ARBITRATION

ARBITRATION CLAUSE NOT ENFORCEABLE WITH RESPECT TO CLAIM UNDER MAGNUSON-MOSS

Kolev v. Euromotors, 658 F.3d 1024 (9th Cir. 2011).

FACTS: Kolev purchased a used car from Euromotors that developed serious mechanical problems within the warranty period. Euromotors refused to honor her warranty claims. Kolev filed suit against Euromotors and the manufacturer, alleging breach of implied and express warranties under the Magnuson-Moss Warranty Act ("MMWA"), as well as breach of contract and unconscionability under California law. Euromotors moved to compel arbitration, and the district court granted the motion. After the arbitrator resolved most of the claims in favor of Euromotors, the district court confirmed the arbitration award. Kolev appealed and the Ninth Circuit reviewed *de novo* the district court's order granting the petition to compel arbitration.

HOLDING: Reversed and remanded.

REASONING: On appeal, Kolev argued that the mandatory arbitration clause of the sales contract, which she signed when she purchased the car, should be barred by a provision of the MMWA disallowing mandatory pre-dispute binding arbitration of warranty claims against a dealership. The court found that although the MMWA does not specifically address the validity of pre-dispute mandatory binding arbitration, Congress expressly delegated rulemaking authority under the statute to the Federal Trade Commission ("FTC"). Pursuant to this authority, the FTC has construed the MMWA as barring pre-dispute mandatory binding arbitration provisions covering written warranty agreements, and issued a rule prohibiting judicial enforcement of such provisions with respect to consumer claims brought under the MMWA. 16 C.F.R. §703.5.

The court applied a two-step inquiry in reviewing the agency's construction of the statute. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). It found that the FTC's construction warranted deference, pursuant to *Chevron*. First, as to whether Congress had "directly spoken to the precise question," the court found that it had not. Having found that the "statute is silent or ambiguous with respect to the specific issue," the court proceeded to the next step, an analysis of whether the interpretation by the agency was "based on a permissible construction of the statute." *Id.* The court concluded that the FTC's construction of the statute as disallowing mandatory pre-dispute binding arbitration was reasonable, for three reasons. First, the FTC sought to implement Congressional intent, which was laid out in a House Subcommittee Staff Report as ensuring "decisions of Section 110 mechanisms not be legally binding." The report further suggested that consumers should be made aware of their rights, including the right to pursue litigation. Second, the court found that the view of the MMWA as barring pre-dispute mandatory binding arbitration advanced the statute's purpose of protecting consumers from being forced into involuntary agreements that they could not negotiate. Finally, the court accorded particular deference to the FTC's construction of the statute because it represented "a longstanding, consistent interpretation of the statute."

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The court also explained why it disagreed with prior rulings on this issue by the Fifth and Eleventh Circuits. In two similar cases, those courts reached the opposite conclusion, holding that the FTC's interpretation should not be afforded *Chevron* deference. *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470 (5th Cir. 2002); *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002). Both courts determined the FTC's construction of the statute was unreasonable in light of the Supreme Court's decision that the 1924 Federal Arbitration Act ("FAA") tended to establish a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The provision in question states that an arbitration agreement "shall be 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. The court gave three reasons why it felt these holdings were incorrect.

First, the court reasoned it was unprecedented to locate Congressional intent with respect to one statute by looking to a prior, less specific statute. Therefore, any ambiguity in the MMWA could not be resolved by simply looking to the much older, broader FAA. Second, the court reiterated their previous argument that the FTC's construction of the statute was reasonable in light of the statute's language, legislative history, and underlying purpose. Finally, the court pointed out that the MMWA is different in four critical respects from every other federal statute that the Supreme Court has found does not rebut the FAA's pro-arbitration presumption, such as the Sherman Antitrust Act of 1890, the Securities Act of 1933, and the Securities Exchange Act of 1934. For example, unlike those statutes, the MMWA was actually construed by an authorized agency as barring pre-dispute mandatory binding arbitration. Also, only the MMWA contains anything from Congress regarding informal, non-judicial remedies in a way that would bar mandatory arbitration. Furthermore, the MMWA, unlike the previous statutes, explicitly preserved a customer's right to press his claims under the statute in civil court. Finally, only the MMWA provided for the protection of consumers from vendors' imposing binding, non-judicial remedies as its primary purpose.

The court held that written warranty provisions that mandate pre-dispute binding arbitration are invalid under the MMWA and that the district court therefore erred in enforcing the warranty clause by compelling mandatory arbitration of Kolev's claims. It reversed and remanded to the district court as to all breach of warranty claims.

AMENDED COMPLAINT REVIVES RIGHT TO ENFORCE ARBITRATION CLAUSE THAT HAD BEEN WAIVED

Krinsk v. Sun Trust Bank, 654 F.3d 1194 (11th Cir. 2011).

FACTS: Krinsk obtained a substantial home-equity line of credit ("HELOC") from SunTrust Bank in 2006. Almost two years later, SunTrust revoked Krinsk's line of credit, claiming that her circumstances had changed and that SunTrust did not believe she would be able to make her payments. SunTrust had earlier mailed Krinsk a letter requesting that she provide updated financial information. SunTrust mailed similar letters to many of its other Florida homeowners. Krinsk sued SunTrust in a class action, alleging the revocation was part of a state-wide scheme by the bank to restore its capital reserves. The proposed class action was limited to Florida residents over sixty-five years old.

Krinsk's agreement with SunTrust contained an arbitration clause, but SunTrust made no attempt to enforce the clause through the discovery process. The trial court granted SunTrust's motion to dismiss in part and granted Krinsk leave to amend her petition in response. The question of class certification was still under review. Krinsk amended her petition but also changed the proposed class by dropping the age requirement. In its response to the amended complaint, SunTrust raised its right to arbitration for the first time. The trial court denied SunTrust's motion to compel arbitration and stay the action, holding that the right was waived by SunTrust's willful participation in the litigation process. SunTrust appealed the ruling, on the grounds that the amended petition revived SunTrust's right to compel arbitration.

HOLDING: Vacated and remanded.

REASONING: SunTrust argued that the district court erred in concluding that the amended complaint was immaterial to whether SunTrust had waived its right to compel arbitration. It contended that even if it had waived its right to arbitrate, the amended complaint "rejuvenated" or revived its right to compel arbitration. In considering SunTrust's interlocutory appeal, the court did not comment on the district court's finding of waiver, but rather focused on SunTrust's argument that the right should be revived by the amended petition because Krinsk's amended petition increased the potential class size from "hundreds", to "thousands" or "tens of thousands." Although under the Federal Rules of Civil Procedure, an amended complaint becomes the operative pleading in the case, the filing of an amended complaint does not automatically revive all defenses or objections that the defendant may have waived in response to the initial complaint. However, the defendant will be allowed to plead anew in response to an amended complaint when it "changes the theory or scope of the case," because it would be unfair to allow the plaintiff to change the scope without granting the defendant an opportunity to respond. *Brown v. E.F. Hutton & Co.*, 610 F. Supp. 76 (S.D. Fla. 1985). Likewise, a defendant's waiver of the right to compel arbitration is not automatically nullified by the plaintiff's filing of an amended complaint. The defendant may revive its right to compel arbitration only if it is shown that the amended complaint unexpectedly changes the scope or theory of the plaintiff's claims.

The court found that although Krinsk's amended complaint merely asserted new claims based on the same operative facts as the claims in the original complaint, the amended complaint was by no means "immaterial." To so conclude flatly ignored the significance of the new class definition in the amended complaint, which greatly broadened the potential scope of the litigation by opening the door to thousands – if not tens of thousands – of new class plaintiffs not contemplated in the original class definition by discarding the old definition's limits on the class plaintiffs' age and on the bases for their HELOC suspensions, and by expanding the class period from over three months to over three years. The court concluded that SunTrust should have been allowed to rescind its waiver of its right to arbitration. SunTrust's acts in furtherance of the litigation all occurred prior to the filing of the amended complaint and thus concerned the class contemplated in the original complaint. SunTrust proceeded in court on the expectation that, if the class action were certified, it would defend itself against only the relatively small plaintiff class defined in the original complaint. SunTrust could not have foreseen that Krinsk would expand the putative class in such a broad way, and given this unforeseen alteration in the shape of the case, SunTrust, in plain fairness, should have been allowed to rescind its earlier waiver through its prompt motion to compel arbitration.

The court concluded that SunTrust's right to compel arbitration, even if waived with respect to the claims in the original complaint, was revived by Krinsk's filing of the amended complaint. It vacated the district court's order denying SunTrust's motion to compel arbitration and stay the proceedings and remanded.