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IN PRACTICE

CONSUMER PROTECTION

All Hail the Mighty Arbitration Provision

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When in doubt, arbitrate it out! That is the message sent by a recent District of New Jersey decision — *Coiro v. Wachovia Bank*, 2012 U.S. Dist. LEXIS 24508 (D.N.J. Feb. 27, 2012) — which enforced an arbitration provision and class-action waiver in a consumer contract, and rejected numerous common-law arguments of unconscionability.

The *Coiro* decision is the natural outgrowth of recent decisions by higher courts that a well-drafted arbitration provision will be enforced to the broadest extent possible, even if it limits the right to commence a putative class action. Thus, corporations should strongly consider reviewing their consumer contracts to add/modify their arbitration and class-action waiver provisions.

Enforcement of Arbitration and Class-Action Waivers

In *Coiro*, the defendant financial institution placed an administrative hold on the bank account held jointly by the plaintiff and her daughter. When the plaintiff opened her account in 1999 with First Union Bank, she entered into a "customer access agreement" with that bank, a predecessor to defendant Wachovia Bank. The agreement required the plaintiff to abide by the terms of the bank's "deposit agreement and disclosures," which gave the bank the right to: (i) compel binding arbitration before the American Arbitration Association; and (ii) change the terms of the agreement at any time on 30 days' notice. In 2003, after First Union merged with Wachovia Bank, the plaintiff was mailed modified deposit agreements. The 2010 modified deposit agreement contained a new class-action wavier, which provided in pertinent part:

> If either you or we request, any irresolvable dispute or claim concerning your account or your relationship to us will be decided by binding arbitration under the expedited procedures of the Commercial Financial Disputes Arbitration Rules of the American Arbitration Association (AAA), and Title 9 of the US Code ….
>
> To the extent permitted by law, if any dispute or claims results in a lawsuit, and neither you nor we have elected or requested arbitration, you and we knowingly and voluntarily agree that a judge without a jury will decide any dispute or claim that is not submitted to binding arbitration that results in a lawsuit. The arbitration or trial will be brought individually and not as part of a class action. It if is brought as a class action, it must proceed on an individual (non-class, non-representative) basis. YOU UNDERSTAND AND KNOWINGLY AND VOLUNTARILY AGREE THAT YOU AND WE ARE WAIVING THE RIGHT TO A TRIAL BY JURY AND THE RIGHT TO PARTICIPATE OR BE REPRESENTED IN ANY CLASS ACTION LAWSUIT.

The court first addressed whether there was a binding arbitration agreement between the parties. While the court acknowledged that traditional contract principles determine the enforceability of an agreement to arbitrate, "[a]ny doubt concerning the scope of arbitrability should be resolved in favor of arbitration." Here, the court found that the arbitration provision was enforceable. The plaintiff had agreed to accept any modification to the deposit agreement "so long as she had sufficient 30-day notice." The plaintiff had the option, as the court declared, "to close her account within the 30-day period" if she did not agree to the modified terms. The plaintiff's failure to do so was a si-

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lence that equaled acceptance, especially where, as here, the arbitration provision in 2010 was not materially different from the one agreed to in 1999.

The court then had to determine whether the class-action waiver contained for the first time in the 2010 agreement was valid. Again, the court concluded that the plaintiff was bound by the waiver, citing to the Supreme Court's recent decision in *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011). There, the Supreme Court held that a California state rule classifying most collective-arbitration waivers in consumer contracts as unconscionable was pre-empted by the Federal Arbitration Act (FAA), but left open the possibility that a specific provision could be void as unconscionable under state common law.

In particular, section two of the FAA provides that an arbitration agreement — including an agreement to arbitrate on an individual, nonclass basis — "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. In *Coiro*, the court determined that the Supreme Court's holding in *Concepcion* did usurp Section 2 of the FAA, and thus did not control as to whether a particular provision is unconscionable under state law. However, this was cold comfort for the plaintiff in *Coiro*, as the court held that this class-action waiver was neither unconscionable nor otherwise unenforceable.

The *Coiro* court reviewed the provision on both procedural and substantive grounds. As to procedure, the court held that — even though the plaintiff alleged she never received the 2010 agreement — it was the plaintiff's fault because she failed to provide an up-to-date address to the bank. The court also found that the large type, all-capital letters of this particular provision should have made clear the importance of this term (and, implicitly that the plaintiff could have moved her account to another bank if she did not like this term).

The court also rejected two substantive arguments. First, it determined that even though the agreement precluded the plaintiff from recovering her fees — which she otherwise could if she prevailed under the New Jersey Consumer Fraud Act (NJCFA) — such a limitation did not "shock the court's conscience." The court made this finding even though another provision required that the plaintiff reimburse the bank if the bank prevailed, holding that such provision could be severed and did not "call into question the entirety of the arbitration provision or the class-action wavier."

Second, the court could not find that enforcement of the class-action wavier "would effectively preclude any action seeking to vindicate proposed class members' legal rights." Here, the plaintiff (or someone similarly situated) could recover various costs and incidental damages resulting "in damages measuring into the thousands." Moreover, the amount that Coiro could recover on an individual basis in this case would be tripled if she were to prevail on her NJCFA claims. The court concluded that the quicker and less costly arbitration process may even be more of a benefit to the plaintiff than class-action litigation.

How to Defend Your Arbitration or Waiver of Class Action Provision

Clearly, the recent trend is to enforce arbitration and class-action waiver provisions. However, Section 2 of the FAA does leave these provisions open to challenge under state common law of unconscionability. Below are some tips for drafting a defensible arbitration provision:

• *Large type and all capital letters*. The longer the consumer contract, the greater the concern that a consumer might not see/understand the arbitration/class-action waiver provision. SO MAKE SURE THAT YOU USE ALL CAPITAL LETTERS AND A LARGE TYPE (AND EVEN A DIFFERENT FONT) to make it stand out.

• *Equitable fee-shifting provision*. The bank got away with one here. Other courts might find that the fee-shifting provisions that favor only the party drafting the contract — and burdening the consumer — may be unconscionable and may affect the arbitration or class-action waiver provision. If there is going to be a fee-shifting provision, it should apply equally to both sides (i.e., no fee-shifting, or prevailing party gets its fees).

• *Clarity.* The arbitration provision should be clear as to what is within the scope of the arbitration and the governing body and rules for the arbitration. Likewise, the class-action waiver should make clear what the consumer is waiving.

• *Provide as much notice as possible for changes to arbitration/class-action waiver provisions*. This goes to the aspect of procedural unconscionability. Simply sending a new agreement may not be enough, especially if the provision is buried at the end of a long document. Try to highlight the changes up front, thereby weakening the "I did not notice the change" argument.

In sum, *Coiro* — as well as the Supreme Court's 2011 *Concepcion* decisions and the Third Circuit's 2012 decision in *Khan v. Dell,* 2012 U.S. App. LEXIS 1167 (3d Cir. Jan. 20, 2012) — strongly support the use of arbitration provisions (including class-action waivers) in consumer contracts. Thus, a well-drafted provision may save your corporation a lot of time and expense by mandating arbitration and limiting class action claims. ■