ARBITRATION

TRIBAL ARBITRATION AGREEMENT IS UNCONSCIONABLE

Jackson v. Payday Fin., L.L.C., 764 F.3d 765 (7th Cir. 2014).
http://law.justia.com/cases/federal/appellate-courts/ca7/12-2617/12-2617-2014-08-22.html

FACTS: Plaintiff, Deborah Jackson ("Jackson"), entered into an online loan transaction to receive a small, high-interest loan from Defendants, Payday Financial, L.L.C. and other defendant entities ("Loan Entities"). The loan agreement stated that it was governed by the Indian Commerce Clause of the US Constitution and the laws of the Cheyenne River Sioux Tribe; it contained a forum selection clause requiring arbitration to resolve any dispute conducted by the Cheyenne River Sioux Tribal Nation in accordance with its consumer dispute rules, and the terms of the loan agreement.

Plaintiff filed suit in Illinois state court, alleging violations of state usury statutes and state consumer fraud statutes. Loan Entities removed the action to federal district court and moved to dismiss based on improper venue, arguing the agreement required arbitration at the Cheyenne River Indian Reservation. The district court dismissed the case for improper venue, finding the allegedly illegal loan agreement did not invalidate the forum selection clause, and the Plaintiff's agreement to arbitrate was not made fraudulently under duress. Plaintiff appealed.

HOLDING: Reversed and remanded.

REASONING: The court held that arbitration agreements are unenforceable when they are unreasonable. The arbitration agreement in the instant case was unreasonable because it was procedurally and substantively unconscionable. It was procedurally unconscionable for three reasons: (1) the tribe had no set of procedures for selecting arbitrators or conducting arbitral proceedings; (2) the inconsistent language specified not only exclusive tribal court jurisdiction but also tribal arbitration, which made it difficult for Plaintiff to understand what she was agreeing to; and (3) Loan Entities' use of the Indian Commerce Clause may have caused Plaintiff to believe she was compelled to agree to the provision.

The court also found the arbitration clause to be substantively unconscionable. Because the dispute resolution method in the loan agreement simply did not exist, part of the loan agreement was illusory and, therefore, unreasonable.

ARBITRATION AGREEMENT UNENFORCEABLE AS ILLUSORY AND LACKED CONSIDERATION

Baker v. Bristol Care, Inc.,____ S.W.3d ____(Mo. 2014) (unpublished).
https://www.courts.mo.gov/file.jsp?id=77100

FACTS: Appellant, Bristol Care, Inc. ("Bristol"), employed Appellee, Carla Baker ("Baker") and after promoting Baker, drafted an employment agreement and an arbitration agreement for her. The agreement provided that all legal claims the parties may have against one another be resolved by arbitration, and Bristol "reserves the right to amend, modify or revoke this agreement upon 30 days' prior written notice to the Employee."

Bristol subsequently terminated Baker's employment, and Baker filed suit. Bristol moved to compel arbitration, and the trial court denied the motion. Bristol appealed.

HOLDING: Affirmed.

REASONING: Bristol argued the arbitration agreement was valid because there were two sources of consideration: 1) Baker's promotion and continued employment with benefits; and 2) Bristol's promises to arbitrate claims arising from Baker's employment and to assume the costs of arbitration. First, the court held that continued at-will employment was not valid consideration to support an arbitration agreement because Bristol made no legally enforceable promise to act in a way it was not already entitled to. Bristol could still terminate an employee for any reason. The court disagreed with Bristol's argument that Baker's entitlement to severance pay following termination constituted consideration above and beyond continued at-will employment. Even if Baker had the right to recover severance pay, Baker was still an at-will employee, and the arbitration agreement still lacked valid consideration.

The court held that continued at-will employment was not valid consideration to support an arbitration agreement.

Second, the court disagreed with Bristol's assertion that the parties mutually promised to arbitrate, as the promise was conditioned on Bristol's "right to amend, modify or revoke" the agreement. This language allowed Bristol to modify the agreement unilaterally and retroactively, making it illusory, and thus was not valid consideration.

ARBITRATION AGREEMENT IS UNENFORCEABLE BECAUSE IT DID NOT CONTAIN CLEAR AND UNAMBIGUOUS LANGUAGE THAT THE PLAINTIFF IS WAIVING HER RIGHT TO SUE

Atalese v. U.S. Legal Servs. Grp., L.P., 99 A.3d 306 (N.J. 2014).
http://caselaw.findlaw.com/nj-supreme-court/1678725.html

FACTS: Plaintiff, Patricia Atalese ("Atalese"), contracted with defendant, U.S. Legal Services Group, L.P. ("USLSG"), for debt-adjustment services. The service contract contained an arbitration provision. Later, Atalese became unhappy with USLSG's services and filed suit. USLSG moved to compel arbitration.

The trial court granted USLSG's motion to compel arbitration pursuant to the service contract, and the appellate court affirmed, finding that the agreement's lack of an express waiver of the right to seek relief in court did not bar enforcement of the arbitration clause. Atalese appealed.

HOLDING: Reversed and remanded.

REASONING: Atalese contended that the arbitration clause did not clearly and unequivocally state its purpose in depriving her of the right to sue in court. USLSG argued that the term "arbitration" was universally understood, and the arbitration clause

was sufficiently clear and adequately advised Atalese of her sole remedy.

The court explained that an enforceable arbitration clause must contain sufficiently clear language to place a consumer on notice that he or she is waiving the right to sue. To qualify as sufficiently clear, the arbitration clause must be phrased in plain language that is understandable to the reasonable consumer. The plain language must at least provide the reasonable consumer with constructive notice of the distinction between arbitration and judicial dispute resolution. The court applied these principles and found that the arbitration clause did not include the clear and unambiguous language required to compel arbitration and was

AGREEMENT REQUIRING ARBITRATION BEFORE TRIBAL PANEL IS UNENFORCEABLE

Inetianbor v. CashCall, Inc., 768 F.3d 1346 (11th Cir. 2014). http://media.ca11.uscourts.gov/opinions/pub/files/201313822.pdf

FACTS: Plaintiff, Abraham Inetianbor ("Inetianbor"), refused to pay a bill from his loan servicer, Defendant, CashCall, Inc. ("CashCall"), after he believed he had satisfied the terms of the loan. CashCall then reported the purported default to credit agencies, reducing Inetianbor's credit score.

Inetianbor sued CashCall, and CashCall moved to compel arbitration pursuant to Inetianbor's loan agreement. The district court denied the motion because the arbitration agreement contained an integral forum selection clause, and the specified forum was not available to arbitrate the dispute. CashCall appealed.
HOLDING: Affirmed.
REASONING: First, the court applied the integral provision rule that precludes arbitration whenever choice of forum is integral to the agreement to arbitrate. The court reasoned that the agreement's express language that arbitration "shall be conducted by the Cheyenne River Sioux Tribal Nation," and many other tribal forum references, strongly indicated that the drafter considered arbitration an integral part of the agreement.

The court then applied an availability analysis to determine whether the specified forum required the tribe's involvement and reasoned that the express language "by" the Tribe and before an "authorized representative" required direct participation from the Tribe. The court also determined that the evidence that the Tribe did not involve itself in arbitration between private parties was further support that the forum was unavailable. Thus, CashCall's intent to specify the tribal forum was an integral part of the arbitration agreement, and, because it was unavailable, the arbitration clause was unenforceable.

SPOUSE IS NOT NECESSARILY BOUND BY AN ARBITRATION AGREEMENT SIGNED BY HER HUSBAND

Zinante v. Drive Elec., L.L.C.,____ Fed. App'x. ____(5th Cir. 2014) (unpublished). http://www.ca5.uscourts.gov/opinions%5Cunpub%5C14/14-20072.0.pdf

FACTS: Mark Zinante ("Mark"), the husband of Plaintiff-Appellee, Joy Zinante ("Zinante") purchased a golf cart from Defendant-Appellant, Drive Electric, L.L.C. ("Drive Electric") on the internet. As part of the transaction, Mark electronically consented to Drive Electric's Terms & Conditions of sale, which included an arbitration provision. Some time later, the golf cart allegedly started a house fire.

Zinante brought suit against Drive Electric for negligence and gross negligence. Drive Electric moved to compel arbitration based on the arbitration agreement in the sales contract. The court denied the motion and Drive Electric appealed.

Under Texas law there is no presumption of third party beneficiary status in the husband and wife context.

HOLDING: Affirmed.
REASONING: Drive Electric first argued that Zinante was equitably estopped from arguing the arbitration provision did not apply to her. The court found that the estoppel doctrine did not apply because Zinante's suit was not based on any of the contract terms. Drive Electric argued alternatively that Zinante's suit was based on the sales contract through the doctrine of intertwined claims. The court rejected this line of reasoning because Zinante's claims were neither derived from, nor intertwined with the terms of the contract between Mark and Drive Electric.

Drive Electric then argued that Zinante was bound by the arbitration provision as a third-party beneficiary of the contract. The court rejected this argument, asserting that under Texas law there is no presumption of third party beneficiary status in the husband and wife context and so such status does not confer without a clearly spelled out provision in the contract. The court found that the sales contract did not fulfill this requirement, and thus Zinante was not bound by the arbitration agreement.

ARBITRATION CLAUSE IN CUSTOMER AGREEMENT IS UNENFORCEABLE FOR LACK OF MUTUAL ASSENT

Knutson v. Sirius XM Radio Inc., ____ F.3d ____(9th Cir.2014). http://cdn.ca9.uscourts.gov/datastore/opinions/2014/11/10/12-56120.pdf

FACTS: Plaintiff, Erik Knutson ("Knutson"), purchased a vehicle that included a trial satellite radio service subscription from Defendant Sirius XM Radio Inc. ("Sirius XM"). Several weeks later, Knutson received a "Welcome Kit" from Sirius XM that included a contract, which contained an arbitration provision. The contract also stated that Knutson agreed to the terms of the agreement if he did not object within three days of the subscription activation, despite the fact that the activation occurred weeks before he received the Welcome Kit. During the trial period, Knutson also revealed several unauthorized calls from Sirius XM to his personal cell phone.

Knutson subsequently sued Sirius XM in district court for violating the federal Telephone Consumer Protection Act. The district court found that both parties consented to the contract terms and that the arbitration was valid and enforceable. Knutson appealed.
HOLDING: Reversed and remanded.
REASONING: Knutson argued that there was no mutual assent to the terms because he was not given an opportunity to review

the arbitration clause at the time his satellite radio subscription was activated. To identify whether a valid contract between the parties was formed, the court considered whether a reasonable person in Knutson's position would understand that he had agreed to the arbitration provision, and whether failure to cancel the trial subscription within three days constituted implied assent.

A reasonable person in Knutson's position could not be expected to understand that purchasing a vehicle would simultaneously bind him to a contract with Sirius XM.

The court found that a reasonable person in Knutson's position could not be expected to understand that purchasing a vehicle would simultaneously bind him to a contract with Sirius XM. Knutson could not have been obligated to act where there was no effective notice that any action was required and so he could not practically have assented to an arbitration provision. The court explained that Knutson did not affirmatively enroll in a subscription service, so nothing indicated he had read the terms of the contract. The court thus held that there was no mutual assent to the contract, rendering the arbitration clause unenforceable.