

RECENT DEVELOPMENTS

CONSUMER CREDIT

\$22 MILLION TRUTH IN LENDING ACT CLASS AWARD OVERTURNED

Christ v. Beneficial Corp., 547 F.3d 1292 (11th Cir. 2008).

FACTS: Beneficial Florida, Inc. (“BFI”) issued a consumer loan to Kenneth Christ, Jr. The disclosure form in the loan documentation indicated BFI charged Christ a non-filing insurance premium (“NFI”), which was listed as a separate item under a column titled itemization of amount financed. Christ brought suit in Florida under the Truth in Lending Act (“TILA”) against BFI. Christ claimed that the NFI premium should have been disclosed in the finance charge column of the disclosure form, rather than the amount charged column because the NFI premium was not for insurance, and even if the NFI premium was for insurance, it was not for non-filing insurance. The Multi-District Litigation (“MDL”) transferred the case to the Middle District of Alabama for consolidated pretrial proceedings with similar cases.

Christ then moved under Fed. R. Civ. P. 23(b)(2) for certification of a nationwide class of borrowers who were charged a similar NFI fee by BFI’s consumer lending subsidiaries. Christ also moved for partial summary judgment under the Declaratory Judgment Act (“DJA”), seeking a declaration that defendants violated TILA’s disclosure requirements. The MDL court entered an order conditionally certifying an injunctive class. The MDL court granted summary judgment to the plaintiff class, remanding the case back to the Florida court. The district court invoked the DJA and awarded to the plaintiff class injunctive relief, and over \$22 million as restitution or disgorgement of the NFI fees. Defendants appealed, arguing that class certification was improper

because equitable relief, such as injunction or disgorgement, is not available to a class under TILA.

HOLDING: Vacated and remanded.

REASONING: Class certification requires that the plaintiff show the defendants acted on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate to the class as a whole. The court held MDL’s inference of injunctive relief was improper under TILA. The court noted that TILA did not expressly provide for private injunctive relief, but neither did it expressly preclude it. Because the court did not expect Congress to expressly preclude remedies, the court did not read TILA to confer upon private litigants an implied right to an injunction or other equitable relief such as restitution or disgorgement. Because injunctive relief was not a remedy available to Christ and plaintiff-class under TILA, certification under TILA was improper. The court vacated the MDL court’s order of class certification.

The court stated that the DJA does not create remedies otherwise unavailable to plaintiffs in anticipated coercive actions. Under DJA, relief beyond a declaratory judgment or decree is permitted only to the extent relief is necessary and proper. The relief ordered by the district court was awarded to Christ both unnecessarily and improperly. The injunction and \$22 million award as restitution or disgorgement of fees was considered impermissibly excessive. The court found the award circumvented the express remedies of actual or statutory damages provided by Congress. The court vacated the district court’s certification of an injunctive class, vacated the award of injunctive relief, and restitution or disgorgement. The case was remanded to the district court.

ARBITRATION

ARBITRATION WAIVED

Citizens Nat’l Bank v. Bryce, ___ S.W.3d ___ (Tex. App.—Tyler 2008).

FACTS: Homer Bryce died having appointed Citizens National Bank independent executor of his estate, and trustee of the marital trust created by his will. Bryce’s survivors (“Plaintiffs”) later asserted that Bank had misappropriated and mismanaged Bryce assets that were formerly community property of Bruce and his wife. Plaintiffs sued Bank for breach of fiduciary duty and negligence. Two months prior to trial, Bank filed a motion to compel arbitration, and to stay the proceedings in the trial court pending arbitration. Bank cited the arbitration clause contained in the agreement between the plaintiffs and Bank, which required arbitration if any dispute arose between them, relating to this agreement. Plaintiffs argued that Bank had waived its right to compel arbitration. The trial court found Bank did waive its right to compel arbitration. Bank filed an interlocutory appeal, asserting it did not waive the right to compel arbitration.

HOLDING: Affirmed.

REASONING: The court reasoned that when an agreement to arbitrate is enforceable under the Federal Arbitration Act, there is

a strong presumption in favor of arbitration and against waiver. However, the court recognized a party implicitly waives its arbitration rights when it substantially invokes the judicial process to the other party’s detriment or prejudice. Prejudice in this context refers to the inherent unfairness in terms of delay, expense, or damage to a party’s legal position, which occurs when the party’s opponent forces it to litigate an issue and later seeks to arbitrate the same issue.

The pertinent inquiry was whether the totality of the circumstances showed that Bank invoked the judicial process to such a degree that its actions resulted in prejudice or detriment to plaintiffs. Bank filed its motion to compel arbitration approximately twenty months after the suit was filed, and just two months prior to trial. During this period, Bank conducted extensive discovery, including a request for disclosure, several requests for production, several sets of interrogatories and a request for admission. The Bank also filed three motions to compel responses to written discovery, and conducted thirteen oral and two written depositions. Bank designated experts, filed a motion to strike experts, and filed several other motions and briefs. The court held that the extensive discovery and pre-trial activity conducted by Bank prejudiced the plaintiffs. Bank affirmatively waived arbitration by substantially invoking the judicial process. Accordingly,

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the lower court's decision to deny the Bank's motion to compel arbitration was affirmed.

ARBITRATION CLAUSE IS ENFORCEABLE DESPITE LANGUAGE BARRIER

Morales v. Sun Constructors, Inc., 541 F.3d 218 (3d Cir. 2008).

FACTS: Sun Constructors, Inc. hired Juan Morales after he passed an exam written in English. Morales attended a required orientation conducted in English and then signed an hourly employment agreement ("agreement"), also in English, which contained an arbitration clause. The Sun employee who conducted the training session, asked Jose Hodge, a bilingual applicant who was present, to translate for Morales. During the training session, Sun explained the arbitration provisions in English. Hodge testified that he did not specifically explain the arbitration clause contained in the documents, and Morales did not ask for an explanation. A year later, Morales was fired for violating safety standards.

Morales filed a wrongful termination suit against Sun, seeking relief for causes of action covered in the agreement's arbitration clause. Sun moved to stay the proceedings pending arbitration. The district court determined that mutual assent to the arbitration agreement did not exist, and denied Sun's motion to stay the proceedings. Sun appealed.

HOLDING: Reversed and remanded.

REASONING: The court agreed with Sun's argument that Morales was bound by the terms of the contract, even if Morales was ignorant of language contained in agreement. Under the objective theory of contracts, a party cannot disclaim the existence of a contract, absent fraud, because the party was ignorant of the

language in which the contract was written. In the absence of fraud, the fact that an offeree cannot read, write, speak or understand the English language is immaterial to whether the contract is enforceable. There was no evidence that Sun tried to hide the arbitration clause, as

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it comprised over half of the agreement. Morales neither claimed fraud nor alleged that Sun misrepresented the contents of the contract in any way. While a clear language barrier existed, it was Morales's own obligation to ensure he understood the agreement before signing it.

The court noted that the Federal Arbitration Act provides that arbitration agreements are enforceable to the same extent as other contracts, and establishes a strong federal policy in favor of arbitration. The court stated acceptance is measured not by the parties' subjective intent, but by their outward expressions of assent. Morales's signature manifested his assent to the entire agreement and bound him to the arbitration clause. Holding Sun was correct in asserting Morales was bound by the agreement, the court remanded the case with instructions to enter a stay pending arbitration.

DISTRICT COURT PROPERLY DISMISSED CLASS ACTION AND GRANTED DEFENSE MOTION TO COMPEL ARBITRATION ON AN INDIVIDUAL BASIS

Pleasants v. Am. Express Co., 541 F.3d 853 (8th Cir. 2008).

FACTS: Chrystin Pleasants brought a putative class action against American Express Incentive Services ("AEIS"), alleging AEIS violated the Truth in Lending Act ("TILA"). Pleasants claimed AEIS extended her credit without any request or application to do so, and without making TILA required disclosures by issuing prepaid cards, permitting charges in excess of the stored balance. After Pleasants received and subsequently overcharged one of these pre-paid cards, AEIS requested she pay the overcharged amount. When Pleasants failed to remit payment, AEIS sent Pleasants a demand letter for the overcharged amount, and assessed a late fee and a transaction fee, pursuant to the card terms and conditions document, accompanying each prepaid card.

Pleasants continued to dispute the charges and brought suit on behalf of herself and others similarly situated, seeking injunctive relief, actual and statutory damages, attorney's fees, and other costs. AEIS moved to compel arbitration on an individual-claim basis contending that the arbitration provision of the card terms and conditions prohibited class action litigation. Pleasants first filed a motion to stay AEIS's motion to compel arbitration in order to allow the parties to engage in discovery related to the validity of the arbitration clause, insisting the discovery could provide evidence that the contract was unconscionable. Pleasants then filed a response to AEIS's motion to compel, arguing the class action waiver in the arbitration clause was both substantively and procedurally unconscionable. The district court granted AEIS's motion to compel arbitration on an individual basis, finding the class-action waiver was neither substantively nor procedurally unconscionable. Pleasants appealed.

HOLDING: Affirmed.

REASONING: The court found the class action waiver did not make the arbitration agreement unconscionable. The Federal Arbitration Act affirms the validity of arbitration agreements, but concedes that such agreements may be voided under state law on grounds, such as unconscionability, fraud or duress that would apply to any contract provision. Under Missouri law, in order for a contract to be void on the basis of unconscionability, the contract must be both procedurally and substantively unconscionable. Reasoning that the terms were conspicuous as opposed to hidden within the agreement, the court rejected Pleasants's claim of procedural unconscionability. The court noted that AEIS printed the arbitration agreement in bold, capitalized letters.

The court found no merit in Pleasants's substantive unconscionability argument. Pleasants claimed the arbitration clause was substantively unconscionable, because absent a class-action device, individual consumers would choose not to litigate the small sums involved in each proceeding. The court disagreed and found the arbitration agreement allowed for recovery based on cost of litigation and attorney's fees, thus it negated any issue of expense to a plaintiff. Because the court found the arbitration agreement was enforceable, it affirmed the order to compel arbitration.