Fleming and Benoit v. Kruziffer Motors, Inc, No. 440-9-06 Wmcv (Wesley, J., July 20, 2007)

STATE OF VERMONT
WINDHAM COUNTY

RUTH FLEMING and
EDDIE BENOIT,
Plaintiffs

v.

WINDHAM SUPERIOR COURT
DOCKET NO. 440-9-06 Wmcv

KRUZIFFER MOTORS, INC.
f/k/a/ ROUNTREE FORD MOTORS,
d/b/a ROUNTREE FORD-MERCURY,
Defendants.

ORDER ON DEFENDANT'S MOTION TO COMPEL ARBITRATION

Plaintiff consumers brought this action alleging consumer fraud in connection with their vehicle purchase from Defendant car dealer. Currently pending is Defendant's motion to compel arbitration based on an arbitration clause in the two purchase agreements Plaintiffs signed in connection with their purchase. In response to the motion, Plaintiffs primarily contend that the arbitration clause is unconscionable and should not be enforced. The Court agrees with Plaintiffs that the Court (rather than the arbitrator) can and should decide this unconscionability question, because it presents a challenge to the arbitration clause separate and distinct from Plaintiffs' misrepresentation-based challenge to the transaction as a whole. However, the Court also concludes that as arbitration clauses go, this one is relatively benign and even-handed. Thus, the

Court cannot conclude that this arbitration clause is unconscionable without concluding that all or most arbitration clauses are unconscionable; and this is a position that has been clearly rejected. Accordingly, the arbitration clause is enforceable and Defendant's motion to compel arbitration must be **GRANTED.**

Background

Plaintiffs bought a used black Jeep from Defendant. That black Jeep had severe front end vibration problems, and when Defendant was unable to repair it and refused to rescind the sale, Plaintiffs agreed to take a used blue Jeep to replace the black one. They allege that the replacement transaction took place at the end of a working day, as the dealership was closing, and that they were told they had to take the deal immediately or lose it, without taking time to review the documents, reflect, or negotiate.

Plaintiffs were not happy with the blue Jeep either, and subsequently discovered that despite being told the replacement vehicle was of equal value to the first one, they were committed to paying a higher monthly amount for a longer period of time. They then brought this action under the Vermont Consumer Fraud Act, see 9 V.S.A. § 2451 *et seq.,* alleging that Defendant misrepresented the condition and value of both Jeeps, as well as the abilities of Defendant's service department to repair any problems they might have.

In connection with both the original purchase and the replacement transaction, Plaintiffs signed purchase agreements containing an agreement to arbitrate rather than litigate if either party so chose. On the purchase agreements, next to the statement that the agreement includes an agreement to arbitrate, there is a space for the "Customer's initials." On the first purchase agreement, both Plaintiffs initialed this space, but on the agreement for the replacement

transaction, only Plaintiff Fleming initialed, though both parties signed the purchase agreement.

Analysis

1. Can the Court Decide Whether the Arbitration Clause is Unconscionable

The United States Supreme Court has held that, regardless of whether a case is in federal or state court, a challenge to the validity of a contract containing an arbitration clause must be decided by the arbitrator, not the court. See *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440 (2006). This means that a motion to compel arbitration should be granted even if the arbitration clause is arguably invalid *if the arguable invalidity of the arbitration clause depends on the invalidity of the contract as a whole. Id.*

If, on the other hand, the plaintiff challenges the validity of the arbitration clause on grounds separate and different from the plaintiff's challenge to the validity of the contract or transaction as a whole, the Court can and should determine the narrow issue of the validity of the arbitration clause first, and then grant or deny the motion to compel arbitration accordingly. See *Vasquez-Lopez v. Beneficial Oregon, Inc.* 152 P.3d 940, 945-46 (Or. Ct. App. 2007). Moreover, the Court's authority and responsibility to decide this separate threshold issue does not depend on whether the plaintiff alleged the separate challenge to the arbitration clause in his or her initial pleading or raised it in his or her response to the motion to compel. *Id.* at 946-48. In *Vasquez-Lopez*, the plaintiffs initially challenged their mortgage transaction as a whole based on a misrepresentation/deceptive practices theory, and then, in response to the defendant's motion to

compel arbitration, challenged the arbitration clause as unconscionable. The court noted that there was some overlap in relevant evidence because "deception in the process of contract formation can play a role in determining whether a contract or contractual provision is unconscionable," but nonetheless concluded that the misrepresentation/deceptive practices challenge to the overall contract and the unconscionability challenge to the arbitration clause were separate and distinct claims or theories. It therefore considered and ruled on the plaintiffs' unconscionability challenge, denying the defendant's motion to compel arbitration because it concluded that the arbitration clause in question was unconscionable and unenforceable under the circumstances. *Id.* at 948-54.

Like the plaintiffs in *Vasquez-Lopez,* Plaintiffs here base their complaint about the overall transaction on a misrepresentation/deceptive practices theory, but raise an unconscionability challenge to the arbitration clause in response to the motion to compel arbitration. Thus, since the challenge to the validity of the arbitration clause is separate and distinct from the challenge to the validity of the two contracts as a whole, this Court will, like the court in *Vasquez-Lopez,* determine whether the arbitration clause here is unconscionable before granting or denying the motion to compel arbitration.[1] Accord *State ex rel. Vincent v. Schneider,* 194 S.W.3d 853, 857

[1] As Defendant points out, *Vasquez-Lopez* is factually distinguishable from this case and decided under Oregon unconscionability law. These differences go to the actual decision on unconscionability itself, however, and do not affect the court's conclusion that it should make the determination on unconscionability one way or the other.

n.1 (Mo. 2006) (noting that rule of *Buckeye Check Cashing* requiring determination of validity by arbitrator does not apply to challenges directed to arbitration clause itself).

2. Is this Arbitration Agreement Unconscionable?

Under Vermont law, unconscionability is a function of both procedural and substantive unfairness. *Maglin v. Tschannerl*, 174 Vt. 39 (2002). The focus of the analysis is whether, as a result of unequal bargaining power and lack of meaningful choice, the substantive terms of the contract are unreasonably and oppressively favorable to the more powerful party. See *Maglin,* 174 Vt. at 45-46; cf. also *In re Palmer,* 171 Vt. 464, 473-74 (2000) (discussing unconscionability in the course of ruling that terms of bail agreements were unconscionable).

In a world devoid of existing law, almost any arbitration agreement in any consumer contract would seem to be logically suspect under this analytical framework. After all, almost all consumer contracts will be contracts of adhesion, and the transaction will be characterized by a disparity of power and a lack of meaningful choice on the part of the consumer. Moreover, the consumer is giving up his or her constitutional right to a jury trial, to have his or her rights determined instead by arbitrators – private commercial actors who may understandably have an institutional bias in favor of the businesses who regularly retain their services and pay their bills.

This is not a world devoid of existing law, however. Rather, it is a world governed by the Federal Arbitration Act (FAA), which expresses a legislative policy decision strongly favoring arbitration to resolve commercial disputes. *Threlkeld v. Metallgesellschaft Ltd.,* 923 F.2d 245, 248 (2nd Cir. 1991). Moreover, it is a world in which this federal policy trumps any desires state legislatures and courts may have to protect their citizens from compelled arbitration. See *id.* (Vermont statute voiding any arbitration agreement where there has not been a specific

acknowledgment of arbitration signed by both parties is preempted by FAA); *Perry v. Thomas*, 482 U.S. 483 (1987) (California statute allowing wage collection actions to be maintained in court regardless of agreement to arbitrate is preempted by FAA); *Southland Corp. v. Keating,* 465 U.S. 1 (1984) (California statute voiding arbitration agreements with respect to actions brought under state Franchise Investment Law is preempted by FAA). Thus, the Court's consideration of unconscionability must take into account well-settled principles by which arbitration is trusted and encouraged for the vindication of a consumer's legal rights as a general matter, as long as the particular terms of the particular arbitration agreement are not so favorable to the more powerful party that they must be considered outrageous or oppressive.

Here, as in most consumer transactions, there was unequal bargaining power and may arguably have been lack of meaningful choice. Nonetheless, the drafters of this agreement purposely used large print to draw attention to the arbitration agreement, rather than burying it in fine print. Moreover, the substantive terms of the arbitration agreement itself seem relatively reasonable and even-handed. This agreement does not preserve a judicial forum for the seller's claims against the consumer while requiring arbitration of the consumer's claims against the seller, compare *Taylor v. Butler*, 142 S.W.3d 277 (Tenn. 2004); nor does it give the seller or a member of the seller's industry organization the sole right to choose the arbitrator, compare *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mo. 2006). The agreement also does not contain a cost-sharing term that effectively denies the consumer any forum by making the arbitral forum cost-prohibitive. See *Vasquez-Lopez,* 152 P.3d at 951-52. Under this arbitration agreement, both sides participate in the choice of arbitrators, arbitrators must be attorneys or retired judges rather than members of the industry, and arbitrators must apply governing

substantive law. If Plaintiffs prevail, they would be entitled to the same remedies, including recovery of costs and attorney fees, as they would in court. Both sides also retain the right to go to small claims court. The only arguably unreasonable and one-sided provisions are those involving the prohibition of class-actions and the seller's retention of its right to repossession, but neither of those provisions is pertinent here.[2]

The Court therefore concludes that the terms of the arbitration agreement at issue here are relatively fair and even-handed. Accordingly, the agreement to arbitrate is not unconscionable, and is enforceable.

3. Is Plaintiff Benoit Bound by the Arbitration Agreement Despite His Failure to Initial It?

Plaintiff Benoit argues that he is not bound by the agreement to arbitrate because he did not put his initials in the appropriate space on the second purchase agreement, next to the large and capitalized notification that the purchase agreement includes the arbitration agreement on the

[2] Though still a minority, some courts have held terms in arbitration agreements prohibiting class-actions to be unconscionable. See, e.g., *Muhammad v. County Bank of Rehoboth Beach, Deleware,* 912 A.2d 88 (N.J. 2006); *Discover Bank v. Superior Court of Los Angeles*, 113 P.3d 1100 (Cal. 2005). Vermont courts may do the same; but this is a close and important question, and the Court does not think it would be wise or appropriate to determine the unconscionability of a class-action prohibition in a case that does not involve a potential class action. Indeed, the above courts based their unconscionability decisions on the specifics of the disputes in question, concluding that denying the possibility of a class action in those circumstances (i.e., when each plaintiffs' claim was predictably small) effectively denied any possibility of vindicating the plaintiffs' rights at all. See *Muhammad,* 912 A.2d at 99; *Discover Bank,* 113 P.3d at 1110.

reverse side of the document. There is no language in the agreement indicating that the parties' initials were required to make the arbitration agreement effective, however. Indeed, there was not even a space for the seller's initials. To the contrary, the format and language – flatly stating that the purchase agreement includes the arbitration agreement – indicate that the initialing of the acknowledgment of the arbitration agreement is not a condition precedent to the enforcement of the arbitration provision. Rather, it simply affords secondary proof of actual notice of the arbitration requirement in order to minimize claims by consumers that they were ignorant of the provision for mandatory arbitration. Here, because Benoit did not initial the space, he suggests a procedural irregularity in the formation of the agreement. The Court incorporated this claim into its unconcscionability analysis, concluding that the irregularity was insignificant in light the absence of other substantive indications of unconscionability, particularly since Benoit had previously initialed a document with an identical arbitration agreement. Nevertheless, Benoit's failure to initial did not void the stipulation for arbitration otherwise plainly incorporated into the signed agreement..

Accordingly, both Plaintiffs are bound by the arbitration agreement, which will be enforced.[3]

ORDER

Defendant's motion to compel arbitration is therefore **GRANTED**.

Dated at Newfane, Vermont, this ____ day of July, 2007.

[3] Plaintiffs also argue that there is no agreement because Defendant failed to sign the second purchase agreement at all. However, because this argument goes to the validity of the second purchase agreement as a whole rather than just the agreement to arbitrate, it is clearly one for decision by the arbitrator rather than the court under *Buckeye Check Cashing*.

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John P. Wesley
Presiding Judge