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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

LOW DESERT EMPIRE PIZZA, INC. et al.,

Plaintiffs and Respondents,

v.

APPLIED UNDERWRITERS, INC. et al.,

Defendants and Appellants.

E067081

(Super.Ct.No. PSC1602331)

OPINION

APPEAL from the Superior Court of Riverside County. James T. Latting, Judge. Affirmed.

Hinshaw & Culbertson, Spencer Y. Kook, and James C. Castle for Defendants and Appellants.

Larry J. Lichtenegger for Plaintiffs and Respondents.

This case involves the intersection of California's workers' compensation insurance laws and the Federal Arbitration Act (FAA). Respondents Low Desert Empire Pizza, Inc., Hi Desert Empire Pizza, Inc., Ten Cap, Inc., and Capten, Inc. (collectively, Desert Pizza) sued several related insurance entities—Applied Underwriters, Inc. (Applied), Applied Underwriters Captive Risk Assurance Company, Inc. (AUCRA, and together with Applied, appellants) and California Insurance Company (CIC) (together with appellants, defendants). Desert Pizza challenged the legality of defendants' EquityComp workers' compensation insurance program, which consists of an insurance policy and two related side agreements. Applied and AUCRA moved to compel arbitration based on arbitration provisions in the side agreements, and Desert Pizza countered that the provisions were unenforceable because defendants failed to file them with California's Insurance Commissioner for approval, as required in Insurance Code section 11658 (Section 11658).[1] The trial court agreed and denied the motions.

Applied and AUCRA appeal that ruling.[2] They argue an arbitrator, not the trial court, must determine the validity of the arbitration provisions. In the alternative, they say Section 11658's filing requirement does not apply to the arbitration provisions, and even if it did, voiding the provisions is an improper remedy.

[1] Unlabeled statutory citations refer to the Insurance Code.

[2] CIC is not a party to this appeal.

This is one of several actions in this state and across the country challenging the legality of defendants' EquityComp program based on their failure to seek and obtain regulatory approval of side agreements to the insurance policy. (E.g., *Citizens of Humanity, LLC v. Applied Underwriters, Inc.* (2017) 17 Cal.App.5th 806 (*Citizens of Humanity*); *Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assur. Co.* (4th Cir. 2017) 867 F.3d 449; *Citizens of Humanity, LLC v. Applied Underwriters Captive Risk Assur. Co.* (2018) 299 Neb. 545.) California's Insurance Commissioner recently issued an administrative decision concluding appellants' failure to file a virtually identical EquityComp side agreement under Section 11658 rendered the arbitration provisions in that agreement void and unenforceable. (*Matter of Shasta Linen Supply, Inc.*, Decision & Order, dated June 20, 2016, file No. AHB-WCA-14-31, at p. 43 (*Shasta Linen*).) Even more recently, our colleagues in Division One reached the same conclusion. (*Nielsen Contracting, Inc. v. Applied Underwriters, Inc.* (2018) 22 Cal.App.5th 1096, 1118 (*Nielsen*), review den. Aug. 15, 2018.) For the reasons we explain below, we also conclude defendants' violation of Section 11658 renders their arbitration provisions unenforceable. We will therefore affirm the order denying the motions to compel arbitration.

I

FACTUAL BACKGROUND

A. *The Parties*

Desert Pizza is a California corporation with its principal place of business in Indio. CIC and AUCRA are both wholly owned subsidiaries of Applied, which is a subsidiary of Berkshire Hathaway. Applied is a Nebraska financial service corporation that provides payroll processing services and underwrites workers' compensation insurance through its affiliated insurance companies to small and medium-sized employers. Its principal place of business is in Foster City, California. CIC is a licensed property and casualty insurance company, domiciled in California and licensed to transact business in 26 states. AUCRA is an insurance company organized under British Virgin Islands law and domiciled in Iowa. Its sole purpose in the Berkshire Hathaway family is to serve as CIC's reinsurance arm.

B. *The Request to Bind and RPA*

According to Desert Pizza's complaint, in 2011 Applied gave them quotes and proposals for EquityComp—its patented workers' compensation program. Based on representations about the program's low cost and profit-sharing benefits, Desert Pizza signed a Request to Bind with Applied. The Request to Bind obligated Desert Pizza to purchase a guaranteed-cost workers' compensation policy from CIC (the CIC Policy). Under a guaranteed-cost policy, the employer pays a fixed annual premium based on its average losses from previous years. CIC issued three of these policies, each with a one-

year term. The Request to Bind also obligated Desert Pizza to sign a separate agreement with AUCRA, called the Reinsurance Participation Agreement (RPA), which had a three-year term.

The RPA modified and supplanted many of the CIC Policy terms. According to Desert Pizza, the RPA altered defendants' insurance program to a profit-sharing (or loss sensitive) plan, where the premium is not fixed but rather adjusts based on the employer's actual losses during the policy year. The complaint alleges Applied told Desert Pizza their initial profit-sharing plan "Pay-In Factor" would be .70 but that number would "go up or down based on losses using the commonly used formula of payroll times rate times the Pay-In Factor. . . . Applied [] also represented that the effect of low losses would be 'immediate'." Of particular relevance, the RPA included an arbitration provision stating:

"(A) It is the express intention of the parties to resolve any disputes arising under this Agreement without resort to litigation in order to protect the confidentiality of their relationship and their respective business and affairs. Any dispute or controversy . . . arising out of or related to this Agreement shall be fully determined in the British Virgin Islands under the provisions of the American Arbitration Association [AAA].

"(B) *All disputes* between the parties relating in any way to (1) *the execution and delivery, construction or enforceability of this Agreement*, (2) the management or operations of the Company, or (3) any other breach or claimed breach of this Agreement or the transactions contemplated herein *shall be . . . finally determined exclusively by binding arbitration in accordance with the procedures provided herein* . . . [¶] . . . [¶]

"(D) . . . All arbitrators shall be active or retired, disinterested officials of insurance or reinsurance companies. . . . [¶] . . . [¶]

"(G) . . . Judgment upon the award rendered by the arbitrator or arbitrators may be entered by any court of competent jurisdiction in Nebraska or application may be made in such court for judicial acceptance of the award and an order of enforcement as the law of Nebraska may require or allow.

"(H) The award of the arbitrator or arbitrators shall be binding and conclusive on the parties. . . .

"(I) All arbitration proceedings shall be conducted . . . in accordance with the rules of the [AAA] and shall take place in Tortola, British Virgin Islands or at some other location agreed to by the parties." (Italics added.)

The provision in paragraph B giving the arbitrator authority to rule on disputes concerning the "enforceability" of the arbitration provision is known as a delegation clause.

In addition, the Request to Bind contained its own arbitration provision, requiring all claims and disputes involving the EquityComp proposal "or any part thereof (including but not limited to the Agreements and Policies)" to be "submitted to and determined exclusively by binding arbitration under the [FAA] in conformity with the Arbitration Act of the State of Nebraska."

The CIC Policy, on the other hand, did not contain an arbitration provision. It adopted the dispute resolution process set out in section 11737, subdivision (f), whereby

the insured can appeal to the Insurance Commissioner if it is dissatisfied with the insurer's resolution of its written complaint.[3]

It is undisputed that, of the three EquityComp agreements (the CIC Policy, Request to Bind, and RPA), the CIC Policy is the only one defendants filed with the regulatory authorities. When the RPA's term came to an end in 2014, Desert Pizza complained Applied had mismanaged their claims and unjustifiably increased their costs. Applied promised the issue was temporary and Desert Pizza would soon start to receive back some of the costs they had paid into the program. Desert Pizza says that in reliance on this promise, they signed a second Request to Bind in 2014, as well as a second RPA and set of CIC guaranteed-cost policies.

[3] Section 11737, subdivision (f) provides: "Every insurer or rating organization shall provide within this state reasonable means whereby any person aggrieved by the application of its filings may be heard by the insurer or rating organization on written request to review the manner in which the rating system has been applied in connection with the insurance afforded or offered. If the insurer or rating organization fails to grant or reject the request within 30 days, the applicant may proceed in the same manner as if the application had been rejected. Any party affected by the action of the insurer or rating organization on the request may appeal, within 30 days after written notice of the action, to the commissioner who, after a hearing held within 60 days from the date on which the party requests the appeal, or longer upon agreement of the parties and not less than 10 days' written notice to the appellant and to the insurer or rating organization, may affirm, modify, or reverse that action. If the commissioner has information on the subject from which the appeal is taken and believes that a reasonable basis for the appeal does not exist or that the appeal is not made in good faith, the commissioner may deny the appeal without a hearing. The denial shall be in writing, set forth the basis for the denial, and be served on all parties."

C. *The Lawsuit*

Desert Pizza sued defendants in May 2016, seeking a declaration the RPA and Request to Bind are void and unconscionable, as well as damages for defendants' misrepresentations and breach of the implied covenant of good faith and fair dealing. Desert Pizza alleged the RPA is an adhesion contract with unfair terms; defendants structured the EquityComp program to purposely circumvent California's insurance laws; and the RPA and Request to Bind, *including their delegation and arbitration provisions*, are unenforceable because they were not filed with regulators as required in Section 11658 and its implementing regulation—California Code of Regulations, title 10, section 2268 (Regulation 2268).[4] Desert Pizza alleged that EquityComp is the "brainchild" of Applied, and that Applied caused CIC to issue an approved guaranteed-cost policy "to give the appearance of compliance with the California insurance regulations" even though "CIC is [n]ever responsible for making payment on claims using its own money" and the RPA changed the nature of the policy. In other words, Desert Pizza alleged that by issuing the government-approved CIC Policy first, followed by the unapproved RPA, defendants engaged in a bait-and-switch ploy to avoid obtaining regulatory approval for the loss-sensitive premiums and arbitration provisions in the RPA.

D. *Shasta Linen*

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[4] All citations to regulations refer to title 10 of the California Code of Regulations. And, unless otherwise stated, all citations to Regulation 2268 refer to the version existing in 2012 and 2014 when the parties signed the RPAs at issue.

In June 2016, a month after Desert Pizza filed their complaint, the Insurance Commissioner issued an administrative decision finding one of defendants' RPAs—which is "essentially identical" to the one at issue here—void due to their failure to comply with Section 11658 and file the agreement for approval. (*Nielsen*, *supra*, 22 Cal.App.5th at p. 1116; *Shasta Linen*, *supra*, at pp. 1, 46, 53, 58.) The Insurance Commissioner concluded Section 11658 and the relevant administrative rule, Regulation 2268, require insurers to obtain approvals for side agreements, including arbitration provisions that differ from the dispute resolution provisions in a previously approved policy. (*Shasta Linen*, at p. 43; see Regs., § 2268.) The Commissioner further concluded defendants' statutory violation rendered the entire RPA, *including its arbitration provisions*, unenforceable. (*Shasta Linen*, at pp. 27-28, 43, 56-57, 69.)

Two months after this decision, defendants entered into a cease-and-desist order with the California Department of Insurance (the Department).[5] The order states defendants disagree with the decision but acknowledge the Department "made [it] precedential" under Government Code section 11425.60, subdivision (b).[6] Among other things, defendants agreed that any arbitrations under existing RPAs "entered into or issued in California" will take place in California.

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[5] We grant Appellants' request we take judicial notice of the order. (Evid. Code, § 452, subds. (c) & (h).)

[6] An administrative agency may designate a decision as precedent if it "contains a significant legal or policy determination of general application that is likely to recur." (Gov. Code, § 11425.60, subd. (b).) That designation allows the agency to rely on the decision in later cases. (*Id.*, subd. (a).)

E. *Motions to Compel Arbitration*

Citing to the RPA's arbitration provisions, AUCRA moved to compel arbitration of all claims in the complaint arising after Desert Pizza signed the RPA. AUCRA argued the RPA contained a delegation clause giving the arbitrator sole and exclusive authority to resolve the enforceability of the arbitration agreement. Citing the Request to Bind's arbitration provision, Applied moved to compel arbitration of all of the precontracting claims in the complaint, like fraud and misrepresentation.

Desert Pizza opposed the motions, arguing the delegation and arbitration provisions in both agreements are unenforceable because they violated Section 11658's filing and approval requirement. They presented evidence showing the RPA was virtually identical to the agreement the Insurance Commissioner deemed void in *Shasta Linen*.

After a hearing, the trial court agreed with Desert Pizza and denied both motions. AUCRA and Applied appealed.

II

DISCUSSION

Appellants argue *an arbitrator* must determine the enforceability of the delegation and arbitration provisions. In the alternative, they argue the trial court should have found the provisions enforceable because either Section 11658 does not apply to them or because noncompliance with Section 11658 does not render them void.

A. *Standard of Review*

A trial court must compel arbitration "if it determines that an agreement to arbitrate the controversy exists." (Code Civ. Proc., § 1281.2.) A party who opposes arbitration "bears the burden of proving by a preponderance of the evidence any defense." (*Peng v. First Republic Bank* (2013) 219 Cal.App.4th 1462, 1468.) In cases like this where the order denying a motion to compel arbitration presents a pure question of law, we exercise independent review. (*Citizens of Humanity, supra*, 17 Cal.App.5th at p. 811.)

B. *The FAA*

"The FAA reflects the fundamental principle that arbitration is 'a matter of contract.'" (*Citizens of Humanity, supra*, 17 Cal.App.5th at p. 812, quoting *Rent-A-Center, W., Inc. v. Jackson* (2010) 561 U.S. 63, 67 (*Rent-A-Center*).) Its purpose is to "make arbitration agreements as enforceable as other contracts, *but not more so*." (*Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395, 404, fn.12, italics added.) In that vein, the FAA makes contractual arbitration provisions involving commerce

"valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." (9 U.S.C. § 2, italics added.) Courts commonly refer to this exception as the FAA's savings clause. While the act generally reflects a "liberal federal policy favoring arbitration," its savings clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses,'" such as fraud, duress, unconscionability, or illegality. (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339; see also *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 962; *Prima Paint Corp.*, at p. 404, fn.12 [noting that "[t]o immunize an arbitration agreement from judicial challenge on [a traditional ground for revocation of contract] . . . would be to elevate it over other forms of contract"].) "It seems clear that the power of the arbitrator to determine the rights of the parties is dependent upon the existence of a valid contract under which such rights might arise . . . In the absence of a valid contract no such rights can arise and no power can be conferred upon the arbitrator to determine such nonexistent rights." (*Loving & Evans v. Blick* (1949) 33 Cal.2d 603, 610.)

C. *The Court Properly Determined the Enforceability of the Delegation and Arbitration Provisions*

The threshold question in this case is who decides the savings clause issue—the court or the arbitrator?

An arbitration provision "'is severable from the remainder of the contract.'" (*Rent-A-Center*, *supra*, 561 U.S. at pp. 70-71.) As a result, "allegations that the main contract is unlawful or unconscionable does not affect the enforceability of the arbitration clause." (*Nielsen*, *supra*, 22 Cal.App.5th at p. 1108.) Thus, a challenge to the validity of

the arbitration agreement itself triggers judicial review, whereas challenges to the validity of the underlying contract are reserved for the arbitrator. (*Preston v. Ferrer* (2008) 552 U.S. 346, 353; *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 443-445.)

The same rule applies to delegation clauses, which are "agreement[s] to arbitrate threshold issues concerning the arbitration agreement." (*Rent-A-Center*, *supra*, 561 U.S. at p. 68.) Like the arbitration agreements containing them, delegation clauses are independent, severable contracts, and as a result, a court must resolve specific challenges to their validity. (*Id*. at pp. 68, 70-71.) Simply put, a party must challenge the validity of "the precise agreement to arbitrate at issue" before a court will intervene to consider the challenge. (*Id.* at p. 71.) It therefore follows that "an argument that the *arbitration agreement or the underlying contract* is unenforceable is not sufficient to trigger the court's obligation to resolve contentions regarding the enforceability of a severable *delegation clause*." (*Nielsen, supra,* 22 Cal.App.5th at p. 1108, italics added.)

Rent-A-Center illustrates this rule. In that case, an employee suing his former employer for discrimination argued the arbitration agreement between them was unconscionable, but the employee did not make any arguments regarding the agreement's delegation clause. (*Rent-A-Center*, *supra*, 561 U.S. at pp. 65-66, 74.) Given the absence of any direct challenge to that clause (the court noted the employee had not "even mention[ed]" it during the litigation), the court enforced it, sending the employee's challenge to the validity of the arbitration agreement *as a whole* off to the arbitrator. (*Id.* at pp. 72-75.) "Following *Rent-A-Center,* California courts have recognized that a court

is the appropriate entity to resolve challenges to a delegation clause nested in an arbitration clause when a specific contract challenge is made to the delegation clause." (*Nielsen*, *supra*, 22 Cal.App.5th at p. 1109.)

Applying the rule here, we conclude Desert Pizza triggered judicial review of the enforceability of the delegation clause and arbitration provisions. In their complaint as well as their briefing and oral argument opposing arbitration, they argued the delegation clause and the arbitration provisions in the Request to Bind and RPA were void and unenforceable because appellants intentionally failed to file them for approval under Section 11658. Appellants countered by arguing Section 11658's filing requirement does not apply to arbitration provisions because they are not insurance policies and because their arbitration provisions did not modify the CIC Policy. These issues trigger judicial review because they relate specifically and only to the delegation and arbitration provisions, as opposed to the underlying RPA or Request to Bind. (Accord, *Nielsen*, *supra*, 22 Cal.App.5th at pp. 1109-1110 [court properly determined the enforceability of the RPA's delegation clause because plaintiff argued the *clause itself* was void for failure to file under Section 11658].)

As they did (unsuccessfully) in *Nielsen*, appellants argue Desert Pizza's challenges to the delegation clause and arbitration provisions were not *sufficiently* specific because those challenges are based on the same ground as their challenge to the RPA (that is, violation of Section 11658's filing requirement). In other words, appellants argue that to trigger judicial review, a challenge to an arbitration provision must be "analytically

distinct" from the challenge to the main contract. Unfortunately for appellants, their argument fares no better here because we share our colleagues' understanding of *Rent-a-Center*.

As *Nielsen* explained: "If we were to accept defendants' argument that courts are precluded from ruling on specific contract defenses to a delegation clause merely because the same defense is also brought to invalidate other related contractual provisions, we would be treating delegation clauses differently than other contractual clauses, a determination that would be inconsistent with the FAA, as interpreted by the United States Supreme Court. (*Nielsen, supra,* 22 Cal.App.5th at p. 1110.)

"*Rent-A-Center's* discussion of the type of challenge that *might* have triggered court review supports [this] conclusion. In explaining that the plaintiff's unconscionability challenge specifically concerned only the validity of the contract as a whole, rather than the delegation provision, the high court noted that the plaintiff's 'substantive unconscionability arguments assailed arbitration procedures called for by the [arbitration] contract—the fee-splitting arrangement and the limitations on discovery—procedures that were to be used during arbitration under *both* the agreement to arbitrate employment-related disputes *and* the delegation provision. It may be that had [the employee] challenged the delegation provision by arguing that these common procedures *as applied* to the delegation provision rendered *that provision* unconscionable, the challenge should have been considered by the court. To make such a claim based on the discovery procedures, [the employee] would have had to argue that the limitation upon

the number of depositions causes the arbitration of his claim that the Agreement is unenforceable to be unconscionable. That would be, of course, a much more difficult argument to sustain than the argument that the same limitation renders arbitration of his factbound employment-discrimination claim unconscionable. Likewise, the unfairness of the fee-splitting arrangement may be more difficult to establish for the arbitration of enforceability than for arbitration of more complex and fact-related aspects of the alleged employment discrimination. [The employee], however, did not make any arguments specific to the delegation provision; he argued that the fee-sharing and discovery procedures rendered the *entire* Agreement invalid.' [Citation.]

"This hypothetical—that *if* the plaintiff *had* directed the unconscionability challenges (the unfairness of the discovery limitations and the fee-splitting requirements) against the delegation clause *in addition* to asserting the same unconscionability challenge against the arbitration agreement itself, the 'challenge [to the delegation clause] should have been considered by the court'—illustrates that the focus of the court's attention must be on whether the particular challenge *is directed at* the delegation clause, not whether the same challenges are *also* directed at the agreement or agreements into which the delegation clause is embedded or nested." (*Nielsen*, *supra*, 22 Cal.App.5th at p. 1111, quoting *Rent-A-Center*, *supra*, 561 U.S. at p. 74.)

Based on this reasoning, *Nielsen* concluded that "whether the challenge is the same as or different from the challenge to other provisions of the arbitration clause or

underlying agreement is not dispositive of whether the challenge is specifically directed at the delegation clause." (*Nielsen, supra,* 22 Cal.App.5th at p. 1111.) We agree.

Malone v. Superior Court (2014) 226 Cal.App.4th 1551, a case predating the current RPA litigation, supports our conclusion. There, a company argued its former employee's unconscionability challenge to its delegation clause was not sufficiently direct because she had also argued the arbitration agreement as a whole was unconscionable. (*Id.* at p. 1557, fn. 4.) The court rejected this argument, concluding her other unconscionability challenge pertained to the substance of different arbitration provisions and as a result her arguments regarding the delegation clause "stood alone." (*Ibid.*)

Appellants' reliance on *Matter of Monarch Consulting, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA* (2016) 26 N.Y.3d 659 serves only to illustrate our point. In that case, the court enforced the delegation clause precisely because the plaintiffs had *not* asserted a specific challenge to the delegation clause. (*Id.* at p. 676 ["a review of the record reveals that [plaintiffs] did not specifically direct any challenge to the delegation clauses empowering the arbitrators to determine gateway questions of arbitrability"].) Here, in contrast, the trial court found Desert Pizza had asserted a specific, substantive challenge to the arbitration provisions that was not merely a device to challenge other aspects of the contract. Because the record supports this conclusion, we uphold the court's determination that Desert Pizza triggered judicial review.

D. *The Challenged Arbitration Provisions Are Unenforceable*

Appellants argue the court erred in concluding the RPA's and Request to Bind's arbitration provisions were unenforceable. We disagree. California insurance law and general principles of contract support concluding the provisions are unenforceable due to appellants' failure to obtain regulatory approval.

1. *Applicable law and relevant authority*

California has a significant interest in regulating the sale of workers' compensation insurance. (*Graczyk v. Workers' Comp. Appeals Bd.* (1986) 184 Cal.App.3d 997, 1002-1003; *American Zurich Ins. Co. v. Country Villa Service Corp.* (C.D. Cal. 2015) 2015 WL 4163008, *11 (*American Zurich*) ["'[w]orkers' compensation insurance programs are to be closely scrutinized and are highly regulated'"].) To that end, "the Legislature has created a highly regulated compensation system for injured workers with the twin goals of providing prompt medical treatment and containing costs." (*Adventist Health v. Workers' Comp. Appeals Bd.* (2012) 211 Cal.App.4th 376, 385.)

As part of the regulatory framework, insurers must obtain regulatory review of any workers' compensation policy or side agreement they plan to use in California. (§ 11658; Regs., § 2218). The insurer must file each policy and side agreement with the Workers' Compensation Insurance Rating Bureau (the Rating Bureau), and if the Insurance Commissioner does not disapprove the document within 30 days, it is deemed approved and may be used in California. (§ 11658.) The purpose of the Rating Bureau is "[t]o

examine policies, daily reports, endorsements or other evidences of insurance for the purpose of ascertaining whether they comply with the provisions of law and to make reasonable rules governing their submission." (§ 11750.3.)

Section 11658 states in relevant part:

"(a) A workers' compensation insurance policy or endorsement *shall not be issued* by an insurer to any person in this state *unless* the insurer files a copy of the form or endorsement with [the Rating Bureau] . . . and 30 days have expired from the date the form or endorsement is received by the commissioner from the rating organization . . ., unless the commissioner gives written approval of the form or endorsement prior to that time.

"(b) If the commissioner notifies the insurer that the filed form or endorsement does not comply with the requirements of law, specifying the reasons for his or her opinion, it is unlawful for the insurer to issue any policy or endorsement in that form." (Italics added.)

An endorsement "is an amendment to or modification of an existing policy of insurance" that "'may alter or vary any term or condition of the policy.'" (*Adams v. Explorer Ins. Co.* (2003) 107 Cal.App.4th 438, 451, 450.)

When the parties executed the RPAs in this case, Regulation 2268 required insurers to attach and incorporate to the workers' compensation policy any "*collateral agreement* modifying the obligation of either the insured or the insurer." (Former Regs., § 2268, italics added.) In 2016, the Department amended Regulation 2268 to delete the

reference to "collateral agreements" and instead state: "An insurer shall not use a policy form, endorsement form, *or ancillary agreement* except those filed and approved by the Commissioner in accordance with these regulations." (Regs., § 2268, subd. (b), italics added.) In addition, the amended Regulation 2250 was amended to define an "[a]ncillary agreement" to include a "dispute resolution agreement." (Regs., § 2250, subd. (f).)

In *Shasta Linen*, the Insurance Commissioner concluded the RPA at issue was a "collateral agreement" under Regulation 2268 because it modified and supplanted the terms of the CIC Policy. (*Shasta Linen*, *supra*, at pp. 1, 46, 53, 58.) The Commissioner also concluded defendants' failure to file the RPA with the Rating Bureau rendered it void. (*Id.* at p. 65.)

The Commissioner reasoned:

"By its own admission [Applied] designed EquityComp and the RPA to circumvent workers' compensation policy. It would defeat the statutory purpose to allow CIC to bypass the governmental review process by simply waiting until after the insurance policy has gone into effect to introduce additional or modified terms to its insurance program. Workers' compensation insurance is mandatory and California employers expect the statute's protection. CIC knew of the review and pre-approval process and deliberately ignored that process with regard to the RPA.

". . . [T]he legal requirement for modifying any workers' compensation insurance obligation is to endorse the agreement to the insurance policy. This is done by filing the agreement with the [Rating Bureau], which in turn will file it with the Insurance

Commissioner, and endorse it to the insurance policy after the requisite time or approval. Unfiled side agreements are *prohibited and shall not be used* . . . they are not permitted in this state and are void as a matter of law." (*Shasta Linen*, *supra*, at p. 66, fns. omitted, italics added.)

"Although *Shasta Linen* pertained primarily to the validity of the entire RPA agreement, the Insurance Commissioner also considered the RPA's arbitration provisions . . . [and] found the RPA's arbitration clause was intended to 'supplant [the dispute resolution provisions] of the [CIC Policy]' and the arbitration clause substantially modified these CIC provisions. [Citation.] The Insurance Commissioner found that Regulations former section 2268 was 'clear on its face' that 'unendorsed side agreements are prohibited' and an 'arbitration obligation' comes within the definition of a 'side agreement[]' that must be filed before it is effective. [Citation.]" (*Nielsen*, *supra*, 22 Cal.App.5th at pp. 1115-1116, quoting *Shasta Linen*, *supra*, at pp. 43, 56.)

In *Nielsen*, the court similarly concluded that AUCRA's failure to file an "essentially identical" RPA with the Rating Bureau rendered the agreement's delegation clause and arbitration provisions unenforceable. (*Nielsen*, *supra*, 22 Cal.App.5th at pp. 1116, 1118.) Our colleagues found this result was compelled by "the plain language of [S]ection 11658 and [Regulation] 2268." In addition, while recognizing the *Shasta Linen* decision is not binding on our courts, they nevertheless "f[ou]nd its analysis persuasive on the prohibition of unfiled 'collateral' or 'side-agreements.'" (*Nielsen*, at p. 1116; see also *Association for Retarded Citizens v. Department of Developmental*

Services (1985) 38 Cal.3d 384, 391 ["the construction of a statute by officials charged with its administration, including their interpretation of the authority invested in them to implement and carry out its provisions, is entitled to great weight"].)

2. *Analysis*

a. *The arbitration provisions are "collateral agreements" that must be filed and approved*

We also conclude the plain language of Section 11658 clearly requires appellants to file the arbitration provisions of the RPA and Request to Bind with the Rating Bureau and obtain approval from the Insurance Commissioner. The analysis is relatively simple. The delegation clause and other arbitration provisions constitute endorsements or at the very least collateral or ancillary agreements because they materially alter the dispute resolution obligations in the Commissioner-approved CIC Policy.

Appellants argue they did not need to file the RPA and Request to Bind because Section 11658 applies only to workers' compensation insurance *policies*, and those side agreements are not policies because they do not provide insurance coverage or address indemnity obligations. Appellants also argue the added arbitration provisions in the RPA and Request to Bind are not endorsements or collateral agreements. We are not persuaded.

First, appellants' minimization of the importance of the RPA and Request to Bind is undercut by the terms of those agreements. The Request to Bind says it pertains to the "workers' compensation insurance policies" that Applied will issue to Desert Pizza "through its affiliates and/or subsidiaries," and the RPA says it "represent[s] the entire

understanding . . . between the Parties with respect to the subject matter hereof and supersedes all prior negotiations, proposals, letters of intent, correspondence and understandings relating to the subject matter hereof." The RPA also specifies that its terms apply "to all payroll, premium, and losses occurring under the Policies." These terms reveal the Request to Bind's entire purpose was to initiate the EquityComp program, an insurance package consisting of the CIC Policy and the RPA. It is disingenuous for appellants to now claim the RPA is not an insurance policy when it marketed it to its clients as such. The *Nielsen* court found defendants' "attempt to recharacterize their . . . EquityComp program to suggest that the statutory filing requirements should not apply" similarly unavailing, observing that Applied had marketed EquityComp as a "seamlessly integrated package providing nationwide workers' compensation coverage." (*Nielsen*, *supra*, 22 Cal.App.5th at p. 1117.)

Moreover, the arbitration provisions in the RPA and Request to Bind fall squarely within the definition of a collateral agreement. At the time of contracting, Regulation 2268 defined a collateral agreement as one that "modif[ies] the obligations of the insured or the insurer" regarding any term of the insurance policy. (Former Regs., § 2268.) As *Nielsen* observed, "[a] collateral agreement is a 'secondary,' 'accompanying,' or 'auxiliary' agreement." (*Nielsen*, *supra*, 22 Cal.App.5th at p. 1117, quoting Random House Dict. of the English Language (2d Unabridged ed. 1987) p. 403, col. 2.) The arbitration provisions at issue here satisfy both the regulatory and common sense definition of the term because they materially alter or modify the dispute resolution

procedures in the CIC Policy. Under the CIC Policy, the parties were not required to arbitrate their disputes. That all changed when Desert Pizza signed defendants' side agreements, which for the first time included a broad arbitration provision covering all disputes and requiring the proceedings to take place in the British Virgin Islands before "disinterested" insurance executives. Because the RPA was not filed, the regulatory authorities had no opportunity to consider or evaluate those provisions.

We agree with the reasoning of the district court in *American Zurich*, when it rejected a workers' compensation insurer's argument that Section 11658's filing provision does not apply to a side agreement that contained, among other things, arbitration terms not included in the main policy. (*American Zurich*, *supra*, *3, 12.)[7] The court found it unreasonable "[i]n light of [California's] comprehensive regulatory scheme" to limit the filing requirement "to the narrow sliver of an insurance agreement regarding only . . . 'indemnity obligations for loss or liability.'" (*American Zurich*, *12.) It concluded the filing requirement applied to an "endorsement," that is, to "*any* agreement that alters or adds to any term or condition of an insurance policy." (*Ibid.*)

Our conclusion finds further support in the 2016 amendments to the Regulations, which made it explicitly clear (in case there had previously been any doubt) that "dispute

[7] "Although we may not rely on unpublished California cases, the California Rules of Court do not prohibit citation to unpublished federal cases, which may properly be cited as persuasive, although not binding, authority." (*Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP* (2010) 183 Cal.App.4th 238, 251, fn. 6.)

resolution agreement[s]" must be "filed and approved by the Commissioner."[8] (Regs., §§ 2268, subd. (b) & 2250, subd. (f).)

Finally, we reject appellants' argument that the RPA and Request to Bind cannot modify the CIC Policy because CIC was not a party to those agreements. As the *Nielsen* court concluded and we agree, the cases appellants cite for that proposition (e.g., *Aerojet-General Corp. v. Transport Indem. Co.* (1997) 17 Cal.4th 38, 50, fn. 4; *Frontier Oil Corp. v. RLI Ins. Co.* (2007) 153 Cal.App.4th 1436, 1463; *Mission Nat'l Ins. Co. v. Coachella Valley Water Dist.* (1989) 210 Cal.App.3d 484, 496-497) "are unhelpful because the courts were not presented with an insurance arrangement similar to here that *required* the use of two policies, the second of which amends and/or supplants the first." (*Nielsen*, *supra*, 22 Cal.App.5th at p. 1117.)

b. *Voiding the provisions is a proper remedy for noncompliance with Section 11658*

Having concluded the arbitration provisions in the RPA and Request to Bind violate Section 11658, we next consider the effect of the violation and conclude it renders the provisions unenforceable. "Generally a contract made in violation of a regulatory statute is void." (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 435; see also *Asdourian v. Araj* (1985) 38 Cal.3d 276, 291

[8] Appellants argue the trial court erroneously relied on an outdated version of Regulation 2268 when it concluded the arbitration provisions in the RPA and Request to Bind were "collateral agreements" that needed to be filed and approved. The argument is not well taken. The court correctly relied on the version of the regulation in effect at the time the parties executed the agreements, and in any event, we see no practical difference for our purposes between the terms "collateral" and "ancillary."

[where a law requires, for regulatory not revenue purposes, one to obtain a license before performing certain services and provides a penalty for violation, the contract of an unlicensed person to perform such services will not be upheld].) "It is a settled rule that a contract will not be enforced if the contract is in violation of the provisions of a statute enacted for the protection of the public." (*Napa Valley Electric Co. v. Calistoga Electric Co.* (1918) 38 Cal.App. 477, 478-479; *Kremer v. Earl* (1891) 91 Cal. 112, 117 ["No court will lend its aid to give effect to a contract which is illegal, whether it violate the common or statute law, either expressly or by implication"].) "'This rule is based on the rationale that "the public importance of discouraging such prohibited transactions outweighs equitable considerations of possible injustice between the parties."'" (*MW Erectors, Inc.*, at p. 436, quoting *Asdourian*, at p. 291.)

"In California, workers' compensation insurance (or an adequate substitute) is mandatory, and the Insurance Commissioner is charged with closely scrutinizing insurance plans to protect both workers and their employers. [Citation.] To accomplish this objective, the Legislature mandated that the Commissioner have full access to insurance information through mandatory filing requirements. [Citation.] It follows that a violation of these requirements prevents crucial regulatory oversight and thus renders the unfiled agreement unlawful and void as a matter of law." (*Nielsen, supra*, 22 Cal.App.5th at p. 1118.)

Appellants contend the arbitration provisions are not unenforceable because neither Section 11658 nor Regulation 2268 specifically provides for such a consequence.

They point out that other sections of the Insurance Code set out specific penalties for certain violations, and argue this shows the Legislature "knows how to impose penalties for non-compliance with statutory requirements, and could have included a provision rendering all unfiled forms under Section 11658 void if that were [its] intention." Appellants confuse the regulatory consequences of their violation with the contractual consequences. The fact Section 11658 or Regulation 2268 does not include a provision expressly allowing *the Insurance Commissioner* to deem an unfiled agreement void does not restrict our power to refuse to enforce the agreement between the parties under general contract principles. "[W]hen it appears there is a violation of a regulating statute . . . a contract made contrary to its terms is void even though the statute does not pronounce the fact." (*Vitek, Inc. v. Alvarado Ice Palace, Inc.* (1973) 34 Cal.App.3d 586, 591.)

Appellants' citation to *Gonzales v. Concord Gardens Mobile Home Park, Ltd.* (1979) 90 Cal.App.3d 871 does not convince us otherwise. In *Gonzales*, a contractor filed an action to establish a mechanic's lien against his client to recover money it owed him for the reasonable value of materials and labor he had spent on a project. (*Id.* at p. 872.) The client asked the court to dismiss the action on the ground the contractor had violated a statute requiring him to provide a notice describing lien laws before starting work on a project. It argued the lien law notice was "a statutory condition precedent to the . . . action." (*Id.* at p. 873.) The court refused to treat the notice requirement as a

condition precedent to the action because doing so would "impose a forfeiture upon the contractor" for all the work he had performed on the project. (*Ibid.*)

Gonzales is inapplicable because the challenge there was not directed at contract formation. The client in *Gonzales* argued *the contractor* violated a statute and therefore could not bring a lawsuit. Desert Pizza, in contrast, argues appellants' *arbitration provisions* are unenforceable because they were made contrary to Section 11658's express prohibition on issuing unfiled agreements. (See *Malek v. Blue Cross of California* (2004) 121 Cal.App.4th 44, 70 [plaintiff claimed the defendant's *arbitration provision* violated the disclosure requirements of Health & Saf. Code § 1363.1 and court agreed and deemed the provision void].) Moreover, unlike *Gonzales*, this case presents no forfeiture problems. Our refusal to enforce the unfiled arbitration provisions does not unjustly enrich Desert Pizza to appellants' detriment. "The parties will still have their day in court, and all parties will have the opportunity to present evidence, arguments, and defenses." (*Nielsen, supra*, 22 Cal.App.5th at p. 1119; see also *Malek*, at p. 71 [violation of statutory arbitration disclosure requirements was "not a case where the defendant retained the benefit of the bargain and would be unjustly enriched if the agreement were not enforced"].) Appellants cannot avoid the consequences of their attempt to evade regulatory review by likening their case to a minor or technical infraction where forfeiture would deprive a party of compensation for work they had already performed.

In another attempt to classify their violation as a technical one, appellants cite to the legislative history of section 11658.5. That provision requires any insurer

"intend[ing] to use a dispute resolution or arbitration agreement to resolve disputes arising in California out of a workers' compensation insurance policy" to obtain a signed disclosure from the insured acknowledging "that choice of law and choice of venue or forum may be a jurisdiction other than California and that these terms are negotiable." (§ 11658.5, subd. (a)(1).) Failure to comply with this disclosure requirement "shall result in a default to California as the choice of law and forum for resolution of disputes arising in California." (*Id.*, subd. (c).) Appellants claim the legislative materials for that provision reveal that the provision's author had removed a section requiring the insurer to file the signed disclosure with the Insurance Commissioner. They point to a statement in the bill analysis saying the author removed the section in an effort "to leave existing law on form filing intact, [but] eliminate the implication in the bill that a technical filing violation would have the effect of voiding a contractual provision that an employer had freely entered into." (Assem. Com. on Insurance, Sen. Bill No. 684, June 27, 2011, at p. 5.)

First of all, the legislative history of a different Insurance Code provision is irrelevant to our interpretation of Section 11658. Section 11658.5 "address[es] a specific issue—the circumstances when an insurance contract designates the controlling law or the forum/venue to be a jurisdiction other than California. The Legislature did not prohibit these terms, but wanted to ensure employers were fully informed of the existence and consequences of such provisions." (*Nielsen, supra,* 22 Cal.App.5th at p. 1120.) Section 11658 deals with the distinct problem of ensuring regulatory oversight of post-

policy amendments to workers' compensation insurance. Because we find its filing requirement clear and unambiguous, there is no reason to turn to legislative history, let alone for a different code provision. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 29 ["resort to legislative history is appropriate only where statutory language is ambiguous"].)

But even if the legislative history of section 11658.5 *were* relevant to the meaning of Section 11658, the statement appellants rely on hurts, not helps, their argument. The statement acknowledges that a filing requirement, while not advisable for the signed disclosure form required in section 11658.5, is necessary in other contexts. Under the "existing law on form filing," which section 11658.5's author had no intention of altering, an insurer must file an endorsement or side agreement modifying the parties' dispute resolution obligations. (§ 11658.) If, say, the endorsement contained a choice of law provision selecting "a jurisdiction other than California," then the insurer would have to file the endorsement, but it would not have to file the signed negotiability disclosure form. Section 11658.5, which simply requires disclosure to insureds that dispute resolution clauses may trigger out-of-state venues, and which does not impose any substantive regulatory oversight responsibility on the Department, has no bearing on our interpretation of Section 11658 or the arbitration provisions at issue.

The unfiled arbitration provisions in the RPA and Request to Bind are unlawful under California law and no equitable grounds exist to enforce them.[9]

III

DISPOSITION

We affirm the order denying the motions to compel arbitration. Appellants shall bear Desert Pizza's costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SLOUGH
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.

[9] Finally, we note the RPA also included a choice-of-law provision stating "[t]his Agreement shall be exclusively governed by and construed in accordance with the laws of Nebraska." In recent decisions, the Second District and the Supreme Court of Nebraska, applying Nebraska law, concluded the RPA's arbitration provisions are unenforceable under that state's Uniform Arbitration Act, which prohibits agreements to arbitrate certain insurance-related disputes. (*Citizens of Humanity, supra*, 17 Cal.App.5th 806, review den. Mar. 14, 2018; *Citizens of Humanity, LLC v. Applied Underwriters Captive Risk Assur. Co., supra*, 299 Neb. 545; see also Neb. Rev. Stats., § 25-2602.01.) A conclusion similar to the one we reach here. The parties did not raise the choice-of-law provision in this appeal, nor does any party argue Nebraska law applies to our analysis.