deposit. The trial court found for Milberger and awarded him attorneys fees and additional money if he prevailed on appeal.
HOLDING: Affirmed.
REASONING: Pulley attempted to prove two causes of action: bad faith retention of security deposit under Tex. Prop. Code Ann. §92.109(a); and bad faith failure to account for security deposit under Tex. Prop. Code Ann. §92.109(b). Both of these require showing the landlord acted in bad faith.

The court noted that Tex. Prop. Code §92.109 allows the tenant to sue a landlord who keeps security deposit without providing an itemized list of damages and deductions within thirty days of surrender. The court also found that Milberger did not have to plead absence of bad faith as an affirmative defense since he denied Pulley's claim of bad faith retention of the deposit. The court then noted that presumption of bad faith can be rebutted by showing: "(1) the landlord is an amateur lessor because the residence is his only rental property; (2) the landlord had no knowledge of the requirement to submit an itemized list of all deductions from the security deposit; (3) extensive damage was done to the residence; (4) the landlord attempted to do some of the repairs himself to save money; or (5) the landlord had a reasonable excuse for the delay."

The Court then noted that a landlord must prove that his retention of security deposit was reasonable, which can be shown when: "the tenant is legally liable under the lease or as a result of breaching the lease; (2) the damages did not exist before the tenant leased the premises; or (3) the damages or charges are equal to or in excess of the security deposit." The evidence showed that: Milberger was an amateur landlord; he believed he could retain the deposit to cover the damages; the damages did not exist prior to leasing the house to Pulley; he had photographs of the extensive damage to house; he had sent Pulley a written description of damage; and he offered to show Pulley documentation of the damages. Therefore he had not acted in bad faith in keeping the security deposit, and was entitled to recover for these damages.

A landlord must prove that his retention of security deposit was reasonable.

ARBITRATION

IN DETERMINING THE UNCONSCIONABILITY OF AN ARBITRATION CLAUSE, COURT SHOULD LOOK TO FACTS AT THE TIME THE CLAUSE WAS SIGNED, NOT WHEN ENFORCED

Overstreet v. Contigroup Companies, Inc., 462 F.3d 409 (5th Cir. 2006).

FACTS: In 2001, Contigroup Companies contracted to provide baby chickens to be raised and cared for by Overstreet. The contract required all disputes between the two parties to be settled by arbitration. Shortly after signing the contract, Overstreet sold her chicken farm and informed Contigroup that she would no longer raise chickens. In 2004, Overstreet sued Contigroup. She alleged fraud, negligence, and wrongful termination of contract.

Contigroup moved for stay and to compel arbitration. Overstreet opposed the motion, and argued that the arbitration clause was unconscionable. The district court found the arbitration clause unconscionable after comparing the high cost of arbitration with Overstreet's current financial situation. The district court denied Contigroup's motion for stay and to compel arbitration. Contigroup appealed.
HOLDING: Reversed and remanded.
REASONING: The court noted that the district court erred by relying on Overstreet's current financial status to determine whether the arbitration clause was unconscionable. In *Results Oriented, Inc. v. Crawford*, 538 S.E.2d 73, 79 (Ga. Ct. App. 2000), the court held that unconscionability should be analyzed by looking to "the circumstances existing at the time the contract was made, rather than those existing … later." Overstreet currently has no real property and no cash savings. However, at the time Overstreet signed the contract with Contigroup, she owned her chicken farm.

Citing *Am. Heritage Life Ins. Co. v. Lang*, 321 F.3d 533 (5th Cir. 2003), the court recognized that the party opposing arbitration bears the burden of proving that the dispute is not arbitrable. The court held that Overstreet did not satisfy her burden of proving that the dispute is not arbitrable because she did not address the circumstances existing at the time she signed the contract with Contigroup. The court remanded the case with instructions to stay the proceedings and compel arbitration.

CLASS ACTION WAIVER IN ARBITRATION CLAUSE UNENFORCEABLE

Kinkel v. Cingular Wireless, L.L.C. 857 N.E.2d 250 (Ill. 2006).

FACTS: In July 2001, Plaintiff entered into a two-year service agreement with Cingular Wireless ("Cingular") for cellular telephone service by signing Cingular's standard service agreement. Although the two-year term was not to expire until July 2003, plaintiff canceled her service in April 2002. In the service agreement Cingular charged an early termination fee, which the Plaintiff paid under protest. In July 2003, Cingular revised the arbitration provision, notifying all then-current customers of the change. The change contained an agreement by Cingular to pay for all American Arbitration Association filing, administration and arbitrator fees. Plaintiff brought action individually and on behalf of a class, against Cingular. They alleged that an early-termination fee constituted an illegal penalty and that the imposition of that fee was both a breach of the service agreement and statutory fraud under state Consumer Fraud and Deceptive Business Practices Acts. Cingular filed a motion to compel arbitration of the customer's individual claim and stay the litigation by invoking the arbitration clause of the service agreement. The Circuit Court of Madison County denied Cingular's motion, finding that the arbitration clause was unenforceable on the basis of unconscionability. The appellate court reversed and remanded, and found that the class

action waiver was unconscionable. Cingular petitioned for leave to appeal.
HOLDING: Affirmed.
REASONING: The Supreme Court of Illinois relied on the decision and reasoning of the appellate court. The appellate court looked to earlier appellate decisions where a contract or contract term could not be found unconscionable unless it was procedurally and substantively unconscionable. However, the supreme court noted a finding of unconscionability may be based on either procedural or substantive unconscionability, or a combination of both. The supreme court explained that the appellate court's finding of procedural unconscionability was based on several factors. First, the service agreement that contained the class action waiver was in a form contract in a take-it-or-leave it basis. Second, the appellate court explained that a contract provision must be bargained for and brought to the consumer's attention. Here, the appellate court concluded that the arbitration clause containing the waiver provision was inconspicuous and was hidden in the fine print where it was unlikely to be seen or read. Thus, the appellate court found that this was sufficient for a finding of procedural unconscionability. The supreme court here concluded that based on the appellate court's findings, there was a degree of procedural unconscionability in the service agreement signed by the plaintiff because it did not inform her that she would have to pay anything at all towards the cost of arbitration. The court stated that this degree of procedural unconscionability would not be sufficient to render the class action waiver unenforceable, but it would be a factor to consider in combination with a finding of substantive unconscionability.

The supreme court then relied on the appellate court's finding of substantive unconscionability. First, because the cost of litigating or arbitrating a claim would have approached if not exceeded the potential recovery, the consumer would be put in a position without an effective remedy in the absence of a mechanism for class arbitration or litigation. Second, the limitation is one-sided because Cingular do not have occasion to sue their customers as a class. The limitation applies in practice only to prevent customers from seeking redress for small amounts of money. The supreme court concluded that under the circumstances of this case, the class action waiver was unconscionable and unenforceable because the arbitration clause was contained in a contract of adhesion that failed to inform the customer of her cost of arbitration, and that did not provide a cost-effective mechanism for an individual customer to obtain a remedy unless as either the representative or a member of a class.

The limitation applies in practice only to prevent customers from seeking redress for small amounts of money.

BANKRUPTCY

DISABILITY PAYMENTS ARE PART OF BANKRUPTCY ESTATE

In re Stinnett, 465 F.3d 309 (7th Cir. 2006).

FACTS: David Stinnett worked for Northwestern Mutual Life Insurance Company ("Northwestern") for 23 years and was covered by a long-term disability insurance issued by the company. His employment was terminated at Northwestern and he began to work at Guardian Life Insurance ("Guardian"). At Guardian he was covered by a long-term disability insurance policy as well. In September 1995 Stinnett was diagnosed with depression. He collected $11,400 from his Northwestern long-term disability insurance policy. However, he continued to work at Guardian and received salary for the next 5 years. He did not claim benefits under his long-term disability policy at Guardian. The IRS made two assessments for unpaid taxes against Stinnett. Unable to pay these assessments, Stinnett filed for Chapter 7 bankruptcy. After he filed for bankruptcy, he stopped working for Guardian and claimed his disability insurance under the Guardian Policy. Since October 2001, Stinnett has received $21,700 from his Northwestern and Guardian disability insurance policies.

The bankruptcy trustee commenced an adversary proceeding to establish the Guardian disability payments were to be applied towards the bankruptcy estate. The IRS sought to have the payments applied towards the federal tax lien. The bankruptcy court concluded that the Guardian disability payments were property of the bankruptcy estate, even though Stinnett did not receive them till after he filed his petition for bankruptcy.
HOLDING: Affirmed.
REASONING: The court reasoned the disability payments were property of the bankruptcy estate because under §541 "all legal or equitable interest of the debtor in property as of the commencement of the case," plus"proceeds or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case," and "any interest in property that the estate acquires after the commencement of the case." 11 U.S.C.A. §541.

In *In re Edgeworth*, 993 F.2d 51, 55 (5th Cir. 1995), the court held that "payments from insurance policies in which the debtor had a prepetition interest, to the extent that the debtor has or would have a right to receive and keep those payments when the insurer paid on a claim, are proceeds of estate property and thus also property of the estate." Stinnett had an interest in the disability payments prior to filing his petition. If he had not filed for bankruptcy, he would have a right to receive and keep the payments from Guardian. Thus, the proceeds are property of the estate. Also, the court held proceeds paid directly to the debtor are property of the estate. The disability insurance from Guardian, while filed after the petition for bankruptcy, were proceeds paid directly to Stinnett.

Stinnett argued the proceeds from Guardian fell in an exception to §541 which provides that "earnings from services performed by an individual debtor after the commencement of the estate" are not property of the bankruptcy estate. He argued the payments were a substitute for his inability to perform