> Thereafter *prospective* purchaser will be without authority to further use the vehicle and acknowledges and agrees that law enforcement authorities may be called.

An employee in the finance office directed Sapia to sign a Bank One-Harahan Credit Application because she felt it was the most likely place to approve Sapia. Bank One did not approve Sapia. The following day Bank One sent a fax to Regency that listed the basis for the denial as excessive inquires and insufficient equity and noted that credit might be extended for an "auto similar to trade."

Sapia was then advised to return to the dealership to restructure the transaction to include a down payment in the hope of obtaining financing. Sapia was unavailable because he had left the country on business. It appeared that Sapia might not return until well after the expiration of the seven day window, so Regency attempted to have the loan approve by AmeriCredit Financial. AmeriCredit refused to approve Sapia and sent a decision notification to him indicating such. Over the next several days, Regency attempted to secure financing with multiple lending institutions, but none financed Sapia due to his bad credit. Regency subsequently took possession of the truck pursuant to the Addendum to Purchase Agreement.

Sapia filed suit under the Truth in Lending Act and the Fair Credit Reporting Act. The court granted summary judgment to the defendant.

HOLDING: Affirmed.

REASONING: The court finds that Sapia presents no evidence of actual damages arising from Regency's conduct. Sapia received adverse action letters from Bank One, Hibernia, Chase Manhattan, and Ford Motor Credit. Regency's duty to send out an adverse action letter could only arise if a lender it contacted failed to do so. AmeriCredit was the only lender from whom Sapia denies receiving an adverse action letter. However, Sapia could not have learned any additional information from a fifth or sixth adverse action letter. Moreover, failure to issue an adverse action letter when the letter is prompted by an accurate report precludes the possibility that there was anything Sapia could remedy in order to obtain financing. The court determines that no damages have occurred.

The court also notes that in order to collect punitive damages under the Fair Credit Reporting Act, Sapia must show that Regency willfully failed to comply with one of the Act's requirements. For the violation to be "willful," thereby justifying an award of punitive damages under the FCRA, a defendant's course of conduct must exhibit a "conscious dis- regard" for or entail "deliberate and purposeful" actions taken against a plaintiff's rights. *Cousin v. Trans Union Corporation*, 246 F.3d 359, 372 (5th Cir. 2001). Sapia stated that "it went without citing authority that Summary Judgment is not the proper vehicle to obtain evidence on intention." Sapia cites no authority in arguing that summary judgment dismissing a claim for punitive damages is improper. Sapia's argument that "willful" envelops all acts committed in violation of the law because a party is "imputed to know the law" is unfounded, incorrect, and, if applied generally, would allow punitive damages for all claims. Furthermore, Sapia presents no evidence that Regency acted in conscious disregard of his rights.

Sapia's argument that "willful" envelops all acts committed in violation of the law because a party is "imputed to know the law" is unfounded.

Therefore, the district court's granting of Regency's Motion for Summary Judgment on the issue of punitive damages is proper.

MISCELLANEOUS

A DELAY DEMANDING ARBITRATION DOES NOT CONSTITUTE WAIVER UNLESS THERE IS ACTUAL PREJUDICE TO THE OPPOSING PARTY

ARBITRATION CLAUSE IS BINDING ONLY ON PARTIES AND ASSIGNEES

In re Rolland, ____ S.W.3d ____ (Tex. App.— Austin 2001).

FACTS: Plaintiff Rolland, prior to moving to Texas in 1981, contracted with Livernois Moving & Storage ("Livernois") to retain and store her furniture in Michigan. Rolland claimed her furniture was in excellent condition when initially stored. Livernois ceased business operations in 1989 but with Rolland's consent, transferred her storage account to Defendant Potter Warehouse ("Potter"). In 1997, Rolland requested her property be shipped to Texas. Based on Potter's recommendation, Rolland contracted with Defendant Wheaton Van Lines ("Wheaton") for the move. When her property arrived, Rolland discovered the property was dank and some items were mildewed, damaged, or missing.

Rolland sued Potter and Wheaton (collectively "Defendants") for various causes, including negligence, breach of contract, and breach of the DTPA. Defendants filed motions to compel arbitration, relying on an arbitration clause in the 1981 agreement between Rolland and now defunct Livernois. Rolland argued there were no enforceable arbitration agreements between her and the Defendants, and in the alternative, Defendants had waived their right to arbitration by waiting too long in the judicial process to compel arbitration. The court subsequently granted Defendants' motions and stayed the litigation pending arbitration. Rolland sought mandamus relief from

the order alleging the trial court had abused its discretion.
HOLDING: Writ of mandamus denied relative to Potter, granted relative to Wheaton.
REASONING: A delay in demanding arbitration does not constitute waiver unless there is actual prejudice to the opposing party. *Pepe Int'l Dev. Co. v. Pub Brewing Co.*, 915 S.W.2d 925, 931 (Tex. App.—Houston [1st Dist.] 1996, no writ). Waiver is found only when the party seeking arbitration has substantially invoked the judicial process to the detriment of the opposing party. *In re Bruce Terminix Co.*, 988 S.W.2d 702, 704 (Tex. 1998). Waiver depends on the circumstances of each case. *Pepe Int'l* at 931. The party opposing arbitration bears a heavy burden of proof to establish that the other party has waived its arbitration rights. We resolve any doubt in favor of arbitration.

Once an enforceable agreement to arbitrate is found, the presumption arises that all disputed issues between the parties must be arbitrated, and the court must compel arbitration.

In this case, Defendants' judicial responses are defensive and do not go beyond a defensive posture. Rolland does not show how she is prejudiced by Defendants' delay in moving for arbitration. Accordingly, Rolland fails to meet her heavy burden to establish Defendants waive their arbitration rights.

No presumption of arbitrability arises unless the trial court finds an enforceable arbitration agreement. *In re Jebbia*, 26 S.W.3d 753, 757 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Once an enforceable agreement to arbitrate is found, the presumption arises that all disputed issues between the parties must be arbitrated, and the court must compel arbitration. In this case, the arbitration clause in the warehouse receipt between Rolland and Livernois is very broad. Rolland consented to the transfer of her account from Livernois to Potter. As a result, Potter, Livernois' assignee, may enforce the arbitration clause to the same extent as could Livernois. Wheaton, on the other hand, was not a party to the warehouse receipt and did not assume any duties or benefits of the receipt. Accordingly, Wheaton may not rely on the warehouse receipt to compel arbitration.

ARBITRATION AGREEMENT DOES NOT BIND CHILDREN

Fleetwood Enters., Inc. v. Gaskamp, 280 F.3d 1069 (5th Cir. 2002).

FACTS: In 1997, plaintiffs, now appellants, William P. Gaskamp, Jr. and Shannon Gaskamp ("the Gaskamps"), purchased a mobile home from Manufactured Bargains ("MB"). The Gaskamps gave a cash down payment, some household items, and their old mobile home in exchange for the delivery and installation of a new mobile home. The home was manufactured by Fleetwood Enterprises, Inc. and Fleetwood Homes of Mississippi, Inc. (collectively, "Fleetwood"). MB was able to secure financing for the Gaskamps through Bombardier Capital, Inc. ("BCI"). BCI agreed to finance the Gaskamps in exchange for a down payment of $12,500 and a signed contract that contained an arbitration clause. The clause stated that the "parties to the Retail Installment Contract or Cash Sale Contract agree" to arbitrate any and all claims against "the manufacturer of the home" and/or "any lender or mortgagee (or assigns) who provides financing." Additionally, the clause stated: "THE PARTIES KNOWINGLY AND VOLUNTARILY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL."

After some time the Gaskamps and their three children began to experience health problems. The Gaskamps' daughter was hospitalized in 1999 as a result of exposure to formaldehyde. Two months later, the Texas Department of Health, Toxic Substances Division, tested the new mobile home and found high levels of formaldehyde. The Gaskamps brought suit in Mississippi state court against Fleetwood, MB, and BCI. The Gaskamps also sued on behalf of their children under the standing theory of "next of friend."

In 2001, BCI settled with the Gaskamps. However, Fleetwood and MB filed a Complaint to Compel Arbitration against the Mississippi suit in the Southern District Court of Texas. The district court ordered the Gaskamps to arbitration and stayed all other claims in both courts. The court's reasoning to compel the children to arbitration was that, unlike a true third party, the children were permanent residents of the home who wholly derive their presence and use from their parents' use of the home. The Gaskamps appealed, arguing that the district court erred in compelling arbitration of the Gaskamp children's claims because they were not parties to the arbitration agreement or third-party beneficiaries thereof.
HOLDING: Affirmed in part and reversed in part.
REASONING: The primary issue that the court resolves is whether the arbitration clause should bind the children to arbitration. The court finds *Webb v. Investacorp*, 89 F.3d 252 (5th Cir. 1996) controlling. In *Webb*, the court applied a two prong test: A party is bound to arbitration if, "(1) there is a valid agreement to arbitrate between the parties; and (2) if the dispute in question falls within the scope of that arbitration agreement." Because both parties agree that the dispute in question falls within the broadly written arbitration agreement, the court finds the second prong is satisfied. Therefore, the issue of the case turns to whether the children "validly agree to arbitrate."

The court holds that the children do not validly agree to arbitration. The court looks for a provision in the arbitration clause expressing that the Gaskamps signed the clause on behalf of their children and are empowered to do so because their children are minors. The court does not find any provision of this nature. Further, the court

relies on the test set forth in *Ladue v. Chevron, U.S.A., Inc.*, 920 F.2d 272 (5th Cir. 1991). In that case, the Texas Supreme Court held that the test to bind non-signatories to arbitration is the following: "where the non-signatory sued on the contract; or where the non-signatory was a third-party beneficiary of the contract." In this case, neither the Gaskamps nor their children are attempting to recover on contractual theory. Their plea for recovery is based on tort theories. Although the Gaskamp's children receive an obvious benefit when their parents purchase a home, the court finds that this does not cause them to become third-party beneficiaries. Because the non-signatory children are not suing under contract theory and are not expressly named as third-party beneficiaries, the children are not bound by the arbitration agreement.

EMPLOYEE'S ARBITRATION AGREEMENT IS UNCONSCIONABLE AND UNENFORCEABLE

Circuit City Stores v. Adams, 279 F.3d 889 (9th Cir. 2002).

FACTS: On October 25, 1995, Saint Clair Adams ("Adams") completed an application to work at Circuit City. As a part of the application, Adams signed the Circuit City Dispute Resolution Agreement ("DRA"), which requires employees to submit all claims and disputes to binding arbitration. Under the DRA, the amount of damages are restricted: back pay is limited to one year, front pay to two years, and punitives to the greater of the amount of front and back pay awarded or $5000. In addition, the employee is required to split the costs of arbitration. Notably, under the agreement, Circuit City is not required to arbitrate any claims against the employee. Also, an employee cannot work at Circuit City without signing the DRA.

In November 1997, Adams filed a state court suit against Circuit City alleging sexual harassment, retaliation, constructive discharge, and intentional infliction of emotional distress under California law. Circuit City then sought to stay the state proceedings and compel arbitration. The district court granted the stay. The case was appealed to the Court of Appeals for the Ninth Circuit. The Supreme Court granted certiorari, reversed the decision of the Ninth Circuit, and remanded for proceedings in accordance with its opinion in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001).

HOLDING: On remand, the decision of the district court is reversed.

REASONING: The Supreme Court found the Federal Arbitration Act ("FAA") to be applicable in this case. *See Circuit City Stores v. Adams*, 121 S. Ct. 1302 (2001). Under § 2 of the FAA, an arbitration agreement shall be enforceable "save upon such grounds that exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Therefore, arbitration agreements will be subject to ordinary state-law principles that govern the formation of contracts, including defenses such as fraud, duress, or unconscionability, which may operate to invalidate arbitration agreements. *See First Optics of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

Because California law governs the contract in this case, the DRA must be both procedurally and substantively unconscionable before it will be unenforceable. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000). Procedurally, the DRA is unconscionable because it is a contract of adhesion: a standard form contract, drafted by the party with superior bargaining power, which relegates to the other party the option of either adhering to its terms without modification or rejecting the contract entirely.

Substantively, the DRA is unconscionable for two reasons. First, the DRA forces employees to arbitrate their claims against Circuit City, however Circuit City is not required to arbitrate its claims against employees. This asymmetry results in an unconscionable unilateral obligation on behalf of employees. Second, the DRA limits the relief available to employees by forcing employees to arbitrate statutory claims without affording them the full range of statutory remedies. Because the DRA withholds a substantial portion of punitive and emotional distress damages available under California law, the agreement is unconscionable.

The DRA must be both procedurally and substantively unconscionable before it will be unenforceable.

This substantive unconscionability is compounded because the DRA requires the employee to split the arbitration fees with Circuit City, which alone would render an arbitration agreement unenforceable. Furthermore, the DRA imposes a strict one-year statute of limitations on arbitration claims, depriving employees of the continuing violation doctrine benefits available under California law. In short, this case is indistinguishable from *Armendariz*, where the California Supreme Court found a similar arbitration agreement to be unenforceable.

The Supreme Court has specifically mentioned unconscionability as a "generally applicable contract defense" that may be raised consistent with § 2 of the FAA. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Therefore, because the DRA is unconscionable under California law, and because those unconscionable provisions run throughout the agreement and cannot be severed, the entire arbitration agreement is unenforceable.