trial court denied this motion because it determined Wilson's legal malpractice action was a claim for "personal injury" pursuant to the Texas Arbitration Act.

HOLDING: Reversed and remanded.

REASONING: The court agreed with Appellants that the legal malpractice claim was subject to arbitration. The court noted that the appellate courts were split on the issue of whether a legal malpractice claim was a claim for personal injury. The court reasoned that the legislature intended to restrict the scope of the personal injury provision of the Texas Arbitration Act to physical personal injury. Thus, the court held inasmuch as Wilson had not suffered a physical injury, her malpractice claim was not excluded from arbitration.

DEVELOPER CAN ENFORCE ARBITRATION CLAUSE AGAINST HOME BUYERS

Harrington v. Pulte Home Corp., 119 P.3d 1044 (Ariz. Ct. App. 2005).

FACTS: Appellee homebuyers, aspiring to represent a class, brought this action against home builders and sales agents ("Appellants") associated with particular subdivisions in Chandler, AZ, despite the presence of binding arbitration clauses in each of their contracts. The complaint alleged incomplete and inaccurate disclosures associated with the homes' proximity to daily aircraft traffic, adversely impacting the ability to use the homes, and diminishing the value of each dwelling. The homebuyers did not dispute appellant's contention that, if enforceable, the arbitration clause would apply to all claims against all defendants. Rather,

the homebuyers argued that the clause in their contracts was unenforceable because it was "part of a contract of adhesion," contravening their reasonable expectations by failing to disclose the abandonment of their rights under the clause and the costs of arbitration. They also maintained that the potential fees associated with arbitration through the American Arbitration Association ("AAA") were "substantively oppressive and unconscionable in their own right." In denying Appellants' motion to compel arbitration and stay or dismiss this action, the trial court agreed with the homebuyers. It found the contract one of adhesion and the arbitration clause defective due to language lacking the conspicuous quality needed to "constitute a knowing, intelligent and voluntary" waiver of the right to a jury trial.

HOLDING: Reversed.

REASONING: Although the court agreed with Appellants' assertion that the Federal Arbitration Act applied to the clause in the contracts at issue, it reiterated that states may regulate arbitration clauses under general contract law principles and invalidate an arbitration clause upon such grounds as exist at law or in equity for the revocation of *any* contract. (Courts may not, however, "invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.") Both the doctrines of reasonable expectations and substantive unconscionability are such grounds. Upon applying the test for Arizona's Reasonable Expectations Doctrine, the court determined that the homebuyers' arguments in favor of their claim that the arbitration clause contravened their reasonable expectations failed to establish that they "would not have entered the contract had they known the clause was present." The relatively short length of the contract, the appearance of the term "ARBITRATION" in bold capital letters, and the homebuyers' initials on the page containing the arbitration provision indicated that the clause was not obscure and made the homebuyers' arguments that they "hadn't known of its presence in the contract" unpersuasive. Also, since the right to a jury trial in civil litigation "is not automatic," the homebuyers' argument that such waiver of the right must be "knowingly, intelligently, and voluntarily" done was rejected. The homebuyers' argument that case law mandated this standard for waiver was a misinterpretation of the ruling. Compare *Broemmer v. Abortion Services of Phoenix, Ltd.*, 840 P.2d 1013, 1014 (Ariz., 1992) with *Id.* at 1017. Thus, the court concluded the arbitration clause at issue was not beyond the homebuyers' reasonable expectations, especially since the court was not at liberty to create a separate "reasonable expectations" rule for arbitration cases. The court then turned to the doctrine of substantive unconscionability, designed to negate unconscionable or oppressive terms. The court stated that arbitration agreements are enforceable in the absence of individualized evidence to establish that the costs of arbitration are prohibitive. *Green Tree Financial Corp.-Ala. v. Randolf*, 531 U.S. 79, 91-92 (2000). Because the homebuyers could not convince the court that arbitration costs would be a prohibitive hardship, enforcement of the arbitration clause was not found to be substantively unconscionable. The court's examination of the arbitration fee schedule led to a determination that it complied with Arizona's law of reasonable expectations.

A NONSIGNATORY PARTY NOT ALLOWED TO COMPEL ARBITRATION BECAUSE IT FAILED THE INTERTWINED CLAIMS TEST

Brantley v. Republic Mortg. Ins. Co., 424 F.3d 392 (4th Cir. 2005).

FACTS: The plaintiffs, the Brantleys, bought a home in August 2003 and financed their entire home. Their mortgage lender, SouthStar Funding, L.L.C., required that they obtain mortgage insurance. Republic Mortgage Insurance Company ("Republic Mortgage") set the Brantley's insurance premium at $590.43. The Brantleys signed an agreement with SouthStar which required arbitration. The agreement stated that it would be applicable "no matter by whom or against whom a claim is made." The Brantleys asserted that Republic Mortgage neglected to tell them that the premium was set because of information gathered from the Brantleys' credit report. The Brantleys alleged that Republic Mortgage's actions violated the Fair Credit Report Act (FCRA) which led to the Brantley's filing of a lawsuit.

Republic Mortgage, a nonsignatory to the arbitration agreement between the Brantleys and SouthStar, moved to compel arbitration. Republic Mortgage asserted that it should receive the benefit of the arbitration agreement because the mortgage insurance was so intertwined with the mortgage and arbitration agreement. Republic Mortgage also asserted that it should compel arbitration because it was a third party beneficiary to the arbitration agreement between SouthStar and the Brantleys. The district court found that Republic Mortgage could not compel arbitration because it failed the intertwined claims test. Republic Mortgage appealed to the Fourth Circuit.

HOLDING: Affirmed.

REASONING: The court determined that Republic Mortgage failed to meet the intertwined claims test, and therefore, could not enforce the arbitration agreement against the Brantleys. The court relied on the Eleventh Circuit's promulgation of the intertwined claims test.

In *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999), equitable estoppel is a doctrine that allows a nonsignatory to force arbitration if two different situations apply. First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting [its] claims against the nonsignatory. When each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of written agreement, the signatory's claims arise out of or relate directly to the [written] agreement, and arbitration is appropriate. The second situation applies when a signatory raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the other signatories to the contract.

The court determined that "[a]lthough the mortgage insurance relates to the mortgage debt, the premiums of the mortgage insurance are separate and wholly independent from the mortgage agreement. The mere existence of a loan transaction requiring plaintiffs to obtain mortgage insurance cannot be the basis for finding their federal statutory claims, which are wholly unrelated to the underlying mortgage agreement to be intertwined with that contract." Also, Republic Mortgage is not entitled to

be a third party beneficiary because the language of the agreement does not clearly provide that it should be given a "direct benefit."

A NON-SIGNATORY PLAINTIFF MAY BE COMPELLED TO ARBITRATE IF ITS CLAIMS ARE "BASED ON A CONTRACT" CONTAINING AN AGREEMENT TO ARBITRATE

In Re People's Choice Home Loan, Inc., ____S.W.3d____(Tex. App.—El Paso 2005).

FACTS: In December of 2002, Maricela Jimenez, without her husband Enrique, applied for a home equity loan through People's Choice Home Loan Inc. (People's Choice). Although Mr. Jimenez took no part in the procuring of the loan he did sign the loan contract and the arbitration agreement contained therein. After the closing of the loan, Mrs. Jimenez realized that she had been overcharged. Mrs. Jimenez informed People's Choice that she had been overcharged and tried to get a refund. Despite Mrs. Jimenez' efforts to obtain a refund, People's Choice neither responded nor investigated the validity of her claims.

Mrs. Jimenez and her husband filed suit against the Amiracle Mortgage Group, People's Choice, and the GMAC Mortgage Corporation to whom People's Choice had been sold. The Jimenezes sought declaratory relief in connection with the loan fees, return of all money paid to People's Choice, and cancellation of the loan.

People's Choice filed a motion to abate the suit and to compel arbitration. The Jimenezes' response asserted that the arbitration agreement was unenforceable on several grounds. The Jimenezes asserted: (1) that the arbitration agreement was unenforceable because GMAC had purchased the loan and was therefore the real party in interest; (2) that the agreement was "procedurally and substantively unconscionable;" and (3) that People's Choice failed to make a timely request for arbitration and thus had waived its right to arbitrate. The Jimenezes also asserted that the agreement to arbitrate was unenforceable because it lacked consideration. The Jimenezes pointed out that because Mr. Jimenez neither applied for nor received the loan, the agreement to arbitrate lacked consideration and thus was unenforceable.

The Court explained that a non-signatory plaintiff under established Texas law "may be compelled to arbitrate if its claims are 'based on a contract' containing an agreement to arbitrate."

The trial court conducted a hearing on the motion to compel arbitration. The Jimenezes argued, among other things, that the agreement was unenforceable because Mr. Jimenez neither received nor requested a loan during the original loan application and closure process. The trial court denied People Choice's motion to compel arbitration. People Choice then petitioned for a writ of mandamus to compel arbitration.

HOLDING: Overturned.

REASONING: The Court held that although Mr. Jimenez did not request or obtain the loan, the arbitration agreement was binding as to him because he signed the loan agreement and brought a cause of action based on a contract containing an arbitration agreement. The Court explained that a non-signatory plaintiff under established Texas law "may be compelled to arbitrate if his claims are 'based on a contract' containing an agreement to arbitrate." *In re FirstMerit Bank, N.A.,* S.W.3d at 732. Mr. Jimenez could therefore be compelled to arbitrate because the claims he asserted were based on a contract containing an arbitration agreement.

ARBITRATION CLAUSE THAT PROHIBITS CLASS ACTIONS IS NOT ENFOREABLE

Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).

FACTS: Christopher Boehr obtained a credit card from Discover Bank (the "Bank"). The cardholder agreement governing the account contained a choice-of-law clause providing for application of Delaware and federal law, which was added as an addendum after the credit card was issued pursuant to the cardholder agreement change-of-terms provision. Accompanying the new addendum was a notice which provided for mandatory arbitration and prevented both parties from participating in class wide arbitration. The Federal Arbitration Act ("FAA") would govern the agreement. Those who objected to the arbitration clause were to notify the Bank of their objections and stop using their account. Boehr filed no such objections.

Boehr filed a putative class action against the Bank, alleging breach of contract and violation of the Delaware Consumer Fraud Act. Boehr contended the Bank breached its agreement by imposing a $29 late fee on payments received after the payment due date. Boehr alleged that the choice of law provision applied only to a potential plaintiff's substantive claims "and not to other issues related to the contract," which plaintiff contended was governed by California or other applicable law. The Bank moved to compel arbitration and dismiss the class action, arguing the FAA required enforcement of the express provisions of the arbitration clause. Boehr opposed, contending the provisions were unconscionable under California law.

The district court granted the Bank's motion to compel. Shortly after the decision, the Fourth Circuit decided a virtually identical class action waiver was unconscionable in *Szetela v. Discover Bank,* 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862 (2002). The lower court granted Boehr's motion for reconsideration, which was followed by the Bank's writ seeking reinstatement of the lower court's original order. The appellate court granted the writ, finding the California rule prohibiting class action waivers was preempted by the FAA.

HOLDING: Reversed and Remanded.

REASONING: Boehr contended that class action waivers in consumer contracts should be invalidated as unconscionable under California law. In California adhesion contracts were generally enforceable, but have been found unconscionable where they operate effectively as exculpatory contract clauses that are contrary to public policy, as dictated by *Ca. Civ. Code § 1668.* The court reasoned that class action waivers were not usually exculpatory clauses, but because damages in consumer cases are often small and because the company reaps a handsome profit

wrongfully from exacting a dollar from millions of customers, the class action is the only effect method to halt and redress such exploitation. Such one-sided, exculpatory contracts, which operate to insulate a party from liability that otherwise would be imposed, were found unconscionable. While other courts have disagreed, contending the waiver refers to a procedural right, the court concluded that class actions are often inextricably linked to the vindication of substantive rights.

In *Szetela,* a similar case, the court found procedural unconscionability in the adhesive nature of the contract and substantive unconsionability in the one-sided and oppressive nature of the class action waiver. The clause was not only harsh and unfair to consumers who were owed a small amount of money, but also gave the "Bank" an incentive to avoid the type of conduct that might lead to class litigation. The Bank had given itself a license to "push the boundaries of good business practices to their furthest limits," fully aware that few customers will seek remedies, and remedies obtained will be limited to that single customer.

The court held that not all class action waivers were unconscionable. The waivers that are unconscionable are those which are found "in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then,….the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to person or property of another.'" *Discover Bank v. Superior Court,* at 1110 (*quoting Cal. Civ. Code § 1668).*

CHILD'S ESTATE BOUND BY ARBITRATION CLAUSE IN CONTRACT

Global Travel Marketing, Inc. v Shea, 908 So.2d 392 (Fla. 2005).

FACTS: Molly Bruce Jacobs ("Ms. Jacobs") signed a travel contract for an African safari on behalf of herself and her son, Mark Garrity Shea ("Garrit"), with Global Travel Marketing. The travel contract included a provision that permitted Ms. Jacobs to agree, on behalf of her son, to various provisions of the contract, including an arbitration clause. Garrit was attacked by hyenas and died during the safari.

After Garrit's death, his father, who was named personal representative of his son's estate, brought suit and alleged that Global Travel's failure to fulfill its duty to use reasonable care in operating the safari and warning of dangerous conditions caused his son's death. Global travel moved to compel arbitration of the father's claim. In response, the father argued that Ms. Jacobs did not have legal authority to contract away Garrit's substantive rights through a release of liability and arbitration clauses. The trial court granted Global Travel's motion to stay the proceedings and compel arbitration, concluding that the arbitration provision bound Garrit's estate. The Fourth District later reversed, concluding that because the arbitration agreement was unenforceable as to the child on public policy grounds, the child's estate could not be bound to arbitrate tort claims arising from the safari.

HOLDING: Remanded.

REASONING: The court agreed with Global Travel that the arbitration provision in the commercial travel contract was not unconscionable, in violation of any statutory prohibition, or void as against public policy.

The court recognized that arbitration agreements are generally favored by the courts. In determining whether to compel arbitration pursuant to the parties' agreement, a court must consider three elements: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived. Since the question of whether a minor child's estate may be bound by an agreement to arbitrate is a question of contract formation, the court must determine whether a valid agreement to arbitrate exists. In resolving this issue, the court reasoned that the Due Process Clause of the Fourteenth Amendment does not permit a State to infringe on the fundamental right of parents to make child rearing decisions. Further, the court noted that the Legislature had not precluded voluntary binding arbitration of claims involving children. The court held that because an arbitration agreement does not extinguish the claim, nothing suggests that an arbitration clause alone is tantamount to waiver or forfeiture of a wrongful death or personal injury claim. Furthermore, requiring parents to seek court approval before entering into commercial travel contracts that include arbitration agreement would place courts in a position of second guessing the decision-making of a fit parent. Parents who allow their children to engage in appropriate activities may also legitimately elect on their children's behalf to agree in advance to arbitrate a resulting tort claim if the risks of these activities are realized.

The court held that because an arbitration agreement does not extinguish the claim, nothing suggests that an arbitration clause alone is tantamount to waiver or forfeiture of a wrongful death or personal injury claim.