ARBITRATION

LOUISIANA REJECTS ARBITRATION CLAUSE IN CONTRACT OF ADHESION

Duhon v. Activelaf, LLC, ___ So. 3d ___ (La. 2016)
https://www.lasc.org/opinions/2016/16CC0818.OPN.pdf

FACTS: Plaintiff accompanied three minors to Defendant's premise, an indoor trampoline park, and was injured in the course of participating in such activities there. Prior to the occurrence of injury, Plaintiff digitally signed an agreement acknowledging awareness of the risk of injuries that could not be eliminated without jeopardizing the essential qualities of the activity. The agreement that Plaintiff consented to also served as a waiver of any all responsibilities or duties owed to Defendant as indemnitees for personal injuries, death and/or property loss/damage sustained by Plaintiff or any minor children while on Defendant's premise or with respect to activities there. The agreement Plaintiff signed also agreed that if there were any disputes regarding the agreement Plaintiff was waiving any right to a trial and any dispute shall be brought within one year of the date of the agreement and will be determined by binding arbitration before one arbitrator.

Following Plaintiff's injury, Plaintiff filed suit against Defendant. In response, Defendant filed several exceptions, including an exception of prematurity. Defendant alleged the agreement contained a mandatory arbitration clause, thereby rendering Plaintiff's suit premature. Plaintiff asserted he did not knowingly consent to arbitration, and argued the agreement was a contract of adhesion and ambiguous.

The district court determined that there was a lack mutuality in the agreement relative to the arbitration clause because only Plaintiff was bound to arbitrate claims. Thus, the district court refused to enforce the arbitration agreement and overruled Defendant's exception of prematurity.

The Supreme Court of Louisiana reversed the district court's ruling and granted certiorari to review the correctness of the appellate court's ruling.

HOLDING: Reversed and remanded.

REASONING: Plaintiff argues that the arbitration clause is unenforceable on general principals of consent and adhesion. Defendant contended that both Louisiana and federal law explicitly favor the enforcement of arbitration clauses in written contracts. Furthermore, Defendant argues that the paragraph containing the arbitration clause was sufficiently distinguished and brought to patrons' attention through the use of a box that had to be digitally checked.

The Louisiana Supreme Court agreed with Plaintiff's argument that the arbitration clause is unenforceable on general principals of consent and adhesion. The Supreme Court opined that the lack of distinguishing features and the specific placement of the arbitration clause serve to conceal the arbitration language from Defendant's patrons. The court determined that when considering the agreement as a whole, the arbitration language appeared to be the only specific provision not relegated to a separate paragraph or set apart in some explicit way. The court related that the effect of the placement of the arbitration language was to cloak it within boilerplate language. The court's rejection of the arbitration clause was further bolstered by a lack of mutuality within the fact that it applied solely to Plaintiff.

Alicea v. Activelaf, LLC, ___ So. 3d ___ (La. 2016) was decided on the same day. As the case occurred under the same fact pattern, the Louisiana Supreme Court rejected the validity of an arbitration clause in a contract of adhesion, applying the same reasoning as Duhon. The two cases are virtually indistinguishable.

ARBITRATION DESIGNATING NAF AS FORUM UNENFORCEABLE

Moss v. First Premier Bank, 835 F.3d 260 (2d Cir. 2016).
http://law.justia.com/cases/federal/appellate-courts/ca2/15-2513/15-2513-2016-08-29.html

FACTS: Deborah Moss took out three payday loans from an online payday lender, SFS. The loan agreement contained an arbitration clause that specified all disputes were to be resolved through the National Arbitration Forum ("NAF"). SFS relied on First Premier Bank and Bay Cities Bank ("The Banks") to debit the customer's account. Moss filed a putative class action against The Banks in federal court, alleging The Banks unlawfully facilitated high-interest payday loans.

The court granted The Banks motion to compel arbitration and stayed the proceedings. Moss sent a letter to NAF indicating her intent to arbitrate her claims. NAF responded that it was unable to handle Moss' claims pursuant to a consent judgment prohibiting it from accepting consumer arbitrations. Moss returned to federal court and moved to vacate the district court's order compelling arbitration. The court granted Moss's motion and held Moss could not be compelled to arbitrate. The Banks appealed.

The agreement in this case contained many indicators showing that the parties intended to arbitrate exclusively before NAF.

HOLDING: Affirmed and remanded.

REASONING: The Banks argued that the NAF's inability to accept the case constituted a "lapse" within the meaning of Section 5 of the Federal Arbitration Act such that the district court was required to appoint a substitute arbitrator. The court disagreed noting that "lapse" in the context of Section 5 referred to a time lapse in the naming of the arbitrator or some mechanical breakdown of the arbitrator selection process. The court noted previous cases, which made it explicit that Section 5 could not be used by a district court to circumvent the parties' designation of an exclusive arbitral forum.

The court reasoned that the agreement in this case contained many indicators showing the parties intended to arbitrate exclusively before NAF. The agreement named the NAF as the chosen forum, it discussed the requirement of conducting the arbitration under the Code of Procedure of the NAF, it required that all claims be filed in an NAF office, and it provided no provision for the appointment of a substitute arbitrator in the event

NAF became unavailable. These terms led the court to determine that the parties had designated an exclusive arbitral forum. Therefore, the district court was not authorized to appoint a substitute arbitrator. With the parties' chosen arbitrator unable to hear the claims, and the district court unable to appoint a substitute, the arbitration agreement at issue was deemed unenforceable and the stay of the proceedings in federal court was lifted.

ARBITRATION CLAUSE REQUIRING ARBITRATION AT CHEYENNE RIVER SIOUX IS UNENFORCEABLE

Parm v. Nat'l Bank of California, N.A., 835 F.3d 1331 (11th Cir. 2016).
http://media.ca11.uscourts.gov/opinions/pub/files/201512509.pdf

FACTS: Appellee Jessica Parm entered into a loan agreement with Western Sky Financial, LLC, a South Dakota limited liability company owned by a member of the Cheyenne River Sioux Tribe ("CRST"). The loan provided that Western Sky could initiate automated or other electronic fund transfers from the bank account Parm included in the loan application. Appellant Northern Bank of California ("NBCal") authorized these electronic transfers. The loan agreement also provided that any dispute would be resolved by arbitration conducted by the CRST. Parm filed a class action lawsuit against NBCal challenging the enforceability of the arbitration provision in the agreement. Parm claimed the purported tribal arbitral forum and governing rules did not exist at the time of the lawsuit or at the time the agreements were electronically signed. NBCal filed motions to compel arbitration under Parm's loan agreement.

The district court denied NBCal's motion to compel arbitration because it was unconscionable and required the parties to arbitrate in an unavailable forum. NBCal appealed.
HOLDING: Affirmed.
REASONING: NBCal argued that the agreement did provide an arbitral forum, and the district court erred when it failed to submit the question of arbitrability to an arbitrator under the agreement's delegation clause.

The court rejected this argument and affirmed the district court's order by holding that arbitration agreements must be enforced in accordance with their express terms. The terms of Parm's arbitration agreement contained a forum selection clause requiring arbitration in a tribal forum that was both unavailable and integral to the parties' agreement to arbitrate. Therefore, the arbitration clause was unenforceable.

ARBITRATION CLAUSE NOT UNCONSCIONABLE OR ONE-SIDED

Dalton v. Santander Consumer United States, Inc., ____ P.3d ____ (N.M. 2016).
http://law.justia.com/cases/new-mexico/supreme-court/2016/35-101.html

FACTS: Eileen Dalton filed suit against Santander Consumer USA, Inc. for: fraud, violations of New Mexico's Uniform Commercial Code, unfair trade business practices, conversion, breach of contract, breach of covenant of good faith and fair dealing, and breach of warranty of title arising from car repossession. Dalton purchased cars under finance contracts. The amounts in the contracts exceeded the jurisdiction of a small claims court, which in New Mexico is $10,000. Santander assisted Dalton in the financing of these purchases. After Dalton missed her first payment, Dalton's car was repossessed without judicial action. She brought suit alleging a variety of violations, breaches, and unfair practices.

The district court denied Santander's motion to compel arbitration, finding that the effect of the small claims and self-help provisions of the contract made the arbitration clause unenforceable because it was substantively unconscionable. The court of appeals upheld the district court's ruling. Santander appealed.

As a matter of public policy, the bilateral small claims carve-out from the finance contracts could have been enforceable if the claim was worth less than $10,000.

HOLDING: Reversed and remanded.
REASONING: Dalton argued that self-help repossession (as opposed to judicial repossession) is a remedy that must be obtained through an arbitral forum if the parties have agreed to arbitrate all disputes, and, therefore, the arbitration clause was one-sided. The court rejected that argument by explaining that allowing the parties to retain private self-help remedies did not make the arbitration clause one-sided, and that the explicit exclusion of self-help remedies from mandatory arbitration was irrelevant in regard to assessing unconscionability. The court further explained the provision was not unconscionable on its face because the arbitration provision did not unambiguously benefit the drafting party alone.

As a matter of public policy, the bilateral small claims carve-out from the finance contracts could have been enforceable if the claim was worth less than $10,000. Because Dalton's finance contracts exceeded $10,000, arbitration would be justified as a matter of judicial efficiency.

UBER ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE

Mohamed v. Uber Techs., Inc., 836 F.3d 1102 (9th Cir. 2016).
http://cdn.ca9.uscourts.gov/datastore/opinions/2016/09/07/15-16178.pdf

FACTS: Plaintiffs Abdul Mohamed and Ronald Gillette ("Plaintiffs") were drivers for Defendant Uber Technologies, Inc. Upon the employment, Plaintiffs signed Software License and Online Services agreements containing an arbitration provision. The arbitration provision required drivers to submit to arbitration to resolve most disputes with the company. The drivers could opt out of arbitration by delivering notice of their intent to opt out, but Plaintiffs did not opt out. Later, Plaintiffs were fired from Uber due to negative information on their consumer credit reports.

Plaintiffs sued Uber alleging that Uber's use of consumer credit reports violated the FCRA and various state statutes. Uber moved to compel arbitration in the lawsuits. The district court denied the motion to compel arbitration, reasoning that the delegation clauses were ineffective because they were not clear and unmistakable, and even if they were clear and unmistakable, they were unenforceable because they were unconscionable. Uber appealed.

HOLDING: Affirmed in part, reversed in part, and remanded.

REASONING: Uber argued the arbitration provisions were enforceable because the delegation provisions delegated the arbitrability issue to an arbitrator and, even if the court had the authority to consider arbitrability question, the court erred in concluding that the arbitration provisions are invalid. The circuit court agreed with Uber and found the arbitration agreement is valid and enforceable because the delegation provision is clear and unmistakable, and not unconscionable.

First, the court noted the delegation provisions in the agreements clearly and unmistakably delegated the question of arbitrability to the arbitrator. Language delegating to the arbitrators the authority to determine the validity or application of any of the arbitration provisions constitutes an agreement to arbitrate threshold issues concerning the arbitration agreement. In this case, the Ninth Circuit found that the language of the agreements delegated to arbitrators the authority to decide issues relating to the enforceability, revocability or validity of the arbitration provisions.

The court also found that the delegation provisions were not unconscionable. Both substantive and procedural unconscionability must be present for a court to find a contract unconscionable. Unconscionable contracts are those that are "so one-sided as to 'shock the conscience.'" An arbitration agreement is not adhesive if there is an opportunity to opt-out. The court found that the delegation provisions are not procedurally unconscionable because the agreements gave drivers an opportunity to opt out of arbitration altogether and the Plaintiffs chose not to opt out of arbitration.

Finally, the court disagreed with the Plaintiffs argument that the delegation provisions were invalid due to effective vindication doctrine because the agreements contained a fee term requiring drivers to split the costs or arbitration equally with Uber, thus precluding drivers from effectively vindicating their federal statutory rights. Because Uber committed to paying the full costs of arbitration, the court found that the fee term in the arbitration agreement presented Plaintiffs with no obstacle to pursuing vindication of their federal statutory rights in arbitration.

ARBITRATOR, NOT COURT, DECIDES WHETHER ARBITRATION AGREEMENT ALLOWS CLASS-WIDE ARBITRATION

Sandquist v. Lebo Automotive Inc., 376 P.3d 506 (Cal. 2016). http://www.courts.ca.gov/opinions/documents/S220812.PDF

FACTS: Timothy Sandquist ("Sandquist") was hired by Lebo Automotive ("Defendant") to work as a salesperson at a dealership. On Sandquist's first day, he was given approximately 100 pages of preprinted forms with instructions to fill out and sign each document as quickly as possible so he could begin work. The documents included three different form arbitration agreements. Sandquist finished the paperwork as quickly as possible and did not realize he was signing multiple arbitration agreements. Sandquist sued Defendant alleging racial discrimination and the complaint brought claims on behalf of a class of former and current employees. Defendant moved to compel individual arbitration based on the arbitration agreements signed by Sandquist on his first day of work. The trial court granted the motion agreements after finding them enforceable and not unconscionable. The trial court dismissed the class claims with prejudice. On appeal, the court reversed in part and declined to address Sandquist's claim that the arbitration agreements were unconscionable because that ruling was not appealable, but it considered his challenge to the dismissal of class allegations. It concluded the availability of class proceedings under an arbitration agreement is a question of contract interpretation for the arbitrator to decide. Defendant petitioned for review, arguing that the Court of Appeal's decision contributed to an existing state and federal split over who should decide whether an arbitration agreement permits class arbitration.

HOLDING: Affirmed.

REASONING: The court concluded when the allocation of a matter to courts or arbitration is uncertain, arbitration is favored. The question of who has the power to decide the availability of class arbitration depends on what the parties agreed about the allocation of that power. Ordinary state-law principles that govern the formation of contracts should be applied. In this case, the parties did not expressly opt for the application of state law, so federal law must be applied to determine if an arbitrator should decide the availability of class arbitration. As a matter of federal law, doubts about the matter should be addressed by arbitration. Even though the Federal Arbitration Act [FAA] directs courts to decide whether an issue is arbitrable, this only applies if it is specified in the parties' agreement. Furthermore, the presumption that arbitrators decide the availability of class arbitration is more consistent with the desire for "expeditious results" that arbitration agreements are designed for. The court concluded there was nothing in the FAA that would support submitting the issue to a court rather than an arbitrator unless the parties explicitly agreed. The court explained that it would not determine how an arbitrator would have decided the issue and by doing so it would violate the agreement. The dissent wrote that the majority is charting a different part from what the Supreme Court has held.

When the allocation of a matter to courts or arbitration is uncertain, arbitration is favored.

TRADITIONAL ARBITRATION WAIVER ANALYSIS DOES NOT APPLY WHERE THERE IS A SUBSTANTIAL CHANGE IN THE LAW

Chassen v. Fid. Nat'l Fin., Inc., 836 F.3d 291 (3d Cir. 2016). http://law.justia.com/cases/federal/appellate-courts/ca3/15-3789/15-3789-2016-09-08.html

FACTS: Chassen ("Plaintiffs") are a putative class of real estate purchasers and refinancers who were overcharged by title agents and attorneys for deed recordings and mortgage instruments. Plaintiffs filed a complaint against Defendants in the U.S. District Court for the District of New Jersey alleging breach of contract. Defendants did not at the time seek to compel arbitration pursuant to the arbitration clause in the contract. In 2011, the Supreme Court ruled in *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333

that the FAA preempted state laws that prohibited a party from compelling bipolar (individual) arbitration in certain situations, even when it was specifically agreed to by contract. Thereafter, Defendants filed a motion to compel arbitration in the District Court. The court granted the motion, and the Plaintiffs appealed.
HOLDING: Affirmed and remanded.
REASONING: Plaintiffs argued that Defendants should not be allowed to compel arbitration because their actions constituted a waiver. Specifically, Plaintiffs argued that Defendants waited two and a half years to file a motion to compel arbitration. The court rejected these arguments and refused to apply traditional arbitration waiver analysis to situations where there is a substantial change in the law, as the *Concepcion* decision was to the present case.

The Third Circuit ruled that there was no requirement for Defendants to pursue what would have been a futile attempt at obtaining bipolar arbitration. Accordingly, the court found that Defendants should not be penalized for failing to pursue a right that did not exist under New Jersey law at the time of the initial suit. Defendants maintained the right to seek bipolar arbitration and did not waive that right since the ruling in Concepcion marked a substantial change in the law.

CONSUMER CREDIT

CLAIMS UNDER THE FAIR CREDIT REPORTING ACT BARRED BY STATUTE OF LIMITATIONS DISCOVERY RULE

Rocheleau v. Elder Living Construction, 814 F.3d 398 (6th Cir. 2016).
https://casetext.com/case/rocheleau-v-elder-living-constr-llc-1

FACTS: Plaintiff, Richard Rocheleau filed a lawsuit against defendants Elder Living Construction, LLC, and First Advantage LSN Screening Solutions, Inc., for violating 15 U.S.C. §1681, the Fair Credit Reporting Act. On September 15, 2011, Elder Living ordered a background screening report on Rocheleau from LexisNexis Screening Solutions, Inc. when he applied for employment. LexisNexis notified Rocheleau that the contents in the background report could adversely affect his employment status. LexisNexis notified him that he had not been hired because of the contents of his background report. Rocheleau did not dispute the accuracy of the background report and complained he had not authorized the release of the background report. Two years later, November 2013, Rocheleau filed for action against Elder Living and First Advantage.

The FCRA's statute of limitations requires claims to be commenced no later than two years after the date of discovery of the violation.

The district court granted summary judgment for both First Advantage and Elder Living, holding that the FCRA's two-year statute of limitations barred Rocheleau's lawsuit.
HOLDING: Affirmed.
REASONING: The court reasoned that Rocheleau's claim was time-barred because it was not filed within the two-year limitations period provided in 15 U.S.C. §1681p and the limitations period in 15 U.S.C. §1681s-2(b) did not apply because Rocheleau never disputed the completeness or accuracy of the report.

The FCRA's statute of limitations requires claims to be commenced no later than two years after the date of discovery of the violation that is the basis of liability. Rocheleau did not dispute that each of the alleged violations occurred in September 2011 and that he received notices on three separate dates in September 2011. So, his claim that he filed in November 2013 was barred by the statute of limitations.

The court also held 1681s-2b applies to disputes regarding the completeness or accuracy of any information provided by a person to a consumer reporting agency. Rocheleau did not dispute the completeness or accuracy of his background report in his appeal, district court filings or communications with LexisNexis. Therefore, his allegation regarding §1681-2(b)'s dispute process has no relevance to this action and does not affect the applicable statute of limitations in any way.