RENDERED: SEPTEMBER 26, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002121-MR

MICHAEL SCHNUERLE;
AMY GILBERT; LANCE GILBERT;
AND ROBIN WOLFF — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 06-CI-004267

INSIGHT COMMUNICATIONS COMPANY, L.P;
INSIGHT COMMUNICATIONS MIDWEST, LLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

CLAYTON, JUDGE: This comes before the Court on an appeal from a decision of the Jefferson Circuit Court's finding that a consumer contract which included a mandatory arbitration clause and a ban on class actions was valid.

I. FACTUAL AND PROCEDURAL BACKGROUND

The appellees, Insight Communications Company, L.P. and Insight Communications Midwest, LLC ("Insight") are internet service providers for the appellants and other consumers. Beginning on or about April 18, 2006, Insight failed to provide continuous access to broadband internet service to the appellants, Michael Schunerle, Amy Gilbert, Lance Gilbert and Robin Wolff (collectively, "the Appellants"), as well as other consumers who are members of a putative class. The appellants contend that Insight also failed to promptly remedy the lack of services, failed to provide an alternative high-speed internet service, disseminated misleading or incorrect information to consumers who inquired about the failures, failed to protect consumers from deletion of information caused by the failure and charged consumers for services it did not provide.

Insight is the Louisville, Kentucky provider of cable internet broadband services. When consumers apply for this service, Insight requires them to agree to a service agreement either in writing or on-line. These agreements are drafted and provided by representatives of Insight and contain a mandatory arbitration clause which requires consumers to attend mandatory arbitration and disallows class actions either in court or in arbitration.

Insight moved the trial court to compel arbitration under the Federal Arbitration Act, 9 U.S.C. § 2, *et seq*. ("FAA") and the Kentucky Uniform Arbitration Act, KRS § 417.050 ("KUAA"). It also moved to dismiss the putative class action.

The Jefferson Circuit Court found that the contract and arbitration clause were neither procedurally nor substantively unconscionable. The trial judge held that, pursuant to the service agreement, the consumers have several alternatives in providers and that those who are aggrieved can either go to an Insight service agent, arbitration or small claims for damages due to claims they might have. He found that the test should not be whether someone will exercise these rights, but whether they are available.

II. STANDARD OF REVIEW

When reviewing a trial court's motion to compel arbitration, an appellate court must "defer to the trial court's factual findings, upsetting them only if clearly erroneous or unsupported by substantial evidence . . . ." *Conseco Finance Servicing Corp., v. Wilder*, 47 S.W.3d 335, 340 (Ky.App. 2001). In determining whether an arbitration clause is unconscionable, the court must determine whether it is a contract which "no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other." *Id*. at 342.

III. ANALYSIS

The appellants first contend that the provision of the arbitration clause that prohibits class proceedings is both procedurally and substantively unconscionable and, therefore, unenforceable. While the *Conseco* Court involved

contract terms which were procedurally unconscionable, the appellants ask this Court to find that substantive unconscionability is also present here.

As for procedural unconsionability, the appellants argue that (1) the class action ban in the arbitration clause is contained within a contract of adhesion; (2) the appellants had significantly less bargaining power than Insight; (3) the arbitration clause was communicated in a manner designed to deflect attention from it; and (4) Insight had a monopoly on broadband service, so class members had no meaningful choice to get this service without accepting the class action ban.

An adhesion contract is "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Id.* at 342, n. 20 (internal citation omitted).

Contracts of adhesion are offered to the consumer on "essentially a 'take it or leave it' basis without affording the consumer a realistic opportunity to bargain." *Jones v. Bituminous Casualty Corp.*, 821 S.W.2d 798, 801 (Ky. 1991).

In *Kodak Mining Co. v. Carrs Fork Corp.*, 669 S.W.2d 917 (Ky. 1984), the Kentucky Supreme Court found that Kentucky law favors the settlement of disputes through arbitration. This includes consumer complaints such as the action before this Court. Several jurisdictions have ruled on the use of class action bans in consumer arbitration clauses and have held that they are not unconscionable. *See Johnson v. Suburban Bank*, 225 F.3d 366 (3rd Cir. 2000); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002); *Iberia Credit*

Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159 (5th Cir. 2004); *Livingston v. Associates Finance, Inc.*, 339 F.3d 553 (7th Cir. 2003); and *Jenkins v. First American Cash Advance of Georgia, LLC*, 400 F.3d 868 (11th Cir. 2005). This Court agrees with these holdings.

"Adhesion Contracts are not *per se* improper." *Conseco*, 47 S.W.3d at 342. In fact, "they have been credited with significantly reducing transaction costs in many situations." *Id.* (*citing Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997)). In the present situation, the consumers can choose from several internet service providers within the Louisville area. While Insight is the only "cable" operator to provide broadband internet service, other companies do provide high-speed internet access.

The arbitration clause within the consumer contract is a favored means within the law of settling disputes. The consumer also has the right to bring actions in small claims court, thus, the right to litigate has been preserved. The specific claims which the litigants would have are not complex issues of law and fact. The disruption of internet service is something which would be easy to prove in a small claims setting.

In *Suburban Bank*, the Third Circuit Court of Appeals explained that:

> though pursuing individual claims in arbitration may well be less attractive than pursuing a class action in the courts, we do not agree that compelling arbitration of the claim of a prospective class action plaintiff irreconcilably conflicts with TILA's goal of encouraging private actions to deter

> violations of the Act. Whatever benefits of class actions, the FAA "requires piecemeal resolution when necessary to give effect to an arbitration agreement."

Id. at 374.

This Court finds that the Service Agreement supplied to consumers by Insight representatives is neither procedurally nor substantively unconscionable and that the arbitration clause therein is valid and enforceable. Thus, the Jefferson Circuit Court's decision of October 6, 2006, is affirmed.

MOORE, JUDGE, CONCURS.

KELLER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

KELLER, JUDGE, DISSENTING: Respectfully, I dissent. As noted by the trial court and the majority, there are two types of unconscionability – procedural and substantive. Based on my review of case law, procedural unconscionability can arise from within the agreement and from the circumstances surrounding the execution of the agreement.[1] The primary factors that can arise from within an agreement to render it unconscionable are: (1) if the agreement is offered on a take-it or leave-it basis, *Howell v. NHC Health Care-Ft. Sanders, Inc.,* 109 S.W.3d 731, 735 (Tenn. Ct. App. 2003); *Broemmer v. Abortion Services of Phoenix, Ltd.,* 840 P.2d 1013, 1016 (Ariz. 1992); (2) if the language of the agreement is not clear or conspicuous, *Wheeler v. St. Joseph Hospital,* 63 Cal. App. 3d 345, 359 (1976); *Howell,* 109 S.W.3d at 734; *In re Southern Indust. Mechanical Corp.,* 266 B.R. 827, 833 (W.D. Tenn. 2001); (3) if the agreement is

[1] Unless otherwise stated, "agreement" refers to the arbitration provisions of the overall written agreement.

part of a larger document, *Howell,* 109 S.W.3d at 734; (4) if the terms are more favorable to one party, *Broemmer,* 840 P.2d at 1015; and (5) if the agreement does not adequately explain the arbitration procedure, *Howell,* 109 S.W.3d at 734. The primary factors that can arise from the events surrounding the execution of the agreement are: (1) whether the parties are on an equal footing, *In re Southern Indust. Mechanical Corp.,* 266 B.R. at 830; (2) whether the person signing the agreement has the educational capacity to read and understand it, *Howell,* 109 S.W.3d at 735; *Miner v. Walden,* 422 N.Y.S. 2d 335, 340 (1979); *Broemmer,* 840 P.2d at 1016-17, (3) whether the agreement was adequately explained to the person signing it, *Howell,* 109 S.W.3d at 735; *Broemmer,* 840 P.2d at 1017; *Obstetrics and Gynecologists William, G. Wixted, Patrick M. Flanagan, William Robinson, Ltd. v. Pepper,* 693 P.2d 1259, 1261 (Nev. 1985); (4) whether the person signing the agreement was under emotional distress at the time of signing, *Broemmer,* 840 P.2d at 1017; and (5) whether the person signing could have reasonably expected that such an agreement would be presented at the time of signing, *Broemmer,* 840 P.2d at 1017; *Wheeler,* 63 Cal. App. 3d at 357.

After reviewing the agreement in question, I believe there may be procedural deficiencies with the agreement and its execution. Although the arbitration portion of the agreement is set out, in part, in capital letters, it is not a stand alone document. In fact, the arbitration agreement begins on page seven of a twenty-three page document. Furthermore, the arbitration agreement is in a portion of the overall agreement that is entitled "EXHIBIT A: Software License

Agreement." It is unclear whether a person executing a service agreement would contain a provision mandating arbitration and waiving the right to pursue a class action suit or that such a provision would be within the software license portion of the service agreement. Although it appears from the record that the plaintiffs had the capacity to understand the agreement, the trial court did not address that issue. Therefore, I would remand this matter to the trial court for it to consider these issues.

Substantively, unconscionability involves three primary factors: (1) whether the agreement limits remedies that are otherwise provided by statute, *Morrison v. Circuit City Stores, Inc.,* 317 F.3d 646, 653 (6th Cir. 2003); (2) whether it limits discovery, *Walker v. Ryan's Family Steak Houses, Inc.,* 400 F.3d 370, 378 (6th Cir. 2005); and, (3) whether the cost of arbitration effectively negates the ability of a party to pursue a remedy, *Morrison,* 317 F.3d at 658.

My substantive concern is that the class action ban portion of the agreement may negate the ability of a party to pursue a remedy. The trial court and majority indicate that the provision for a litigant to proceed in small claims court overcomes any issue regarding the cost of arbitration. While the minimal filing fee associated with a small claims action may permit litigants with minimal claims to proceed, it is not clear to me that it would have permitted these litigants to do so. Furthermore, one must consider more than just the filing fee when considering the cost associated with litigation. A litigant with a minimal claim, even one in excess of the small claims court filing fee, may be foreclosed from litigating simply

because of the time involved in appearing in court. It does not appear that the trial court took this into consideration when rendering its decision. Therefore, I would remand this matter to the trial court to consider this issue.

Finally, I note that the arbitration agreement provides that "NEW YORK LAW (EXCLUDING ITS CHOICE OF LAW RULES) WILL APPLY TO THE CONSTRUCTION, INTERPRETATION AND ENFORCEMENT OF THIS AGREEMENT." Neither the trial court nor the majority addressed what impact this choice of law provision has on the arbitration agreement. Therefore, this matter should be remanded to the trial court for adjudication of that issue.

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