fact that Sky Bank did indeed finance Vallies's purchase of the GAP insurance. Because the court found Sky Bank's disclosures inconsistent and confusing, it rejected the reasoning of the district court and reversed its prior judgment.

A REJECTED SALES CONTRACT MAY BE A BASIS FOR TILA LIABLITITY

Gibson v. LTD, Inc. 434 F.3d 275 (4th Cir. 2006),

FACTS: Timothy Gibson ("Gibson") financed his purchase of two trucks from Lustine Toyota/Dodge, Inc. ("LTD") by executing five different retail installment sales contracts. Two sales contracts were executed in connection with his purchase of the 2002 Dodge truck, and the other three in connection with the later purchase of the 2003 Dodge Truck. Because of Gibson's low credit score, he was denied credit by several companies and was forced to sign multiple credit contracts in his pursuit of a lender to finance the purchase of both his trucks. LTD learned that Gibson was no longer employed the day after he signed his credit application for the 2003 truck. After learning of the change in Gibson's employment status, LTD requested that he return the 2003 Dodge truck. Gibson complied, but then bought suit against LTD, alleging that the dealership violated the Truth in Lending Act ("TILA"), committed fraud when it prepared finance agreements for the purchase of two vehicles, and violated the Virginia Consumer Protection Act. The federal district court in Virginia found that the dealer violated TILA and awarded Gibson damages and attorney's fees. LTD appealed.

HOLDING: Affirmed and modified in part.
REASONING: The court held that a rejected sales contract may form the basis for TILA liability. LTD argued, unsuccessfully, that any violation with respect to the unconsummated credit contracts between it and Gibson cannot form the basis for a complaint under TILA, because it regulates only "consummated" transactions. 15 U.S.C. § 1683(b)(1) & 12 C.F.R. § 226. The court, relying on *Nigh v. Koons Buick Pontiac GMC, Inc.*, 319 F.3d 119 (4th Cir. 2003), *rev'd in part* 543 U.S. 50, 125 S.Ct. 460, 160 L.Ed.2d 389 (2004), attempted to determine whether the rejected sales contracts signed by Gibson were consistent with the statutory requirement for a consummated transaction. In *Nigh,* a transaction was consummated under the statute only when a consumer became contractually obligated to a credit transaction. 15 U.S.C. § 1638(b)(1) & 12 C.F.R. § 226.17(b). Considering this incomplete, the court modified the consummation definition in *Nigh* by stating that a transaction was consummated under the statute not only when a consumer became contractually obligated, but also when a consumer signed a retail installment sales contract, when the condition precedent was within the seller's control, when a borrower could no longer alter the terms of credit and upon signing the agreement became contractually obligated.

In the context of a motor vehicle purchase, the court concluded that when a purchaser signs a retail installment sales contract which he no longer can alter, and the dealer retains the exclusive right to decide when the financing arrangement takes effect, the transaction is consummated for TILA purposes. Thus, the consumers consummated their agreements when they signed them, not when the dealer obtained third-party financing.

ARBITRATION

ARBITRATION PANEL DID NOT MANIFESTLY DISREGARD APPLICABLE LAW AND DID NOT VIOLATE PUBLIC POLICY

Sarofim v. Trust Co. of the West, 440 F.3d 213 (5th Cir. 2006).

FACTS: Valerie Biggs Sarofim invested $12.7 million, received as part of a divorce settlement, with Trust Company of the West ("TCW"), an investment company. After three years, Sarofim's investments had lost approximately $6 million. When combined with Sarofim's withdrawals, it left her with an account worth approximately $2.5 million. Because the agreement between Sarofim and TCW provided for disputes to be handled by arbitration, Sarofim initiated arbitration proceedings alleging, *inter alia,* breach of fiduciary duty, fraud, negligent misrepresentation, and breach of contract.

A three-person arbitration panel reviewed the dispute and issued a reasoned award, which held that TCW breached its fiduciary duty by placing her holdings in "wholly and negligently unsuitable" investments. The panel further held that TCW failed to diversify Sarofim's investments, failed to educate Sarofim about the risks of investments, and failed to educate themselves properly on her investment needs. The arbitration panel awarded Sarofim $6.3 million, but denied her request for attorney's fees and costs. The panel awarded Sarofim $2.9 million in punitive damages, the same amount which she had requested in attorney's fees. Sarofim then sought confirmation of the award with the United States District Court for the Southern District of Texas. TCW did not challenge the findings of the arbitration panel, but did seek to vacate the award. The court granted the motion to confirm the award and denied the motion to vacate. TCW appealed this decision.

HOLDING: Affirmed.
REASONING: The court held that an arbitration award may be vacated on two grounds; if the award displays manifest disregard for the law or is against public policy. In order for a party asserting "manifest disregard" to prevail, the party seeking to vacate the award must meet a two-step test: (1) based on available information, if it is not manifest that the arbitrators acted contrary to the applicable law, the award should be upheld, and (2) based on available information, if it is manifest that the arbitrators acted contrary to the applicable law, the award should be upheld *unless* it would result in significant injustice.

The court rejected the TCW's argument that the court's review was restricted to the "four corners of the arbitral award", holding that the court could turn to any applicable evidence. The court then affirmed the factual findings of the lower court, finding that TCW failed to diversify the investments, failed to educate

Sarofim on the potential risks, and failed to educate itself on Sarofim's investor needs. The court further reasoned that, despite its absence of specific terms, the arbitration award could lead to a finding of guilt under California law, proving that the arbitration award was not in "manifest disregard" of the applicable law.

The court stated that it may refuse to enforce an arbitration award if it is against public policy, but the public policy at issue must be "explicit, well-defined, and dominant." *Prestige Ford v. Ford Dealer Computer Servs., Inc.,* 324 F.3d 391, 396 (5th Cir. 2003)(citing *W.R. Grace & Co. v. Rubber Workers,* 461 U.S. 757 (1983)). The court rejected TCW's claim that the punitive award undermined the goals of such an award. The award satisfied the stated goals of "punishment" for the wrongdoer and "deterrence" of similar behavior. California law did not limit awards for punitive damages, even where those awards are contrary to the law imposed by statutory or judicial interpretations. An arbitrator is given broad discretion, guided by the principles of equity and justice, to determine the correct award.

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CLAIM AGAINST CREDIT CARD COMPANY FOR VIOLATING AUTOMATIC STAY IS SUBJECT TO ARBITRATION

MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104 (2d Cir. 2006).

FACTS: Chapter 7 debtor Kathleen Hill initiated an adversary proceeding as a putative class action against creditor MBNA America Bank, N.A. ("MBNA") based on events that occurred after she had filed for bankruptcy. Prior to her bankruptcy filing, Hill had authorized direct monthly withdrawals from her bank account for payment against a MBNA consumer loan. After her bankruptcy filing, and despite multiple notices to MBNA of her bankruptcy petition, MBNA successfully withdrew another monthly payment and attempted to continue monthly withdrawals. Based on these actions, Hill alleged that MBNA violated 11 U.S.C. § 362(h) of the Bankruptcy Code and that such actions constituted unjust enrichment. Hill also requested class certification for others similarly situated.

MBNA responded that Hill's account agreement provided for mandatory arbitration and moved to stay or dismiss the proceedings in bankruptcy court. Although Hill's original account agreement with MBNA did not contain an arbitration clause, it contained a provision allowing MBNA to amend the agreement. Subsequently, MBNA amended the agreement, including a new mandatory arbitration clause. Because Hill's notification of the amendment was returned as undeliverable, she never opted out of the amended agreement. The bankruptcy court denied MBNA's motion. The district court affirmed the ruling as it applied to the alleged automatic stay violation. MBNA then appealed the district court's order.

HOLDING: Reversed and remanded.

REASONING: The conflict between the Bankruptcy Code and the Federal Arbitration Act was resolved based on whether the claim was a "core" or "non-core" bankruptcy matter. "Non-core" bankruptcy matters are those that simply "relate to" bankruptcy cases and may proceed to arbitration. "Core" bankruptcy matters are those that implicate "more pressing bankruptcy concerns." Bankruptcy courts are more likely to refuse arbitration where the Bankruptcy Code "inherently conflict[s]" or is "necessarily jeopardize[d]" by arbitration.

The court agreed that claims under 11 U.S.C. § 362(h) constituted "core" bankruptcy matters because they are derived from substantive rights provided by the Bankruptcy Code and arise only within the bankruptcy context. However, the Court concluded that arbitration in this case would not "necessarily jeopardize" the objectives of the Bankruptcy Code. First, Hill's bankruptcy case had been administered; thus, arbitration would not affect the distribution of her estate. Second, Hill had initiated her proceedings as a putative class action which belies a close connection between the claim and her individual bankruptcy case. Lastly, automatic stays are not so closely related to an injunction that bankruptcy courts have exclusive jurisdiction over their litigation and enforcement. For these reasons, the court held that a claim against a credit card company for violating the automatic stay was subject to arbitration.

ISSUE OF VALIDITY OF CONTRACT MUST BE DECIDED BY ARBITRATOR, NOT COURT

Buckeye Check Cashing, Inc. v. Cardedgna, 126 S.Ct. 1204 (2006).

FACTS: John Cardegna and Donna Reuter ("Respondents") entered into deferred-payment transactions with Buckeye Check Cashing ("Buckeye"), wherein they received cash in exchange for a personal check in the amount of the cash plus finance charge. With each transaction, they signed a "Deferred Deposit and Disclosure Agreement" that included a mandatory arbitration provision.

Respondents brought a putative class action suit in Florida state court, alleging usurious interest rates made the agreement criminal on its face. Buckeye moved to compel arbitration, but the trial court denied the motion. The trial court ruled that a court should resolve a claim that a contract is illegal and void *ab initio.* The district court of appeal in Florida reversed and held that, because respondents did not challenge the arbitration provision itself, the agreement to arbitrate was enforceable, and the question of the contract's legality should go to the arbitrator. The Florida Supreme Court then reversed the ruling. The court reasoned that enforcing the arbitration provision in a contract challenged as unlawful "could breathe life into a contract that not only violates state law, but also is criminal in nature…" 894 So.2d 860, 862 (2005)(quoting *Party Yards, Inc. v. Templeton,* 751 So.2d 121, 123 (Fla. App. 2000)).

HOLDING: Reversed and remanded.

REASONING: The Court identified two types of challenges to the validity of arbitration agreements which exist at law or in equity for revoking any contract: (1) a challenge to the validity of the agreement to arbitrate, and (2) a challenge to the contract as a whole. The Respondents' claim fell into the latter category.

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,*

the Supreme Court held that a federal court may adjudicate a claim of fraud in the inducement of the arbitration clause. 388 U.S. 395 (1967). However, if the claim went to the fraudulent inducement of the contract generally, statutory language precluded the federal court from considering the claim. The Court also rejected the notion that "severability" was a question of state law. In *Southland Corp, v. Keating,* the Court held that the Federal Arbitration Act ("FAA") create[d] a body of federal substantive law" applicable in both state and federal courts. 465 U.S. 1, 12 (1984). Together, *Prima Paint* and *Southland* established three propositions that apply to this case: (1) an arbitration provision is severable from the contract as a matter of federal substantive law; (2) the issue of the contract validity is to be addressed by the arbitrator first, unless the challenge is to the arbitration clause; and (3) this law applies in state and federal courts. Because Respondents challenged the entire agreement, the arbitration provision remains enforceable, and the arbitrator must address the validity of the contract.

The Court rejected the argument that enforcement of the arbitration agreement should turn on Florida public policy and contract law, asserting that it need not address whether the challenge at issue would render the contract void or voidable, because the validity of the contract was reserved for judgment of the arbitrator. The Court also rejected Respondents' argument that *Prima Paint's* rule of severability did not apply in state court and refused to read FAA §2 as narrowly as suggested by Respondents. The Court reversed the judgment of the Florida Supreme Court and remanded the case for further proceedings.

AN ARBITRATOR'S FAILURE TO DISCLOSE HIS PROFESSIONAL ASSOCIATION WITH ONE OF THE PARTIES' COUNSEL WARRANTED OVERTURNING HIS AWARD

Positive Software Solutions, Inc. v. New Century Mortgage Corp., 436 F.3d 495 (5th Cir. 2006).

FACTS: New Century Mortgage generates business through telephone contracts with prospective borrowers. Positive Software Solutions ("Positive") develops, markets, and manufacturers computer-software products for the mortgage industry. Positive developed "LoanForce," a software product and licensed it to New Century pursuant to a Software Subscription Agreement ("SSA"). Positive learned that New Century was allegedly copying LoanForce and incorporating it into different software products. Positive filed suit and claimed, *inter alia,* copyright infringement, theft of trade secrets, and breach of contract. The district court granted Positive's motion for preliminary injunction enjoining New Century from using LoanForce. Additionally, arbitration was ordered pursuant to the SSA.

Arbitration was held pursuant to the rules of the American Arbitration Association ("AAA"). Both parties provided their list of acceptable arbitrators to the AAA and ranked them in order of preference and an arbitrator was chosen with the highest combined score. The arbitrator signed and returned the standard "Notice of Appointment" form to the AAA, which advised arbitrators to "please disclose any past or present relationship with the parties, their counsel, or potential witnesses, direct or indirect, whether financial, professional, or any other kind…" The letter included questions to help determine this standard, including whether he had any professional or social relationship with counsel for any party or their law firms. The arbitrator did not indicate any problems before he ruled in favor of New Century.

The court must be scrupulous in safeguarding the impartiality of arbitrators, as they have "completely free rein to decide the law as well as the facts and are not subject to appellate review.

Following the award, Positive conducted a detailed investigation into the arbitrator's background that discovered the arbitrator and his former law firm had been involved in a professional relationship with New Century's arbitration counsel for a period of time. Positive filed a motion to vacate the arbitration award because the arbitrator failed to disclose his relationship with New Century, and this prior relationship "might create a reasonable impression of possible bias." Also, the failure to disclose that relationship deprived Positive of the opportunity to make an informed choice. After the district court stayed the arbitration proceeding, New Century appealed.

HOLDING: Affirmed.

REASONING: The court, discussing the meaning of "evident partiality" specifically noted that arbitrators are not expected to sever ties with the business world. Nevertheless, the court must be scrupulous in safeguarding the impartiality of arbitrators, as they have "completely free rein to decide the law as well as the facts and are not subject to appellate review." *Commonwealth Coatings Corp. v. Continental Cas. Co.,* 393 U.S. 145 (1968). The court further imposed "the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." Full disclosure is far better at the outset, when the parties are free to reject the arbitrator or accept him with the knowledge of the relationship and continuing faith in his objectivity.

The court held that the arbitrator selected by the parties displayed evident partiality by the very failure to disclose facts that might create a reasonable impression of the arbitrator's partiality. Nondisclosure demonstrated the evident partiality, regardless of whether actual bias was established. Further, the district court stated, "the full disclosure rule of *Commonwealth Coatings*| reinforces the parties' expectations that arbitrators will abide by the AAA rules, which the Supreme Court deemed 'highly significant.'" Accordingly, the court affirmed the stay of the arbitration proceeding.