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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 18-0614

DA 18-0614

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 288

JOHN STOWE and KATHARINE STOWE,

Plaintiffs,

and

TUDOR INSURANCE COMPANY, as subrogee of JOHN AND KATHARINE STOWE,

Intervening Plaintiff,

v.

BIG SKY VACATION RENTALS, INC.,

Defendant.

BIG SKY VACATION RENTALS, INC.,

Third-Party Plaintiff and Appellee,

v.

POINTCENTRAL, LLC.,

Third-Party Defendant and Appellant.

APPEAL FROM: District Court of the Eighteenth Judicial District,
In and For the County of Gallatin, Cause No. DV 17-303B
Honorable Rienne McElyea, Presiding Judge

COUNSEL OF RECORD:

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Submitted on Briefs: May 29, 2019

Decided: December 17, 2019

Filed:

Clerk

Justice Dirk M. Sandefur delivered the Opinion of the Court.

¶1 PointCentral, LLC (PointCentral) appeals from the judgment of the Montana Eighteenth Judicial District Court, Gallatin County, denying its motion to dismiss the third-party claims of Big Sky Vacation Rentals, Inc. (BSVR) pursuant to M. R. Civ. P. 12(b). We address the following dispositive issues:

1. *Whether the District Court erroneously concluded that the PointCentral/BSVR arbitration agreement was invalid or unenforceable due to lack of mutuality or equitable unconscionability?*

2. *Whether the PointCentral/BSVR arbitration agreement is illegal or unenforceable in contravention of § 27-1-703, MCA?*

¶2 We reverse.

PROCEDURAL AND FACTUAL BACKGROUND

¶3 BSVR is a Montana-based corporation engaged in the business of property management and vacation rentals in Big Sky, Montana. PointCentral is a Virginia-based technology company engaged in the business of providing home automation products and services that allow vacation rental and property managers to remotely control access, HVAC, and hot water systems in managed residential properties from desktop computers or mobile devices. PointCentral licenses its proprietary products, and related services, to property management companies for sale or provision to third-party property owners.

¶4 In 2013, John and Katharine Stowe (Stowes) executed a ten-page contract with BSVR for management and vacation rental of their Big Sky home.[1] On July 14, 2014,

[1] Stowes allege that they purchased the home in 2013 for $1,080,000.

BSVR introduced to its clients a "Home Assurance Plan" touted as an "all-encompassing maintenance and security program" with various features including, *inter alia*, "24/7 [e]mergency response service for guests."[2] An included component of the Plan was a PointCentral system that would provide specified keyless entry, security, and energy management features. The e-mail announcement stated that the keyless entry component was mandatory to clients and would involve an initial installation fee (shared by BSVR and clients) with a recurring quarterly service fee.[3] The announcement described the component as a:

> keyless monitoring system that allows us to issue unique codes to every person entering your property. Guests will be given a unique code vs. keys upon full payment of a reservation and will use this code to open the lock on the door. . . . Each property has a dashboard as shown in the attached PowerPoint that allows us to see when cleaning staff have entered, status of a property (occupied, unoccupied, clean in progress, etc.)[.] . . . In addition, should someone enter the home with a key without notifying us, the infrared camera will snap two photos which are immediately sent to our cell phones. This system does not replace the security system that an owner may already have, but rather enhances it's [sic] effectiveness and eliminates the possibility of keys being lost or misplaced. The lock-out feature allows us to remotely unlock the door via cell phone should an owner or guest forget their code and lock themselves out of the property.

¶5 Attached to the BSVR e-mail announcement was a referenced .pdf copy of a Microsoft PowerPoint presentation describing a PointCentral "Smart Home Control"

[2] The Home Assurance Plan included referenced features and services that it would provide in association with referenced BSVR "Partners" including PointCentral, Live-Rez (reservation management system provider), Hammond Property Management company, and contracted third-party HVAC, landscaping, snow-removal, and chimney services.

[3] The Plan included an optional energy management feature of the PointCentral system that would allow BSVR to remotely monitor and manage unit HVAC and hot water systems.

system. The presentation was manifestly a marketing tool designed by PointCentral for marketing its products and services to BSVR. It described the PointCentral system as a "SmartHome Automation" system that would provide "[r]emote, web[-]enabled control and visibility of all properties including . . . [k]eyless access" and "[p]roperty status" monitoring via the cellular telephone network rather than the internet. (Ellipsis in original.) It stated that "PointCentral is the cloud-based service that gives [the property manager] the ability to control systems in [all] of your homes from any web-enabled device." (Emphasis omitted.) The presentation described various system access history logging, reporting, and alert/notification features. Using motion-sensor-triggered infrared cameras in door locksets, PointCentral designed the keyless access monitoring feature to log and photograph detected motion events around exterior doors and then send motion alerts and photographs to configured desktop and mobile devices. BSVR alleges that, in implementing the system, it purchased all recommended system components from PointCentral and installed them in client homes through a PointCentral approved third-party installer.

¶6 BSVR and PointCentral were engaged under a July 2014 dealer/licensing agreement (Agreement) authorizing BSVR to sell or provide "PointCentral-ready Products" and "PointCentral Services" to third-party clients.[4] The Agreement provided for PointCentral to provide various services to BSVR including, *inter alia*, enabling of data communication

[4] The Agreement referenced BSVR clients as "End Users" defined as "end-user[s] of the PointCentral Services provided pursuant to [the] Agreement" who are "owner[s] or renter[s] of a vacation rental property" managed by BSVR and which have "one or more properly installed PointCentral-ready Products installed on [the] premises."

between installed residential systems and the PointCentral operations network, data hosting, remote access to hosted data, and remote control of installed residential systems via a user interface on the PointCentral website. The Agreement included an attached price quote to BSVR for contemplated PointCentral-ready products and services referenced as the "PointConnect System." The Agreement required PointCentral to provide technical support to BSVR, but specified that BSVR would "provide all customer service and technical support for the PointCentral Services and PointCentral-ready Products" to BSVR clients.

¶7 The Agreement also included reciprocal contract indemnification provisions and a broadly-worded arbitration agreement. Except for third-party claims within the scope of PointCentral's duty to indemnify BSVR, the Agreement required BSVR to indemnify PointCentral for contract and tort claims asserted by third parties against PointCentral as a result of, or "arising from," breaches of the Agreement or related tortious conduct by BSVR. Except for third-party claims within the scope of BSVR's duty to indemnify PointCentral, the Agreement similarly required PointCentral to indemnify BSVR for contract and tort claims asserted by third parties against BSVR as a result of, or "arising from," breaches of the Agreement or related tortious conduct by PointCentral.

¶8 Subject to two narrow exceptions, the arbitration agreement broadly required BSVR and PointCentral to arbitrate "[a]ny controversy or Claim" between them "arising out of or relating to" the Agreement or a "breach thereof." In the event of a third-party lawsuit against PointCentral within the actual or apparent scope of BSVR's contract

indemnification duty, the first exception allowed PointCentral to join BSVR as a third-party defendant for the purpose of enforcing its contract right to indemnification from BSVR. Under the second exception, PointCentral further retained "the right to seek injunctive relief in any court of competent jurisdiction with respect to any breach" of the Agreement by BSVR regarding "PointCentral's intellectual property or proprietary rights or business reputation."[5]

¶9 Based on system activity logs and photographs, Stowes allege that, on February 12, 2016, at 2:27 a.m., their PointCentral keyless entry system detected a motion-based "intrusion" event and immediately generated two infrared photographs depicting electrical sparks flying in the home. They allege that the system immediately transmitted the intrusion alert and photographs to configured BSVR desktop(s) or mobile device(s). Stowes allege that an ensuing fire subsequently destroyed the home as a result of BSVR's failure to timely monitor, notice, and respond to the system-transmitted intrusion alert and photographs until hours later when it was too late to save the home. Based on those allegations, Stowes filed a District Court complaint in April 2017 asserting various contract and tort claims against BSVR, including breach of contract, negligence, and negligent misrepresentation. In August 2017, Stowes' homeowners insurance carrier (Tudor Insurance Company (Tudor)) intervened on leave of court to assert a subrogation claim against BSVR for recovery of insurance proceeds paid to Stowes as a result of the fire.

[5] The second exception corresponded to the provisions of the Agreement granting BSVR the limited right to use and access PointCentral trademarks, service marks, proprietary software and firmware, business goodwill, and other contract-defined confidential information licensed to BSVR under the Agreement.

¶10 On leave of court eight months later, BSVR asserted third-party claims against PointCentral for contribution and indemnification regarding the Stowes and Tudor claims. BSVR's third-party complaint incorporated by reference all allegations set forth in the Stowes and Tudor complaints and further alleged that: (1) PointCentral produced the remote monitoring system and accompanying explanatory information provided to Stowes; (2) BSVR installed the system through a PointCentral-approved installer; and (3) the PointCentral system was the cause, or at least a contributing cause, of the damages claimed by Stowes and Tudor.

¶11 In June 2018, based on the arbitration agreement in their 2014 licensing Agreement, PointCentral filed a motion pursuant to M. R. Civ. P. 12(b)(1) or 12(b)(6) for dismissal of BSVR's third-party claims. The District Court denied the motion in October 2018 based on the fact that the agreement provided two exceptions to PointCentral not provided to BSVR. The court concluded that the agreement thus lacked mutual consideration and was therefore unenforceable as a matter of generally applicable contract law. PointCentral timely appeals.

STANDARDS OF REVIEW

¶12 Rulings under M. R. Civ. P. 12(b)(1) and 12(b)(6) regarding subject matter jurisdiction or whether a complaint fails to state a claim for which relief may be granted are conclusions of law reviewed de novo for correctness. *Harrington v. Energy W. Inc.*, 2015 MT 233, ¶ 7, 380 Mont. 298, 356 P.3d 441; *Zempel v. Liberty*, 2006 MT 220, ¶ 11, 333 Mont. 417, 143 P.3d 123; *Powell v. Salvation Army*, 287 Mont. 99, 102, 951 P.2d

1352, 1354 (1997). The focus of Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction is whether the court has the threshold authority to hear and adjudicate the type of claim at issue on the facts pled. *Harrington*, ¶¶ 9, 13. The court must generally take all well-pled factual assertions as true in the light most favorable to the claimant and then dismiss only if it clearly lacks authority to hear and adjudicate the claim as pled. *See Harrington*, ¶¶ 9, 13.[6] In contrast, the focus of a Rule 12(b)(6) motion to dismiss is whether the complaint is facially sufficient to state a cognizable legal claim entitling the claimant to relief on the facts pled. *Kleinhesselink v. Chevron, U.S.A.*, 277 Mont. 158, 161, 920 P.2d 108, 110 (1996); *Fandrich v. Capital Ford Lincoln Mercury*, 272 Mont. 425, 428-29, 901 P.2d 112, 114 (1995); *Busch v. Kammerer*, 200 Mont. 130, 131-32, 649 P.2d 1339, 1340 (1982).[7] The court must take all well-pled factual assertions as true in the light most favorable to the claimant. *Willson v. Taylor*, 194 Mont. 123, 126, 634 P.2d 1180, 1182 (1981).

¶13 We review rulings on motions to compel arbitration de novo for correctness under the governing standard of the Federal Arbitration Act (FAA), 9 U.S.C. § 1, et seq., or the

[6] If subject matter jurisdiction turns on disputed facts and adjudication of those facts will not touch on the merits of the claim at issue, the court has discretion to determine jurisdiction based on evidence presented outside the complaint by affidavit or limited evidentiary hearing. *Harrington*, ¶¶ 9-11.

[7] *See also* M. R. Civ. P. 8(a) (complaint must set forth a short and plain statement of cognizable legal claim showing entitlement to relief); *Ryan v. City of Bozeman*, 279 Mont. 507, 511-13, 928 P.2d 228, 230-32 (1996) (claimant burden to "adequately plead a cause of action"); *Mysse v. Martens*, 279 Mont. 253, 266, 926 P.2d 765, 773 (1996) (complaint must state factual basis of all elements of a cognizable legal claim).

Montana Uniform Arbitration Act (MUAA), § 27-5-111, MCA, et seq., as applicable.[8] *Lenz v. FSC Sec. Corp.*, 2018 MT 67, ¶ 12, 391 Mont. 84, 414 P.3d 1262. Rulings on Rule 12(b) motions to dismiss a claim pursuant to an arbitration agreement similarly involve conclusions of law reviewed de novo for correctness under the applicable M. R. Civ. P. 12(b) standard and the governing arbitration Act. *See Lenz*, ¶ 12.

DISCUSSION

¶14 "A party may assert the right to compel arbitration either by affirmative claim for relief or as an affirmative defense" to a claim. *Bucy v. Edward Jones & Co.*, 2019 MT 173, ¶ 18, 396 Mont. 408, 445 P.3d 812 (citing 9 U.S.C. §§ 3-4, 6, 204; *Am. Sugar Refining Co. v. Anaconda*, 138 F.2d 765, 766-67 (5th Cir. 1943). Based on their June 2014 arbitration agreement, PointCentral moved for dismissal of BSVR's third-party contribution and indemnification claims pursuant to M. R. Civ. P. 12(b)(1) or 12(b)(6). Despite historical characterization of arbitration agreements as precluding or divesting courts of subject matter jurisdiction to adjudicate a matter within their scope, the more precise modern view is that arbitration agreements do not preclude or divest courts of subject matter jurisdiction but, rather, implicate the non-jurisdictional question of whether substantive judicial relief is available or may be granted as a threshold matter of law within the scope of a valid and enforceable arbitration agreement. *See DiMercurio v. Sphere Drake Ins., PLC*, 202 F.3d 71, 74-79 (1st Cir. 2000). Accordingly, we will review PointCentral's motion to dismiss

[8] The MUAA governs arbitration agreements subject to Montana law but not governed by the FAA. *See* § 27-5-111, MCA, et seq.

as a Rule 12(b)(6) motion to dismiss rather than a Rule 12(b)(1) motion challenging subject matter jurisdiction.

¶15 In 1925, Congress enacted the FAA to offset "widespread judicial hostility to arbitration agreements," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 1745-46 (2011), and place them "on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443-44, 126 S. Ct. 1204, 1207-08 (2006). *Accord Thompson v. Lithia Chrysler Jeep Dodge of Great Falls*, 2008 MT 175, ¶ 12, 343 Mont. 392, 185 P.3d 332. "The FAA encompasses a discrete body of substantive federal law mandating enforcement of arbitration agreements within its scope regardless of any contrary substantive or procedural state law." *Peeler v. Rocky Mountain Log Homes Can., Inc.*, 2018 MT 297, ¶ 12, 393 Mont. 396, 431 P.3d 911 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983)). The FAA governs agreements to arbitrate disputes "arising out of" or "involving" interstate commerce. 9 U.S.C. § 2; *Southland Corp. v. Keating*, 465 U.S. 1, 10-17, 104 S. Ct. 852, 858-61 (1984); *Zigrang v. U.S. Bancorp Piper Jaffray, Inc.*, 2005 MT 282, ¶ 10, 329 Mont. 239, 123 P.3d 237.[9]

¶16 BSVR is a Montana-based company engaged in the property management and vacation rental business in Montana. BSVR's third-party complaint alleges that

[9] The MUAA is similarly a discrete statutory overlay of general contract law mandating enforcement of arbitration agreements governed by Montana law. *See* § 27-5-114, MCA.

PointCentral is a Delaware corporation with its principal place of business in Virginia.[10] The manifest purpose and effect of the parties' Agreement is to license BSVR to sell and support PointCentral's internet-based PointConnect system as a component of the home property management and rental services sold to BSVR clients in Montana. The BSVR/PointCentral dispute thus involves and arises from interstate commerce. Their arbitration agreement is therefore governed by the FAA.

¶17 FAA-governed arbitration agreements are "valid, irrevocable, and enforceable" except "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Consequently, though strongly favored by federal law, arbitration agreements remain subject to all "generally applicable" defenses for the invalidation of "any contract," such as lack of mutual assent or consideration, fraud, duress, unconscionability, and violation of public policy. *Concepcion*, 563 U.S. at 339, 131 S. Ct. at 1746 (internal citations omitted). On a motion to compel or dismiss in favor of arbitration, courts may narrowly consider only whether the parties agreed to arbitrate, whether the arbitration agreement is enforceable under principles applicable to contracts in general, and, if so, whether the terms of the agreement require arbitration of the particular matter or type of matter at issue. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S. Ct. 588, 592 (2002); *Mont. Pub. Emps.' Ass'n v. City of Bozeman*, 2015 MT 69, ¶ 7, 378 Mont. 337, 343 P.3d 1233. Here, PointCentral and BSVR clearly and unambiguously agreed to

[10] *Inter alia*, the Dealer Agreement expressly provides that "the laws of the Commonwealth of Virginia . . . shall govern this agreement and all controversies or claims arising out of or relating to this agreement . . . ." (Revised to sentence case.)

arbitrate "[a]ny controversy or [c]laim arising out of or relat[ed] to" the 2014 Agreement. The PointCentral/BSVR dispute is thus arbitrable within the scope of their arbitration agreement. The issue then becomes whether the agreement is valid and enforceable under generally applicable contract law principles.

¶18 *1. Whether the District Court erroneously concluded that the PointCentral/BSVR arbitration agreement was invalid or unenforceable due to lack of mutuality or equitable unconscionability?*

¶19 The essential elements of a valid and enforceable contract are: (1) "identifiable parties capable of contracting"; (2) mutual consent of the parties; (3) "a lawful object"; and (4) mutual consideration. Section 28-2-102, MCA; *Kortum-Managhan v. Herbergers NBGL*, 2009 MT 79, ¶ 18, 349 Mont. 475, 204 P.3d 693. For purposes of contract formation, mutual consideration simply means "valuable consideration on or for both sides of the agreement." *Bucy*, ¶ 27 (internal citations omitted). However, even if validly formed, a contract, or included term, may yet be unenforceable under generally applicable contract law if the contract or term is illegal, contrary to public policy, or equitably unconscionable. *See* §§ 28-2-102 and -701, MCA; *Lenz*, ¶ 26 (internal citations omitted).[11] A contract or included term is equitably unconscionable only if it is adhesive and either

[11] Because they generally effect a waiver of state and federal constitutional rights to full legal redress, jury trial, due process, and equal protection of law, arbitration agreements must also be minimally sufficient to effect a "knowing, voluntary, and intelligent" waiver of Montana constitutional rights under the totality of the circumstances. *Lenz*, ¶ 19. However, a valid waiver does not necessarily require an explicit explanation or waiver of Montana constitutional rights in every case. *Bucy*, ¶¶ 30-35 (citing *Lenz*, ¶ 19). Considerations relevant to mutual assent and equitable unconscionability are often similarly relevant, *inter alia*, to whether a valid waiver occurred. *See Bucy*, ¶¶ 30-35, 40-41; *Lenz*, ¶¶ 19-23, 31-32.

"unreasonably favors the stronger party or is unduly oppressive to the weaker party." *Lenz*, ¶ 26. A contract or term is adhesive if dictated by a "party in superior bargaining position" to a "weaker party on a take it or leave it basis without any reasonable opportunity for negotiation." *Lenz*, ¶ 26.[12]

¶20 Here, BSVR and PointCentral make various factual assertions regarding the enforceability of their arbitration agreement. Because the issue came before the District Court on a Rule 12(b) motion to dismiss, our review of factual matters pertinent to the enforceability of the agreement is limited to the well-pled factual allegations in BSVR's third-party complaint, and the incorporated Stowes and Tudors complaints and attachments. Without clearly distinguishing between threshold issues of contract formation or equitable unconscionability, the District Court concluded that the arbitration agreement is unenforceable because it provides litigation exceptions to PointCentral not provided to BSVR. Despite noting that those exceptions "may not be as extreme as" those precluding mutuality in *Global Client Solutions, LLC v. Ossello*, 2016 MT 50, ¶¶ 40-41, 382 Mont. 345, 367 P.3d 361 (holding that arbitration agreement lacked mutuality where drafting party reserved right to litigate its "primary claim [against the other] while requiring [the other] to arbitrate any and all claims she might have"), the court concluded that the

[12] "Preprinted, standard-form consumer contracts are typically contracts of adhesion." *Lenz*, ¶ 26 (citing *Woodruff v. Bretz, Inc.*, 2009 MT 329, ¶¶ 8-11, 353 Mont. 6, 218 P.3d 486). Arbitration agreements in consumer contracts are typically adhesive in modern commerce. *Concepcion*, 563 U.S. at 346-47, 131 S. Ct. at 1750.

agreement was unenforceable due to lack of "mutuality of obligation" because it "unreasonably favors PointCentral . . . ." We disagree.

¶21 *Inter alia*, "valid contract formation requires mutuality of consideration—valuable consideration on or for both sides of the agreement." *Bucy*, ¶ 27 (citing § 28-2-102, MCA, and *Kortum*, ¶ 18). However, the requirement for mutuality does not necessarily require arbitration agreements to provide "identical rights and obligations" to both parties or that they bind them "in the exact same manner." *Glob. Client Sols.*, ¶ 36 (internal citation omitted). Here, the arbitration exceptions reserved to PointCentral are limited. They merely permit it to (1) seek injunctive relief enjoining BSVR from unauthorized use of the intellectual and proprietary rights licensed to it under the Agreement, and (2) join BSVR for secondary contract indemnification if sued by a BSVR client, or other third party, based on BSVR's conduct.

¶22 As a threshold matter, the narrow exceptions provided to PointCentral do not diminish the central contract requirement that the parties arbitrate all other contract or tort claims that may arise between them. Moreover, even to the extent disparate, the exceptions manifestly relate to the fact the parties are not similarly situated on the face of the Agreement. The Agreement licensed BSVR to sell, provide, and support PointCentral products and services to BSVR's third-party clients, thereby exposing PointCentral to increased risk of liability to third parties engaged in business with or otherwise affected by BSVR. On its face, the Agreement does not similarly subject BSVR to similar third-party

liability because it does not similarly contemplate PointCentral selling or providing BSVR products and services to third-party PointCentral clients.

¶23 The parties are further dissimilarly situated based on the fact that the Agreement provides BSVR a limited right to use and access PointCentral trademarks, service marks, proprietary software and firmware, business goodwill, and other contract-defined confidential information in marketing and supporting its provision or sale of PointCentral products and services to BSVR clients. PointCentral has no similar right or need on the face of the Agreement to use or access proprietary BSVR information or marks. The FAA expressly contemplates and provides for supplemental injunctive relief as an adjunct to facilitate and enforce arbitration decisions regarding underlying arbitrable matters centrally in dispute. *See* 9 U.S.C. § 13. Construing the parties' primary arbitration obligation and the limited injunctive relief exception in concert as a whole with effect to both, PointCentral's reserved right to seek injunctive relief consists of no more than a limited (1) pre-arbitration remedy, for which BSVR has no similar need, for temporary injunctive protection against misuse of its proprietary information pending arbitration of the parties' underlying rights and (2) a post-arbitration remedy, similarly available to both parties under the FAA, and not denied to BSVR by the Agreement, for injunctive enforcement of a predicate arbitration decision. Thus, without diminishing the otherwise broad scope of matters mutually committed to arbitration by both parties under the agreement, the limited arbitration exceptions reserved to PointCentral are reasonably related on the face of the Agreement to PointCentral's unique needs for those exceptions.

¶24 BSVR did not oppose PointCentral's motion to dismiss based on the assertion that outstanding factual issues remained on the face of is third-party complaint, and incorporated complaints and attachments, as to whether the arbitration agreement was unconscionable.[13] Rather, BSVR essentially asserted, and the District Court agreed, that the arbitration agreement was unconscionable on its face, as attached to the incorporated Stowes complaint, based on exceptions provided solely to PointCentral. On the face of the Agreement and related facts pled or otherwise incorporated into BSVR's third-party complaint, the limited arbitration exceptions reserved to PointCentral do not render the parties' arbitration agreement facially illusory, lacking in mutual consideration, or otherwise oppressively, unfairly, or unreasonably one-sided for purposes of contract formation or equitable unconscionability.[14] We hold that the District Court erroneously concluded that the PointCentral/BSVR arbitration agreement was invalid or unenforceable due to lack of mutuality or equitable unconscionability.

¶25 *2. Whether the PointCentral/BSVR arbitration agreement is illegal or unenforceable in contravention of § 27-1-703, MCA?*

[13] Neither party requested a preliminary summary proceeding to resolve any genuine issues of material fact regarding the threshold validity or enforceability of the arbitration agreement. *See Bucy*, ¶ 17 n.10 (in re summary procedure authorized by FAA and MUAA). Nor did BSVR seek conversion of PointCentral's motion to dismiss to a motion for summary judgment pursuant to M. R. Civ. P. 12(d) and 56 to allow it to present any extrinsic facts supporting its otherwise naked assertion that the arbitration agreement was unconscionable.

[14] Having addressed the narrow issue of facial unconscionability as asserted below under the second element of the equitable unconscionability test, we need not address BSVR's additional assertion, raised for the first time on appeal, that outstanding factual questions on the face of its third-party complaint, and incorporated complaints and attachments, remain as to whether the arbitration agreement was a contract or term of adhesion under the first element of the test.

¶26 All contracts must have "a lawful object." Section 28-2-102(3) and -602, MCA. Consequently, an otherwise validly formed contract is void or unenforceable if "contrary to an express provision of law" or "the policy of express law." Section 28-2-701(1)-(2), MCA; *Mont. Petroleum Tank Release Comp. Bd. v. Crumleys, Inc.*, 2008 MT 2, ¶¶ 55-56, 341 Mont. 33, 174 P.3d 948. As an independent contract defense, BSVR alternatively asserts that the PointCentral arbitration agreement is unenforceable as illegal or violative of public policy in contravention of § 27-1-703(4), MCA. It asserts that continued joinder of PointCentral is essential to a full and fair apportionment of liability among all parties involved because, as construed in *Metro Aviation, Inc. v. United States*, 2013 MT 193, ¶¶ 17-21, 371 Mont. 64, 305 P.3d 832, § 27-1-703(4), MCA, requires without exception a single-case determination and apportionment of all sources of negligence alleged by any party to have been a cause of the injury and damages claimed by a plaintiff to have resulted from the negligence of the named defendant(s). We disagree.

¶27 In deviation from the perceived harshness of common law joint and several liability principles, the Legislature altered common law joint and several liability principles by enacting a modified joint and several liability scheme to attempt to more fairly apportion negligence liability based on the comparative negligence of all responsible parties, including joint tortfeasors and contributorily negligent plaintiffs. *See* §§ 27-1-702 to -704, MCA. The current version of § 27-1-703, MCA, attempts to fairly account for and apportion the contributing negligence of the plaintiff, defendant-tortfeasor(s) sued by the plaintiff, and any other tortfeasor not sued by the plaintiff but alleged by a defendant to be

wholly or partially responsible for the injury. *See* § 27-1-703, MCA.[15] The manifest purpose and effect of § 27-1-703 is, *when possible and to the extent elected* by the plaintiff(s) and named defendant(s), to have a single-case determination and apportionment of the relative negligence of all individuals that combined to cause the plaintiff's asserted injury. However, as manifest in its express language, § 27-1-703(4)-(5), MCA, does not necessarily require joinder of all unsettled/unreleased responsible parties in every case.

¶28 Except as otherwise provided, § 27-1-703 preserves the base common law principle that each party-defendant to a negligence action is "jointly and severally liable" for any "amount that may be awarded" to the claimant-plaintiff. Section 27-1-703(1), MCA. But, in deviation from the common law, it further provides that party-defendant(s) have the secondary "right of contribution from any other person whose negligence" was a contributing cause of the injury at issue. Section 27-1-703(1), MCA.[16] Except for previously settled or released joint tortfeasors, non-party joint tortfeasors may be procedurally brought into a negligence action in one of two ways—either as named

[15] Section 27-1-703, MCA (1997), is the Legislature's third attempt to overcome nagging constitutional problems with how to fairly balance the competing public policy objectives of encouraging tortfeasors to promptly settle liability claims with injured parties while at the same time holding unsettled joint tortfeasors proportionally accountable to the extent of their negligence. *See* 1997 Mont. Laws ch. 293, Preamble; 1997 Mont. Laws ch. 429, Preamble; *Plumb v. Fourth Judicial Dist. Court*, 279 Mont. 363, 372-80, 927 P.2d 1011, 1016-21 (1996) (superseded by 1997 Mont. Laws ch. 293); *Newville v. Mont. Dep't of Family Servs.*, 267 Mont. 237, 883 P.2d 793 (1994); *State ex rel. Deere & Co. v. Fifth Judicial Dist. Court*, 224 Mont. 384, 387-97, 730 P.2d 396, 399-405 (1986).

[16] Contribution is a statutory remedy, unknown at common law, that provides for apportionment of liability "among joint tortfeasors by requiring each to pay his or her proportionate share of the negligence that caused the plaintiff's injuries . . . ." *State Farm Fire & Cas. Co. v. Bush Hog, LLC*, 2009 MT 349, ¶ 6, 353 Mont. 173, 219 P.3d 1249 (internal citations omitted).

defendants joined by a plaintiff, or as third-party defendants joined by a named defendant for contribution. *See* § 27-1-703(1), (4), MCA. Named defendants may not join or maintain settled or released tortfeasors in the action but may still obtain a determination and apportionment of their negligence by asserting an affirmative non-party defense with the attendant burden of proof. *See* § 27-1-703(6), MCA. *See also Faulconbridge v. State*, 2006 MT 198, ¶ 66, 333 Mont. 186, 142 P.3d 777; *Plumb*, 279 Mont. at 372-80, 927 P.2d at 1016-21; *Deere*, 224 Mont. at 387-97, 730 P.2d at 399-405.

¶29 Contrary to BSVR's central premise, § 27-1-703, MCA, does not require a single-case consideration and apportionment of all contributing sources of negligence in every case without exception. Section 27-1-703(6)(c), MCA, generally bars "comparison of fault" in a negligence action with any "person who could have been . . . named as a third[-]party" defendant in the action "but was not."[17] Consequently, pursuant to § 27-1-703(4) and (6)(c), MCA, if a named defendant in a negligence action fails to join another alleged tortfeasor, with whom the plaintiff has not settled or released and "who could have been . . . named" as a third-party defendant, the defendant may not separately seek contribution from that individual in a separate action. *Metro Aviation*, ¶¶ 20-21.[18]

[17] Section 27-1-703(6)(c)(i)-(ii), MCA, similarly bars "comparison of fault with any . . . person who is immune from liability to the claimant" or "who is not subject to the jurisdiction of the court."

[18] Section 27-1-703(4), MCA, provides that a defendant in a negligence action may join as a third-party defendant "any other person whose negligence may have contributed as a . . . cause to the [asserted] injury . . . ." It then provides that, "[f]or purposes of determining the percentage of liability attributable to each *party* whose action contributed to the [asserted] injury . . . , the trier of fact shall consider the negligence of the claimant, injured person, defendants, and *third-party defendants* . . . [and] shall apportion the percentage of negligence of all *persons listed in this*

¶30 However, § 27-1-703, MCA, includes an express exception to its single action rule. A named defendant may separately seek contribution from another alleged tortfeasor (with whom the plaintiff has not settled or released) if "*for any* reason . . . contribution cannot be obtained" from that individual in the primary negligence action. Section 27-1-703(5), MCA (emphasis added). Nothing in the clear and unambiguous language of § 27-1-703(4)-(5), MCA, evinces any effect or intent to preclude an FAA-governed arbitration agreement as a legal reason, as referenced in § 27-1-703(5), MCA, why contribution "cannot be obtained" from a joint tortfeasor who would otherwise be subject to third-party joinder and contribution pursuant to § 27-1-703(4), MCA. Our role in construing statutes is simply "to ascertain and declare what is in terms or in substance contained therein"—"not to insert what has been omitted or to omit what has been inserted." Section 1-2-101, MCA. We must, to the extent possible, attempt to effect the manifest intent of the Legislature in accordance with the clear and unambiguous language of its enactments without resort to further means of construction. *See Mont. Vending, Inc. v. Coca-Cola Bottling Co.*, 2003 MT 282, ¶ 21, 318 Mont. 1, 78 P.3d 499. In the absence of a statutory definition or an established "peculiar and appropriate meaning in law," we must construe statutory terms in accordance with their plain and ordinary meaning. Section 1-2-106, MCA; *In re Marriage of Parker*, 2013 MT 194, ¶ 28, 371 Mont. 74, 305 P.3d 816; *Ravalli County v. Erickson*, 2004 MT 35, ¶¶ 11-12, 320 Mont. 31,

subsection." (Emphasis added.) It expressly provides, however, that "[*n*]*othing . . . in* [*27-1-703*] *makes any party indispensable* pursuant to" M. R. Civ. P. 19 (emphasis added).

85 P.3d 772. To the extent possible, we must construe several statutory "provisions or particulars" in harmony to give effect to all. Section 1-2-101, MCA. Accordingly, we conclude that an otherwise enforceable FAA-governed arbitration agreement may be a reason, as referenced in § 27-1-703(5), MCA, why contribution "cannot be obtained" from a joint tortfeasor who would otherwise be subject to third-party joinder and contribution under § 27-1-703(4), MCA.

¶31 Here, if so inclined under the belief that they had a meritorious claim against PointCentral, the plaintiffs (Stowes) certainly could have joined PointCentral as a named defendant-tortfeasor, but did not. Whatever their reasoning, Stowes' right to obtain full compensation simply does not depend on whether PointCentral is joined as a third-party defendant for contribution *to BSVR*. Pursuant to §§ 27-1-701 and -703(1), MCA, and upon sufficient proof, BSVR, as the named defendant, remains directly liable, jointly and severally, to the Stowes except as otherwise provided by § 27-1-703(4)-(5), MCA. The only question under § 27-1-703, MCA, is the *method* for secondarily apportioning liability between BSVR and PointCentral—whether by third-party joinder and contribution in the primary action under the general rule of § 27-1-703(4), MCA, or by a separate contribution action between the two of them under § 27-1-703(5), MCA. The added wrinkle here is that an enforceable arbitration agreement takes this case out of the single-action rule of § 27-1-703(4), MCA, and then, by contract, effectively substitutes arbitration as the procedural means for separately determining BSVR's substantive right to contribution under § 27-1-703(5), MCA.

¶32 In that regard, parties are free to contract except as otherwise provided by law or contrary to public policy. *Arrowhead Sch. Dist. No. 75 v. Klyap*, 2003 MT 294, ¶ 20, 318 Mont. 103, 79 P.3d 250; *State v. Gateway Mortuaries, Inc.*, 87 Mont. 225, 234-40, 287 P. 156, 157-59 (1930). BSVR and PointCentral clearly and unambiguously agreed to arbitrate the type of dispute at issue here. Nothing in § 27-1-703, MCA, prohibits joint tortfeasors from contracting out of § 27-1-703(4)-(5), MCA, to substitute arbitration for litigation as the procedural means for determining the extent of one's statutory right to contribution from the other. Federal law and underlying public policy strongly favor arbitration agreements as an alternative dispute mechanism. *See* 9 U.S.C. § 1, et seq.[19] BSVR has not shown that its arbitration agreement with PointCentral was otherwise invalidly formed or unenforceable under generally applicable contract law. As broadly contemplated by § 27-1-703(5), MCA (availability of separate third-party contribution action when "contribution cannot be obtained" against a non-party joint tortfeasor "for any reason"), the parties' arbitration agreement contractually precludes BSVR from joining PointCentral in this litigation as a third-party defendant for apportioned contribution as would otherwise be proper under § 27-1-703(4), MCA.

¶33 Though it effectively substitutes arbitration for litigated contribution action under § 27-1-703(4)-(5), MCA, the arbitration agreement does not impair the essence of BSVR's substantive right under § 27-1-703(1) and (5), MCA, to separately apportioned contribution from a joint tortfeasor when the other tortfeasor cannot be joined in the

[19] Montana public policy similarly favors arbitration agreements. *See* MUAA § 27-5-111, MCA, et seq.; *Tedesco v. Home Sav. Bancorp, Inc.*, 2017 MT 304, ¶ 27, 389 Mont. 468, 407 P.3d 289.

primary negligence action "for any reason." Except for the forum and procedural means for apportioning that liability between them, BSVR still has the right to obtain contribution (i.e., apportionment between BSVR and PointCentral of any liability apportioned to BSVR in the primary negligence action) in arbitration to the same extent as in a separate contribution action under § 27-1-703(5), MCA. The only difference is that arbitration will separately determine the extent of BSVR's right to contribution from PointCentral rather than a separate action otherwise provided by § 27-1-703(5), MCA. Compatibly construed with § 27-1-703, MCA, the arbitration agreement preserves BSVR's substantive right to apportioned contribution under § 27-1-703(1) and (5), MCA, but in the procedural form of a separate arbitration proceeding instead of litigation.

¶34 Our analysis of § 27-1-703(4)-(5), MCA, would be incomplete if we did not reconcile it with our prior holding in *Metro Aviation*. The narrow essence of our pertinent holding there was that the failure of the named defendant to join another alleged joint tortfeasor as a third-party defendant in the primary negligence action, *when no obstacle prevented doing so*, precluded the defendant from later separately seeking contribution from that individual. *See Metro Aviation*, ¶¶ 19-20. Due to the parties' arbitration agreement, that is not the situation here.

¶35 In *Metro Aviation*, instead of joining an alleged non-party joint tortfeasor (United States of America) as a third-party defendant for contribution in the primary negligence action, the named defendant-tortfeasor (Metro Aviation) settled with the plaintiff (Dengel Estate) prior to trial and then later attempted to assert a separate, stand-alone contribution

action against the third party. *Metro Aviation*, ¶¶ 6-7, 18. Unlike here, there was no reason in *Metro Aviation* why the defendant could not have joined the other alleged tortfeasor as a third-party defendant in the primary negligence action for contribution pursuant to § 27-1-703(4), MCA. *See Metro Aviation*, ¶¶ 6-7, 18. With the narrow separate action exception of § 27-1-703(5), MCA, therefore clearly inapplicable and referenced only for analytical contrast, the more precisely stated issue was whether a tortfeasor named as a defendant in the primary negligence action could assert a separate "stand-alone contribution claim" against a joint tortfeasor *apart from* the narrow separate action exception provided by § 27-1-703(5), MCA. *See Metro Aviation*, ¶¶ 19-20. Our obvious answer to that narrow question was *no*—contribution is a purely statutory right and § 27-1-703, MCA, does not provide for a separate contribution action apart from the narrow exception provided by § 27-1-703(5), MCA. *Metro Aviation*, ¶ 20. Carefully read in the context of the narrow issue presented, our statement that § 27-1-703(5), MCA, "assumes that liability for contribution has already been determined in the preceding single action referenced in § 27-1-703(4), MCA," was imprecise dicta that was not the basis of our narrow holding that the § 27-1-703(5), MCA exception did not apply because there was no reason in that case why the defendant could not have joined the other alleged tortfeasor for third-party contribution in the primary negligence action pursuant to § 27-1-703(4), MCA. *See Metro Aviation*, ¶¶ 19-20. Our analysis here is thus entirely consistent with our pertinent holding in *Metro Aviation.* PointCentral's liability for contribution to BSVR can be determined in a separate proceeding, albeit arbitration

substituted for litigation, as contemplated by § 27-1-703(5), MCA, when "contribution cannot be obtained" from the joint tortfeasor in the primary negligence action "for any reason"—here, an enforceable arbitration agreement. [20]

¶36 If at all, the parties' arbitration agreement contravenes § 27-1-703, MCA, only to the limited extent that it contractually alters the procedural means for a named defendant to obtain apportioned contribution from an unsettled/unreleased joint tortfeasor. While the FAA (9 U.S.C. § 2) expressly preserves all state law defenses generally applicable to "any contract," courts may not invalidate or refuse to enforce arbitration agreements based on defenses that either "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339, 131 S. Ct. at 1746 (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 1656 (1996)). In other words, state law may not defeat arbitration agreements based on "special rules which apply only to arbitration provisions." *Iwen v. U.S. W. Direct*, 1999 MT 63, ¶ 26, 293 Mont. 512, 977 P.2d 989 (citing *Casarotto*, 517 U.S. at 687, 116 S. Ct. at 1656).[21]

[20] BSVR alternatively asserted a third-party claim against PointCentral for common law indemnity. However, common law indemnity (as defined by *State v. Butte-Silver Bow County*, 2009 MT 414, 353 Mont. 497, 220 P.3d 1115, and distinct from contract indemnity) and statutory contribution under § 27-1-703, MCA, are incompatible and mutually exclusive. *State Farm*, ¶ 6. Section 27-1-703, MCA, supplants and precludes common law indemnity between joint tortfeasors where, as here, "both parties allegedly are negligent in causing the plaintiff's injuries." *Metro Aviation*, ¶¶ 23-27.

[21] In *Casarotto*, the Supreme Court held that we erroneously concluded that a former Montana statute, requiring as a condition of enforceability that contracts containing arbitration agreements include a capitalized and underlined arbitration notice on the first page of the contract, did not undermine the policy embodied in the FAA, and was thus not preempted by the FAA. *Casarotto*, 517 U.S. at 684-89, 116 S. Ct. at 1654-57 (second reversal of our decision in *Casarotto v. Lombardi*, 268 Mont. 369, 886 P.2d 931 (1994), *cert. granted, judgment vacated sub nom.*

¶37 In addition to prohibiting special rules applicable only to arbitration agreements, 9 U.S.C. § 2, further prohibits courts from applying otherwise generally applicable contract defenses "in a fashion that disfavors" or is "incompatible with" arbitration. *Concepcion*, 563 U.S. at 341-46, 131 S. Ct. at 1747-49. In that regard, state courts may not apply a generally applicable contract defense in a manner that disproportionally affects arbitration agreements or that "demand[s] *procedures* incompatible with arbitration." *Concepcion*, 563 U.S. at 342-43, 131 S. Ct. at 1747-48 (noting the "great variety of devices and formulas" often used to invalidate arbitration agreements on public policy grounds including requiring adherence to generally applicable rules of evidence or "*ultimate disposition by a jury*") (internal punctuation omitted and emphasis added). "[N]othing in [9 U.S.C. § 2] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's" central purpose of ensuring enforcement of arbitration agreements to thus afford contracting parties' discretion to design a dispute resolution procedure "tailored to" the types of disputes contemplated. *Concepcion*, 563 U.S. at 341-46, 131 S. Ct. at 1747-49.

¶38 Here, even if couched in terms of the otherwise generally applicable principle that contract terms may not violate or contravene public policy, a holding, as advocated by BSVR, that the PointCentral/BSVR arbitration agreement is unenforceable in contravention of § 27-1-703(4), MCA, would effectively preclude arbitration agreements

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Doctor's Assocs., Inc. v. Casarotto, 515 U.S. 1129, 115 S. Ct. 2552 (1995), and *opinion reinstated*, 274 Mont. 3, 901 P.2d 596 (1995)).

between joint tortfeasors by demanding strict compliance with the precise *procedure* prescribed for the exercise and enforcement of the substantive right to contribution among joint tortfeasors under § 27-1-703, MCA. Without affecting BSVR's substantive right to apportioned contribution, the only effect of the arbitration agreement here is to substitute arbitration for litigation under § 27-1-703(4) or (5), MCA. The holding advocated by BSVR would thus apply an otherwise generally applicable contract defense in a manner that disproportionally, if not specifically, invalidates arbitration agreements in this context contrary to the fundamental preemptive purpose of the FAA. We hold that the PointCentral/BSVR arbitration agreement is not unenforceable as illegal or violative of public policy in contravention of § 27-1-703(4), MCA.[22]

CONCLUSION

¶39 The District Court erroneously concluded that the PointCentral/BSVR arbitration agreement was invalid or otherwise unenforceable due to lack of mutuality or equitable unconscionability. The agreement similarly does not contravene the letter or underlying purpose or policy of § 27-1-703(4)-(5), MCA. We hold that the District Court erroneously failed to dismiss BSVR's third-party claims against PointCentral pursuant to M. R.

[22] BSVR further asserts pursuant to *Plumb* that failure to maintain joinder of PointCentral will deny BSVR substantive due process of law. We narrowly held in *Plumb* that the since-superseded non-party defense referenced and provided in § 27-1-703(4) and (6), MCA (1995), violated the federal and state substantive due process rights of *plaintiffs* and *previously settled or released third-party tortfeasors*. *Plumb*, 279 Mont. at 374-80, 927 P.2d at 1018-21. Since BSVR is neither, and having determined that the subject arbitration agreement does not contravene § 27-1-703(4), MCA, we decline to further address BSVR's constitutional argument.

Civ. P. 12(b)(6). We reverse and remand for entry of a conforming third-party judgment in favor of PointCentral.

/S/ DIRK M. SANDEFUR

We concur:

/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ JIM RICE

Justice James Jeremiah Shea, concurring and dissenting.

¶40 I concur with the Majority's ultimate resolution of Issue Two—that an agreement to arbitrate indemnification or contribution is not unenforceable as illegal in contravention of § 27-1-703, MCA. I dissent from the Majority's conclusion in Issue One that the arbitration agreement was not invalid or unenforceable due to lack of mutuality or equitable unconscionability. Because the District Court did not address whether the contract between PointCentral and BSVR was a contract of adhesion, I would remand this matter to the District Court with leave for PointCentral to either move for summary judgment or to compel arbitration contingent on the District Court's determination regarding whether the Agreement was a contract of adhesion.

¶41 The parties' respective rights and obligations regarding indemnification are set forth in Section 8 of the Agreement. PointCentral's indemnification rights are set forth in Section 8.1. BSVR's indemnification rights are set forth in Section 8.2. The two sections

are substantively identical. Relevant to the case at hand, these identical rights and obligations provide that if either party is sued by a third party, each party has the right to seek indemnification "to the extent of their respective liability." Despite PointCentral's and BSVR's respective indemnification rights being identical, however, the manner by which these identical rights are vindicated, and how "the extent of [each party's] respective liability" is determined, follow divergent paths.

¶42 Section 11.2 of the Agreement sets forth an arbitration exception and provides, in relevant part:

> [I]f PointCentral or any other beneficiary of the indemnification set forth in Section 8.1 becomes a defendant in a proceeding *in any court* and the indemnification applies to such Claim, or there is a good faith basis to contend that the indemnification applies to such Claim, PointCentral shall have the right to enforce the indemnification, and any other provision of this Agreement, against [BSVR] *in such court proceeding*, including by impleading or cross-claiming against [BSVR] or otherwise.

(Emphasis added.) Notably, this arbitration exception applies only to BSVR's indemnification obligations as set forth in Section 8.1, and thus only to the benefit of PointCentral. PointCentral's identical indemnification obligations, as set forth in Section 8.2, are not subject to this exception. Therefore, if the Stowes had sued PointCentral—as the Majority acknowledges they certainly could have done, Opinion, ¶ 31—Section 11.2 would allow PointCentral to file a third-party claim against BSVR to recover whatever indemnity to which it might be entitled under Section 8.1. PointCentral would then incur the expense of only one proceeding, in which PointCentral's respective liability, if any, would be determined by a single fact-finder, who would also be allowed to consider

BSVR's respective liability in the same action. Also significant, PointCentral would enjoy the full due process right of appeal regarding any alleged errors in the trial court relative to its third-party claim—a right that is not available to BSVR in arbitration because the role of a reviewing court when asked to vacate an arbitration award is limited. *See Geissler v. Sanem*, 285 Mont. 411, 415, 949 P.2d 234, 237 (1997) (citation omitted) "[T]he Montana Uniform Arbitration Act clearly does not authorize judicial review of arbitration awards on the merits of the controversy."; § 27-5-312(1), MCA.

¶43 In short, Section 11.2 allows PointCentral to exercise all the benefits, rights, and due process of a defendant seeking indemnification from another party, while denying those same benefits, rights, and due process to BSVR. That this provision lacks mutuality is beyond dispute. The Majority dismisses this disparity, though, by contending that "the exception[] manifestly relate[s] to the fact the parties are not similarly situated on the face of the Agreement." Opinion, ¶ 22. In fact, as it pertains to their indemnification rights and obligations relative to each other, the parties are not just similarly situated on the face of the Agreement—they are identically situated. The parties' respective rights and obligations regarding indemnification are expressly controlled on the face of the Agreement by Section 8. As noted above, Sections 8.1 and 8.2 set forth *identical* indemnification obligations; yet only BSVR is required to submit its indemnification claim to arbitration.

¶44 The Majority further attempts to justify the disparate treatment of the two parties by reasoning that PointCentral is exposed to an increased risk of liability to third parties by

virtue of its association with BSVR, whereas BSVR is not subjected to similar third-party liability by virtue of its association with PointCentral. Opinion, ¶ 22. This reasoning is belied by the fact that the very subject of this appeal is BSVR's liability to a third party by virtue of its association with PointCentral, and its attempt to seek indemnification from PointCentral for that liability in the same manner that PointCentral could seek indemnification from BSVR if the shoe was on the other foot.

¶45 The Majority's basis for upholding the arbitration exception in this case ultimately boils down to its erroneous conclusion that "the limited arbitration exceptions reserved to PointCentral are reasonably related on the face of the Agreement to PointCentral's *unique needs* for those exceptions." Opinion, ¶ 23 (emphasis added). But this conclusion begs the question: How can PointCentral's needs regarding indemnification be "unique," when the Agreement itself defines them identically to BSVR's?

¶46 Although discussed in its resolution of Issue Two, the Majority's discussion of the constitutional and public policy implications of our joint and several liability scheme, and the statutory process by which liability is apportioned in Montana courts, illustrates the gravity of a one-sided arbitration agreement that allows one party to avail itself of the due process and statutory safeguards of seeking indemnification by way of a third-party action, while depriving the other party the same due process and statutory safeguards. The Majority correctly observes that this Court and the Legislature have struggled on multiple occasions to address the

> nagging constitutional problems [of] how to fairly balance the *competing public policy objectives* of encouraging tortfeasors to promptly settle liability claims with injured parties while at the same time holding unsettled joint tortfeasors proportionally accountable to the extent of their negligence.

Opinion, ¶ 27 n. 15 (citations omitted) (emphasis added). This observation illustrates that a contract provision the Majority dismisses as little more than a matter of procedure is, fundamentally, a matter of constitutional rights and public policy objectives. The significance of the lack of mutuality must be analyzed in that context. In *Ossello*, we noted that "under Montana law, a contract provision can be unconscionable and therefore unenforceable if 'when considered in its context, [it] is unduly oppressive, unconscionable or against public policy.'" *Ossello*, ¶ 35 (quoting *Iwen*, ¶ 27) (alteration in original). In *Lenz*, we noted that "violation of public policy is an independent, generally applicable ground for invalidating a contract provision, separate and distinct from equitable unconscionability." *Lenz*, ¶ 26. In both *Ossello* and *Iwen*, we held the arbitration clauses invalid because they allowed a party to compel arbitration while reserving to itself the right to pursue its remedies in a court of law. *Ossello*, ¶ 41; *Iwen*, ¶ 31. I would apply the same reasoning here and hold that the arbitration exception that allows PointCentral to seek indemnification in court, while requiring BSVR to arbitrate the identical indemnification rights is invalid.[1]

[1] The Majority points out a second exception to the arbitration clause in the Agreement allowing PointCentral the right to seek injunctive relief in court. Opinion, ¶ 8. I am not addressing this second exception because the injunctive relief provision is not relevant to this case.

¶47 Because the Majority concluded the arbitration exception was not facially unconscionable, it did not address whether the contract at issue was a contract of adhesion. Opinion, ¶ 24 n. 14. Likewise, the District Court did not address this issue. Problematic to the resolution of this issue on appeal is that PointCentral did not move to compel arbitration in the District Court; it moved to dismiss BSVR's third-party complaint pursuant to Rule 12(b)(1) or 12(b)(6). The Majority appropriately determined PointCentral's motion should be treated as a Rule 12(b)(6) motion on appeal. Opinion, ¶ 14. Resolution of a Rule 12(b)(6) motion to dismiss focuses on whether the complaint is facially sufficient to state a cognizable legal claim entitling the claimant to relief on the facts pled. *Anderson v. ReconTrust Co., N.A.*, 2017 MT 313, ¶ 8, 390 Mont. 12, 407 P.3d 692 ("A claim is subject to M. R. Civ. P. 12(b)(6) dismissal only if it either fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under that claim."). The court must take all well-pled factual assertions as true in the light most favorable to the claimant. *Anderson*, ¶ 8; *Willson v. Taylor*, 194 Mont. at 126, 634 P.2d at 1182. In this case, there is no question that BSVR has set forth a cognizable legal claim. The only question is whether that cognizable legal claim may be adjudicated in court or by arbitration. Because the right to compel arbitration is an affirmative defense to a claim, *Bucy*, ¶ 18, it is not something that would be pled in the complaint.

¶48 While unconscionability or lack of mutuality in a contract may be something that is susceptible to resolution by way of a motion to dismiss, determining whether a contract is

a contract of adhesion would almost certainly require an inquiry beyond the well-pled allegations of the complaint. That is certainly the case here. Although the District Court correctly held that the arbitration clause lacks mutuality of obligation and unreasonably favors PointCentral, PointCentral may yet have the right to compel arbitration if the Agreement is not a contract of adhesion. Therefore, while I would affirm the District Court's conclusion that the arbitration exception lacks mutuality and unreasonably favors PointCentral, I would remand this matter to the District Court to determine whether the Agreement was a contract of adhesion. If the District Court determined the Agreement was not a contract of adhesion, I would grant leave to PointCentral either to move for summary judgment or to compel arbitration.

¶49 Although I do not agree entirely with the Majority's interpretation of § 27-1-703, MCA, I agree with the ultimate conclusion that § 27-1-703, MCA, does not prohibit BSVR from seeking contribution from PointCentral in a subsequent action, if the arbitration clause is enforceable. I therefore concur in the Majority's resolution of Issue Two.

/S/ JAMES JEREMIAH SHEA

Chief Justice Mike McGrath and Justice Ingrid Gustafson join the Concurrence and Dissent of Justice Shea.

/S/ MIKE McGRATH
/S/ INGRID GUSTAFSON