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inconsistent with its provisions, purposes or policies. TEX. BUS. & COM. CODE ANN. § 1.103, cmt. 2. Thus, any common law theory of recovery that allows a plaintiff to exceed the maximum amount of liability as stated in Section 3.420 is preempted. The appellate court found that AMX's interest in the instrument deposited by CIT Group was \$59,478, and AMX recovered more than that amount from the Willies. Although the court agreed

that AMX's claim against the Willies for breach of contract was technically different from their cause of action against Bank One for conversion, both causes of action were based on AMX's right to recover for the temporary loss of \$59,478, which resulted in a single injury to AMX. Thus, under the Business and Commerce Code Section 3.420(b), AMX is precluded from recovering the same loss under different theories against different parties.

ARBITRATION

ARBITRATION CLAUSE APPLIES RETROACTIVELY TO SUBSCRIBER CLAIMS

Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006).

FACTS: Boston area residents Masterman, Pinella, Rogers and Kristian ("Subscribers") subscribed for cable services through Comcast predecessor companies from 1987 through 1999, respectively. Subscribers, in two complaints, alleged the prices paid for services delivered were inflated as a result of anticompetitive practices on the part of Comcast and AT&T Broadband, Comcast's predecessor-in-interest. Subscribers' complaints alleged that Comcast had been consolidating its hold on the market through agreements to swap or exchange cable television assets ("swap agreements"). Swap agreements allegedly violate antitrust laws because through them, cable providers can divide and allocate markets, leaving a subscriber with only one choice for a provider in his or her location. When Subscribers first subscribed for cable services, none of their service agreements contained arbitration provisions. In 2001, Comcast began including an arbitration provision in the terms and conditions governing the relationship between Comcast and its subscribers. These terms and conditions were contained, in part, in notices informing subscribers at the time of cable installation, and at least annually thereafter, of the terms and conditions governing their subscriptions. Comcast included the Policies & Practices with each Boston area subscriber's invoice as a billing stuffer during the November 2001 billing cycle. The arbitration provision mailed in 2002 appeared, at first blush, substantially different from that mailed in 2001. The arbitration provision mailed in 2003 was unchanged from the 2002 provision. Comcast filed motions to compel arbitration pursuant to the 2002/2003 agreements. Subscribers argued that the actions giving rise to the complaints occurred before the existence of the arbitration agreements at issue in this case.

The district court agreed with Subscribers, holding the arbitration agreements did not have retroactive effect, and did not apply to the state antitrust claims at issue. The district court, in parsing the language of the agreements, found that the agreements referred to specific services under the particular subscriber agreement at issue, and did not refer to services provided in a general sense. Because the 2002/2003 agreements were not phrased like the agreements in any of the cases it cited, the district court found the ambiguity of the agreements should be interpreted against Comcast in light of the policy of construing adhesion contracts strictly against the drafter. The district court expressly found that the arbitration agreements

were contracts of adhesion. Finally, the district court also held that a statute of limitations clause included in the 2002/2003 agreements would act as a waiver of all disputes arising one-year prior to the execution of that agreement. The court stated that such a waiver was a significant departure from prior agreements because prior agreements did not even include an arbitration provision.

HOLDING: Reversed.

REASONING: The court evaluated the lower court's denial of Comcast's motion to compel *de novo*, and also stated that upon review the court is not wedded to the lower court's rationale, but may affirm its order on any independent ground made manifest in the record. In disagreeing with the lower court, the first circuit concluded that the district court ignored a large number of cases where arbitration agreements contained language specifically excluding retroactive effect. These cases concerned agreements that unmistakably limited arbitration to what was covered by the agreements.

The provisions at issue did not contain such exclusionary language, and when read most naturally were not as limited in scope as interpreted by the district court. In effect, the district court's reading added words of limitation to the agreement. Moreover, contrary to the district court's finding, the 2002/2003 arbitration agreements did not effect a substantial change in the terms governing a potential arbitral proceeding between Comcast and Subscribers. The 2001 provision included a limitations period identical to the one found in the 2002/2003 provision. The 2001 provision also explicitly contained language that addressed retroactivity in language, with the main difference between it and the 2002/2003 provision being that certain provisions were located in different sections. The district court, therefore, drew the wrong conclusion because it did not incorporate the 2001 agreement into its analysis. The district court incorrectly relied on the state contract principle requiring contracts of adhesion to be construed strictly against the drafter. Given the strong federal policy of resolving any doubts concerning arbitrability in favor of arbitration, any ambiguity created by the change in language from 2001 to 2002/2003 should be resolved in favor of finding arbitrability. While the federal policy favoring arbitration does not totally displace ordinary rules of contract interpretation, the presumption does apply to the resolution of scope questions. Scope questions arise when the parties have a contract that provides for arbitration of some issues and it is unclear whether a specific dispute falls within that contract. In arguing that their antitrust claims do not fall within the scope of the arbitration agreements as a result of non-retroactivity, Subscribers are raising a scope question calling for the application of the presumption

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favoring arbitration. The court, therefore, concluded that the 2002/2003 arbitration agreements, like their 2001 predecessor, do have retroactive effect.

NEW JERSEY SUPREME COURT STRIKES DOWN CONSUMER CLASS ACTION BAN AS UNENFORCEABLE

Muhammad v. County Bank of Rehoboth Beach, ___A.2d___ (N.J. 2006).

FACTS: Plaintiff Jaliyah Muhammad received a short-term, single-advance, unsecured loan of \$200. The principal plus a \$60 finance charge was due, with an annual percentage rate of 608.33%. Muhammad extended the loan twice, resulting in a total of \$180 in finance charges.

To receive a loan, Muhammad had to complete and sign three pages of standard form contracts, that contained an arbitration agreement calling for binding individual arbitration, and prohibiting class arbitration. Furthermore, the contract contained additional statements directly above the signature line specifically excluding customer participation in class actions.

Muhammad brought a putative class-action lawsuit against County Bank, Main Street Service Corp., Easy Cash, and Telecash, alleging violations of the Consumer Fraud Act, the civil usury statute, and the New Jersey RICO statute alleging that defendants charged and conspired to charge illegal rates of interest. Muhammad argued that the arbitration agreement was unconscionable based on the class-action waiver and other provisions. The trial court disagreed and granted defendants' motion to compel arbitration. The appellate division affirmed. The New Jersey Supreme Court granted Muhammad leave to appeal.

HOLDING: Reversed and remanded.

REASONING: The Court held that the presence of the class-arbitration waiver in Muhammad's consumer arbitration agreement rendered that agreement unconscionable. The court reasoned as a matter of generally applicable state contract law, it was unconscionable for defendants to deprive Muhammad of the mechanism of a class-wide action, whether in arbitration or in court. The court noted the public interest at stake in the ability to effectively pursue statutory rights under the State's consumer protection laws overrides the defendants' right to seek enforcement of the class-arbitration bar in their agreement.

LANDLORD TENANT

TENANT HAS BURDEN TO PLEAD AND PROVE FAILURE TO MITIGATE, AND BREACH OF WARRANTY OF SUITABILITY AS AFFIRMATIVE DEFENSES

McGraw v. Brown Realty Co., 195 S.W.3d 271 (Tex. App.—Dallas 2006).

FACTS: In late December 2003, Donnie McGraw ("McGraw") signed a lease with Brown Realty for a building in Dallas, Texas, to be used as a restaurant. The lease was to begin on February 15, 2004 and to end on February 14, 2009. The rent was to be paid in monthly installments of \$3,450, totaling \$207,000. On March 3, 2004, McGraw sent a letter to Gary Brown, the president of Brown Realty ("Brown"), in regards to some equipment that needed repair or replacement. McGraw also sent a second letter complaining of a leak in the building's roof. Brown Realty never responded to the letters. McGraw paid his rent payments from March through October of 2004 on time. One check in November 2004 was returned for insufficient funds, and McGraw later abandoned the premises in early December.

Brown sued McGraw for breach of contract in early February 2005. In late March, McGraw filed his original answer and affirmative defenses. In June, Brown moved for traditional summary judgment where they claimed they had mitigated damages by securing a new tenant for the premises. McGraw responded by filing his own traditional summary judgment motion on his affirmative defenses. The trial court entered summary judgment in favor of Brown on its breach of contract claim for \$114,714.

HOLDING: Affirmed in part; reversed in part; remanded.

REASONING: The court dealt separately with the two arguments McGraw made on appeal. First, the court examined the issue of breach of an implied warranty of suitability. This question was raised for the first time on appeal. When dealing with a breach

of implied warranty of suitability, the court must recognize the matter has to be pleaded by a cause of action, counter-claim, or as an affirmative defense. The court reasoned that although McGraw did not specifically assert breach of the implied warranty of suitability as an affirmative defense, it was evident from the original answer that it was part of the basis of his defense to the suit.

The court, however, pointed out that the lease explicitly stated that McGraw waived his right to terminate the lease because of any condition on the premises. Accordingly, McGraw waived his remedy or defenses to the nonpayment of rent, by failing to raise an issue of material fact in order to establish his affirmative defense as a matter of law. The court held that the trial court's grant of summary judgment for Brown was correct.

The court also discussed the issue of whether the landlord failed to mitigate damages. Brown argued it mitigated damages when it found a new tenant. McGraw responded by claiming there was an issue of material fact regarding the amount of damages Brown had mitigated. The court examined McGraw's exhibits. These demonstrated Brown's claim of having secured a new tenant for the lease term of August 1, 2005 though July 21, 2007 was untrue. The court held that the lower court erred when it granted summary judgment on damages in favor of Brown. The court reversed with respect to damages and remanded for further proceedings on damages.

McGraw waived his remedy or defenses to the nonpayment of rent, by failing to raise an issue of material fact in order to establish his affirmative defense as a matter of law.