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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002039-MR

DAYMAR COLLEGES GROUP, LLC.;
DAYMAR LEARNING OF PADUCAH, INC.;
DAYMAR LEARNING OF OHIO, INC.;
MARK GABIS; AND DAYMAR LEARNING, INC. APPELLANTS

APPEAL FROM MCCRACKEN CIRCUIT COURT
v. HONORABLE TIMOTHY KALTENBACH, JUDGE
ACTION NO. 10-CI-00132

BRITTANY DIXON; PATRICIA TABER;
MARTHA ELIZABETH WATHEN-COLLIER;
MONICA SYKES; CANDICE WILLIAMS;
TASHA ALLEN; JESSICA GORDAN;
DARENA PRESCOTT; TINA CAIN;
KIMBERLY MILAN; AND AMY LEE APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON, AND LAMBERT, JUDGES.

CAPERTON, JUDGE: The Appellants, Daymar Colleges Group, LLC; Daymar Learning of Paducah, Inc.; Daymar Learning of Ohio, Inc.; Mark Gabis; and Daymar Learning, Inc. (hereinafter "Daymar"), appeal the October 7, 2010, order of the McCracken Circuit Court, denying their motion to compel Appellees Brittany Dixon, Patricia Taber, Martha Elizabeth Wathen-Collier, Monica Sykes, Candice Williams, Tasha Allen, Jessica Gordan, Darena Prescott, Tina Cain, Kimberly Milan, and Amy Lee, former students of Daymar (hereinafter, "Students") to arbitrate in accordance with two arbitration agreements: (1) a broad arbitration provision that requires arbitration of all claims Students assert in this lawsuit; and (2) a "delegation provision" that requires arbitration of any dispute over the scope or enforceability of the arbitration provision. Daymar now argues that the circuit court erred by declining to enforce these two arbitration provisions against Students, all of whom signed a two-page student enrollment agreement containing both provisions. Following a thorough review of the record, the arguments of the parties, and the applicable law, we reverse and remand for additional proceedings not inconsistent with this opinion.

Daymar College is a for-profit institution offering Bachelors and Associates degrees in such fields as Medical Assisting, Paralegal Studies, and Billing and Coding. Daymar has Kentucky campuses in Paducah, Clinton, Madisonville, Russellville, Owensboro, Louisville, Bowling Green, Scottsville, Bellevue, and Albany, as well as several in Ohio, Indiana, and Tennessee. According to Students, Daymar aggressively recruits students, and induces them to

enroll in and attend Daymar by making material, false, and misleading representations, including promising full transferability of Daymar credits to other institutions of higher learning, and jobs upon graduation. The Students now assert that very few Daymar credits are actually transferrable, and that very few students obtain any sort of job in their field of study after graduation.[1]

Each of the Students signed a Student Enrollment Agreement when they enrolled, which was also signed by a Daymar recruiter and Campus Director. The Agreement is one page, front and back, and the arbitration provision at issue *sub judice* is contained in the last paragraph on the back page. It is of the same type and font as the surrounding text, and was not specially marked or identified as being an arbitration provision. That provision stated, in pertinent part, that:

> Any dispute … arising out of or relating to my enrollment at the College, this Agreement, or the breach thereof, shall be resolved by arbitration in the city in which the campus I attend is located in accordance with the commercial rules of the American Arbitration Association then in effect, and judgment upon the award rendered by the arbitrator may be entered in any court of competent jurisdiction.

That same paragraph of the enrollment agreement also contains the delegation provision, which provides that, "All determinations as to the scope or enforceability of this arbitration provision shall be determined by the arbitrator, and not by a court."

[1] In issuing this opinion, and finding that the arbitration provision is enforceable for the reasons set forth herein, *infra*, we make no commentary on whether the larger contract as a whole is conscionable, and indeed, certainly understand the concerns of Students in raising these issues. Those issues certainly remain to be determined, and we do not address the merits of those arguments at this time.

Above each student's signature on the front page is language of incorporation, which reads as follows:

> This Agreement and any applicable amendments, which are incorporated herein by reference, are the full and complete agreement between me and the College. By signing this Agreement, I confirm that no oral representations or guarantees about enrollment, academics, financial aid or career employment prospects have been made to me, and that I will not rely on any oral statements in deciding to sign this Agreement.

The incorporation language does not reference the additional terms on the back of the agreement, and the Students assert that they were not aware of the existence of the back page of the agreement, which contained the arbitration provision itself, and that Daymar officials were aware of this. However, immediately underneath the language of incorporation, on the first page, in all-bold, capitalized type, is a sentence reading, "I have read both pages of this student enrollment agreement before I signed it, and I received a copy of it after I signed it." The Students were required to initial next to this particular sentence.

The agreement also included various other terms, including those requiring that: (1) Students must pay half the cost of arbitration, including the aribtrator's fee; and (2) any students filing claims against Daymar must pay their own attorney fees.

Below, the trial court heard testimony from the Students, and also from Daymar Director of Admissions, Shannon Jones, and attorney, David Kelly, who offered testimony concerning the expenses of arbitration. The Students

asserted that no one from Daymar explained to the Students that by signing the agreement, they were agreeing to arbitrate all claims against Daymar, and Daymar officials acknowledged that they did not inform the Students of the arbitration provision. Further, the Students testified that they felt pressure from the Daymar recruiters to sign the agreement quickly.

Students testified that they met with Daymar recruiters from between thirty minutes to one hour. The Students stated that during that initial 30- 60-minute meeting, they were required to take at least one twelve-minute test, fill out a questionnaire, undergo an interview, view a PowerPoint presentation, take a tour, and fill out financial aid paperwork, in addition to signing the enrollment documents. The Students stated that they were not given the opportunity to read the enrollment documents, or ask questions. They testified that they were advised to sign the documents and read them when they went home.

By contrast, Daymar asserts that each student was asked by the admissions counselor to "read the document, front and back," and to initial, acknowledging that he or she had read both sides of the enrollment agreement.[2] Daymar further disputes the Students' assertion that they were given a stack of documents, but instead were given only one document at a time. Daymar states that all other admissions documents were completed after the enrollment

[2] We note again that the only capitalized and bold text on the page was located next to the area where the students were told to initial, and provided that, "I HAVE READ BOTH PAGES OF THIS STUDENT ENROLLMENT AGREEMENT BEFORE I SIGNED IT AND I RECEIVED A COPY OF IT AFTER I SIGNED IT."

agreement, and that the Students had ample time to read the enrollment agreement and ask questions.

Attorney David Kelly also testified below as an expert witness on the issues of arbitration procedures. He testified that parties are required to pay anticipated arbitration costs up front, which the trial court found to be between $300 and $350 per hour on average, and possibly ranging up to $1,050 per hour, should the claims end up in front of a three-arbitrator panel.[3] However, he did acknowledge on cross-examination that a fee waiver or deferral procedure is available under the AAA rules to persons seeking to limit or defer the cost of arbitration.

According to Kelly, a three-to-four-day arbitration with only one arbitrator can cost tens of thousands of dollars, although this amount would be determined under the AAA rules on the basis of the amount being claimed by the party. Kelly testified that he has never encountered a situation where the losing party is required to pay all arbitration costs, and that he has never seen a situation in which all costs are allocated solely to one party or another. He stated that he did not think it would take an arbitrator more than a day, at most, to hear proof on the issue of whether the arbitration provision was unconscionable. The trial court

[3] Daymar asserts that, contrary to the findings of the trial court, under the rules of the American Arbitration Association (AAA), for a claim seeking an amount between $10,000 and $75,000, the filing consumer is responsible for one-half of the arbitrator's fee, up to a maximum of $375. For claims demanding less than $10,000, the consumer is responsible for no more than $125. Daymar notes that all Students testified that the amount they paid to attend Daymar was less than $75,000.

found that the Students could not afford the costs of arbitration because the majority were either unemployed or had very low-paying jobs.

Students commenced this lawsuit in February of 2010, alleging that they were deceived into enrolling at Daymar. Some also alleged that they were deceived into purchasing books at inflated prices from the Daymar bookstore.[4] Daymar moved to compel arbitration, and Students claimed that the arbitration provision was unenforceable. Pursuant to the delegation provision of the agreement, which required arbitration of any dispute over the scope or enforceability of the arbitration provision, Daymar moved to compel arbitration of the claim that the arbitration provision was unenforceable.

Prior to the hearing conducted by the court below, the U.S. Supreme Court rendered a decision in *Rent-A-Center v. Jackson*, 130 S.Ct. 2772, 2778-79 (2010). Below, Daymar argued that *Jackson* held that a delegation provision like the one in this case must be enforced in accordance with its terms regardless of the enforceability of the larger agreement in which it was found. The court disagreed, and overruled Daymar's motion to compel arbitration, finding that it was unconscionable to require the Students to pay part of the costs of arbitration when many had an income at or below the national poverty threshold.[5] Further, the court

[4] In total, Students asserted 11 causes of action against Daymar. Again, we do not comment upon the substantive merits of each of these causes of action, and intend our opinion in no way to be a commentary concerning the unconscionability of the contract as a whole, or the fraud that may or may not have been perpetrated by Daymar upon the students who entered into those contracts.

[5] We note that Daymar had repeatedly referenced its offer to advance the arbitration costs of any plaintiff who the court found could not afford to arbitrate based on the costs charged by the American Arbitration Association, and stated that they would neither seek nor accept reimbursement from Students, even if Daymar were to prevail. We are not persuaded by this line

concluded that it was unconscionable to require the Students to pay an arbitrator's fees to determine the enforceability of the arbitration provision, considering that each student owed between $17,000 and $34,000 in student loans. Additionally, the court found that the arbitration agreement was procedurally unconscionable, stating:

> The signed arbitration agreements were imposed as a condition of enrollment and were non-negotiable. Plaintiffs had a limited opportunity to read the agreements in an enrollment process that lasted less than ninety minutes. The enrollment process required that they sign numerous other documents in that period. While all of the Plaintiffs could read, many had only a GED, and none had earned a degree beyond high school. None knew, or reasonably could have known, what arbitration was. The agreement was contained in the last paragraph on the back page of a two-page contract. The two-page contract did not require the students' signature or initials on the second page. The arbitration provisions were not in bold type. Though admissions counselors were present when the enrollment agreements were signed, none explained the significance of the arbitration agreement to the students.

Daymar filed a motion to alter, amend or vacate, which was also overruled by the court. It is from those denials that Daymar appealed to this Court.

On appeal, Daymar makes four arguments: (1) That federal and Kentucky law strongly favor the enforcement of agreements to arbitrate; (2) That the circuit court erred by overruling Daymar's motion pursuant to *Rent-a-Center v. Jackson*; (3) That the circuit court compounded its error by incorrectly determining

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of argument as a reason to find the provision conscionable, and indeed, find limited evidence in the record that such was the case. Regardless, we are bound by the four corners of the contract at issue insofar as our interpretation of the provision at issue is concerned, and rely upon same in forming our opinion herein.

that the arbitration provision was unconscionable; and (4) That regardless, the circuit court should have severed the cost-splitting provision which it incorrectly determined to be objectionable.

In response, Students argue that: (1) The arbitration provision is both substantively and procedurally unconscionable, rendering it unenforceable in its entirety; and (2) That the trial court was correct in ruling that it, and not an arbitrator, should determine whether or not the claims necessitated arbitration.

We believe that the arguments of the parties may be condensed to two issues: (1) Whether or not the trial court erred in finding the arbitration provision to be substantively and procedurally unconscionable; and (2) Whether the trial court should have severed the cost-splitting provision. Prior to addressing the arguments of the parties, however, we note that this Court reviews errors of law *de novo*, and sets aside findings of fact only if they are clearly erroneous. *Monin v. Monin*, 156 S.W.3d 309 (Ky.App. 2004); Kentucky Rules of Civil Procedure (CR) 52.01. Further, we note that due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. *Id.* We review this matter with these standards in mind.

First, Daymar asserts that the trial court erred in reaching the question of who should have jurisdiction in this matter at all, and that the arbitrator, and not the court, should have determined who had jurisdiction over this matter. In support of its argument that the trial court erred in making this finding, Daymar notes that

both the Federal Arbitration Act (FAA)[6] and Kentucky law favor the enforcement of arbitration agreements,[7] and that any dispute regarding the scope of arbitrable issues should be resolved in favor of arbitration.

Daymar also argues that the circuit court erred in overruling its motion under *Rent-A-Center v. Jackson*, 130 S.Ct. 2772 (2010),[8] because the agreement's delegation provision required the parties to arbitrate any dispute over the scope or enforceability of the arbitration provision. Daymar argues that *Rent-A-Center* mandates the enforcement of delegation provisions, and that even if the rest of the contract is found to be void, the arbitration provision is severable, and still valid. Thus, Daymar asserts that a party cannot avoid arbitration by claiming that the larger contract containing the arbitration provision is unenforceable, and that such a claim must be decided by an arbitrator. Daymar argues that when the parties have agreed to a delegation provision, courts must enforce it unless there are grounds for revoking the delegation provision specifically. Daymar argues that

[6] Daymar argues that the FAA is applicable because the Students' enrollment agreements govern a relationship affecting commerce.

[7] In making this argument, Daymar cites to the recent holding of our Kentucky Supreme Court in *American General Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 550 (Ky. 2008), wherein the Court stated that, "Whether state or federal law governs makes little practical difference … because the Kentucky Uniform Arbitration Act (KUAA) contained in Kentucky Revised Statutes Chapter 417 is similar to and has been construed consistently with the FAA."

[8] *Rent-A-Center* addressed what was termed a "delegation provision" in an employment arbitration agreement, and the contract at issue was an agreement between *Rent-A-Center* and its employee to arbitrate disputes related to his employment. In his employment discrimination action, Jackson challenged the agreement as a whole, arguing that it was unconscionable, although he never specifically put forth evidence or argument on the unconscionability of the arbitration provision.

the Students did not satisfy their burden of establishing that the delegation provision itself was unenforceable.[9]

As noted, Daymar further argues that the arbitration provision was both procedurally and substantively sound, and that the circuit court compounded its refusal to compel arbitration by incorrectly determining that the arbitration provision was unconscionable. Daymar argues that the circuit court never should have reached this question of whether the arbitration provision was unconscionable, and alternatively, that it was not actually unconscionable, either substantively or procedurally. Daymar argues that the Students failed to meet their burden to show otherwise, and that each signed the agreement after having an opportunity to read it, and that there was nothing unconscionable about the form of the agreement, the circumstances under which the Students signed it, or the terms of the arbitration provision itself.

Daymar also argues that the provision was not unreasonably nor grossly unfavorable to one party, and that the circuit court erred in applying an analysis of cost-prohibitiveness that has been confined by the Sixth Circuit to federal statutory claims.[10] Daymar asserts that Kentucky law does not support the

[9] In support of this assertion, Daymar cites to the testimony of expert David Kelly, who was called as a witness by Students to support their claim that it would be prohibitively expensive for them to arbitrate their substantive claims against Daymar. Daymar states that Kelly's only testimony on the cost of arbitrating the unconscionability of the arbitration provision came during cross-examination. At that time, Kelly testified that he did not think it would take an arbitrator more than a day, at most, to hear proof on the issue of whether the arbitration provision was unconscionable. Kelly conceded that this would be less expensive to the parties than one day-long deposition during a traditional court proceeding.

[10] In making this assertion, Daymar argues that the Sixth Circuit has expressly limited this analysis to federal statutory claims. *See Stutler v. T.K. Constructors*, *Inc*. 448 F.3d 343, 345 (6th Cir. 2006).

proposition that the cost of arbitration can render an arbitration provision unconscionable, and that the question of whether the cost of arbitration can render an arbitration agreement unenforceable is one of first impression in Kentucky. Moreover, Daymar argues that to adopt the circuit court's holding that the cost-sharing provision renders the arbitration agreement unconscionable would be an action inconsistent with Kentucky Revised Statutes (KRS) 417.140,[11] which allows for the arbitration provision to define the allocation of fees and expenses of arbitration.

Alternatively, Daymar argues that even if the cost of arbitration could render an arbitration agreement unconscionable, arbitration was not cost-prohibitive in this case. Daymar notes that in cases where parties resisted the arbitration of federal statutory claims, those parties bore the burden of proving that the cost of arbitration would prohibit them from meaningfully litigating their claims. Daymar argues that if this analysis applied to state law claims in Kentucky, Students would have the burden of proving that cost prohibited them from meaningfully asserting their claims. Daymar argues that the Students could not have met this burden because the undisputed proof was that the cost of arbitrating would be minimal if Students were seeking less than $75,000.

Moreover, Daymar asserts that the undisputed proof was that the American Arbitration Association had a process in place to seek a waiver or

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[11] KRS 417.140 provides that, "Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses, fees and other expenses incurred in the conduct of the arbitration shall be paid as provided in the award."

reduction in fees, which it states that the court below failed to consider. Finally, Daymar asserts that arbitration was not cost-prohibitive because Daymar agreed to pay the cost of arbitration.[12] Thus, Daymar argues that as a matter of law, arbitration cannot be cost-prohibitive when the party asserting the claim is not required to pay anything.

Concerning whether or not the arbitration provision was procedurally unconscionable, Daymar argues that the circuit court erred in finding that this was the case. Daymar argues that the enrollment agreement's arbitration provision bore none of the hallmarks of procedural unconscionability, and that there was nothing oppressive or surprising about the inclusion of the arbitration provision in the enrollment agreement. Daymar argues that the court erred in finding the agreement to be procedurally unconscionable merely because the Students declined to read the agreement before signing it.

As its final argument on appeal, Daymar argues that the circuit court should have severed the cost-splitting provision which it determined to be objectionable. Daymar argues that under Kentucky contract law, the absence of a severability provision does not prohibit the severance of an offensive provision. It also asserts that Kentucky courts have a policy in favor of enforcing contracts, and will strike an objectionable provision to sustain contracts as a whole. Daymar asserts that the cost-splitting provision may be eliminated because it is supported by the parties' mutual promise to equally share the cost of arbitration, and is

[12] For the reasons set forth herein, *supra*, we do not rely upon Daymar's offer or lack thereof in forming our opinion herein.

therefore an "independent covenant" which should be severed from the enrollment agreement.

In response to the arguments made by Daymar, the Students argue that the arbitration provision is both substantively and procedurally unconscionable, rendering it unenforceable in its entirety, and further, that the trial court was correct in ruling that it, and not an arbitrator, should determine the arbitrability of Students' claims. Turning to this latter assertion first, we note that the Students argue that the trial court correctly determined that it, and not an arbitrator, should have determined whether or not the agreement was unconscionable because of the costs of requiring an arbitrator to determine the enforceability of the agreement.

The Students argue that they put forth significant evidence on the unconscionability of the delegation provision, and that the enrollment delegation provision in this instance was distinguishable from that in *Rent-A-Center*, *supra*. The Students note that the *Rent-A-Center* provision provided that:

> The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement including, but not limited to, any claim that all or any part of this Agreement is void or voidable.

By contrast, Students note that the Daymar delegation provision reads as follows:

> All determinations as to the scope or enforceability of this arbitration provision shall be determined by the arbitrator and not by a court.

Thus, Students argue that Daymar's alleged delegation provision does not "clearly and unmistakably" inform potential students that an arbitrator and not the court will decide whether disputes are to be arbitrated, and therefore, it cannot be enforced. They assert that in the present case, the text found in the agreement mentions only enforceability, and not preliminary disputes. They argue that the law has a strong presumption against construing an agreement to provide for arbitration of the arbitrability of a dispute. *See Rent-A-Center* at 2778, n. 1. Accordingly, they urge this Court to affirm.

Concerning the unconscionability of the agreement, the Students assert that the provision was contained in a contract of adhesion drafted by Daymar, obtained by fraud, and imposed on the Students. The Students argue that the provision was hidden from notice in fine print on the back of a preprinted form, and contained numerous terms which operated to the severe and disproportionate disadvantage of the Students by preventing them from enforcing their legal rights and allowing Daymar to shield itself from the consequences of that fraud.

Procedurally, the Students assert that the provision was unconscionable for three reasons: (1) Because it was a contract of adhesion; (2) Because it was an "unfair surprise"; and (3) Because it was procedurally unconscionable per se. Concerning their first assertion, that the contract was one of adhesion, the Students argue that they were given a "take it or leave it" scenario, and that they were not given the option to modify the contract in any way. The Students argue that because it was a contract of adhesion, it demanded greater

scrutiny than it would otherwise. Moreover, the Students note that each of them signed their name in the middle of the enrollment agreement and not at the end. Thus, they assert that, pursuant to KRS 446.060, all of the terms that followed the signature, including the arbitration provision, are excluded from the agreement.[13]

The Students also assert that the contract was substantively unconscionable, and that the court below was correct in so finding. The Students assert that the arbitration provision required Students to split the costs and fees of arbitration with Daymar, including the cost of the arbitrator. Students assert that the costs of arbitration could amount to much more than the cost of litigating in a judicial forum, and that such a cost is unconscionable, particularly in light of the fact that the Students are largely unemployed or hold low-paying jobs, and owe student loans.

Concerning Daymar's argument that the court below erred in refusing to sever the cost-splitting provision from the remainder of the arbitration provision, the Students argue that the court was correct in refusing to do so. First, Students assert that this argument was not timely raised to the circuit court, and accordingly, should not be considered by this Court on appeal. Alternatively, Students argue that absent a severability clause, it is improper to sever some clauses in a contract while enforcing others, and that accordingly, the court must void the entire

[13] In its reply brief, Daymar disagrees with the applicability of KRS 446.060, stating that by its plain language, that provision only applies when the law requires a writing to be signed by a party, as is the case with wills, and contracts within the Uniform Commercial Code. Alternatively, they assert that KRS 446.060 does not abolish the doctrine of incorporation by reference, and that the back page of the agreement is incorporated by reference.

arbitration agreement. Moreover, Students argue that the parties clearly did not intend for the contract to be severable, and that because there was no severability clause in the agreement, this Court should affirm the trial court's refusal to sever the cost-splitting provision.

Alternatively, Daymar argues that even if this Court were to find that the cost-splitting provision should have been severed, there would be no resolution as to who is responsible for paying the expenses of arbitration, and that Students may still be found to be responsible for paying half of the costs.[14]

In addressing the arguments of the parties, we turn first to the issue of whether *Rent-A-Center v. Jackson* is applicable to the matter *sub judice*. As noted, *Rent-A-Center* concerned a former employee's 42 U.S.C. §1981 action alleging racial discrimination. The employer moved to compel arbitration pursuant to the arbitration agreement that Jackson signed as a condition of employment. Our United States Supreme Court ultimately held that the provision of the employment

[14] In making this assertion, Students recognize what they describe as Daymar's "belated offer" to pay the arbitration fees for the Students. Students note the trial court's finding that, "Defendant's offer to pay all of the costs of arbitration, without later seeking a recovery of those costs from the Plaintiffs, was made only after the order denying arbitration was entered. Defendant's post-judgment offer made to avoid the finding of unconscionability does not satisfy any of the grounds contained in CR 59.01 [sic] to alter, amend, or vacate a judgment." Thus, Students argue that the trial court was correct in finding that: (a) Daymar had not originally agreed to pay all costs of arbitration; (b) Daymar's offer was intended to avoid unconscionability; and (c) Daymar's offer to pay for the costs of arbitration was untimely and could not be considered by the Court in a CR 59.05 motion. Alternatively, Students argue that even if Daymar did pay the fees of the arbitrator and the AAA administrative fees, Students would still be responsible for all other expenses, including discovery and expert fees. Thus, Students assert that Daymar's offer to pay the arbitration fees does not resolve the unconscionability of the arbitration provision.

agreement which delegated to an arbitrator exclusive authority to resolve disputes relating to enforcement of the agreement was a valid delegation under the FAA.[15]

In so finding, the Supreme Court recognized that arbitration agreements, like other contracts, can be void for unconscionability. *Rent-A-Center* at 2776. However, the Court went on to note that, under the FAA, a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate. The Court found that as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. *Id.* at 2778. The Court thus concluded that the question to be decided by the court is whether the party is challenging the agreement as a whole, or whether the party is specifically challenging the delegation clause. *Id.* In the latter case, the court reasons, it is for the court, and not an arbitrator, to make the determination.

Having reviewed *Rent-A-Center*, the arguments of the parties, and the record, we are ultimately in agreement with the court below that the court was the appropriate forum to make a determination as to whether the delegation provision

[15] In addressing the holding of *Rent-A-Center*, we briefly turn to the issue of the applicability of the FAA to this matter. We agree with Daymar's assertion that the FAA is applicable because Students' enrollment agreements govern a relationship affecting commerce. *See* 9 U.S.C. §§1-2. As our federal courts have held, the "involving commerce" language included in the FAA is as broad as the scope of Congress' full power under the commerce close. *See Saneii v. Robards*, 289 F.Supp.2d 855, 858 (W.D. Ky. 2003). *Sub judice*, the enrollment agreement discloses that federal financial aid regulations apply to Daymar's financial aid programs, and all Students allege that they were damaged by taking out student loans. Regardless, we note that our Kentucky Supreme Court recently observed that "whether state or federal law governs makes little practical difference … because the Kentucky Uniform Arbitration Act (KUAA) contained in Kentucky Revised Statutes (KRS) Chapter 417 is similar to and has been construed consistently with the FAA." *American Gen. Home Equity*, *Inc. v. Kestel*, 253 S.W.3d 542, 550 (Ky. 2008).

itself was unconscionable. In *Rent-A-Center*, the entire contract at issue was an agreement between Rent-A-Center and Jackson to arbitrate disputes related to his employment, and Jackson made no challenge to the delegation provision specifically, but only to the contract as a whole. Such was not the case *sub judice*.

Sub judice, Students challenged the delegation provision specifically, claiming that it was unconscionable to require them to pay for an arbitrator to determine whether the agreement was, in fact, arbitrable.[16] As our Supreme Court noted, "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Id.* at 2778, quoting *AT & T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986).

Accordingly, we believe the court was correct to review the issue of whether the delegation provision itself was conscionable, and to make a determination as to same. In finding that the conscionability of the delegation provision was an appropriate issue for the trial court to address, we turn now to whether an analysis of cost-prohibitiveness was an appropriate basis for finding unconscionability. Ultimately, having reviewed the arbitration agreement itself,

[16] In so finding, we note briefly our disagreement with the remainder of Students' argument concerning the difference between the delegation provision in the Daymar agreement and that contained in the *Rent-A-Center* agreement. Students assert that the delegation provision provided in the Daymar agreement does not "clearly and unmistakably" inform potential students that an arbitrator and not a court, will decide whether disputes are to be arbitrated. They assert that the terms "scope" and "enforceability" are vague and ambiguous in comparison with the provision contained in the *Rent-A-Center* agreement. We disagree, and find no significant difference between the wording of the two provisions. Nevertheless, for the reasons previously set forth herein, we believe that the court below appropriately addressed the issue of whether the delegation provision was conscionable.

the arguments of the parties, and the applicable law, we are of the opinion that the court below erred in finding cost-prohibitiveness as an appropriate basis for finding the agreement to be unconscionable.

Our law is clear that a written agreement, duly executed by the party to be held, who had an opportunity to read it, will be enforced according to its terms. *Conseco Finance Servicing Co. v. Wilder*, 47 S.W.3d 335, 341 (Ky.App. 2001). While the doctrine of unconscionability does provide a narrow exception to that rule, we find nothing unconscionable about the form of the agreement in this instance. Importantly, our review of the agreement reveals that it is only two pages, front and back. Moreover, we find the Students' assertion that they were unaware of the contents of the back page of the agreement to be unpersuasive, particularly in light of the fact that they each placed their initials next to the only text on the page which was capitalized and in bold, indicating that they had read both the front and back page of the agreement.

Turning first to the issue of procedural unconscionability, we note that relevant factors in determining if an agreement is procedurally unconscionable include whether the contract's terms are conspicuous and comprehensible, whether they are oppressive, and whether the party seeking to invalidate the contract had a meaningful choice about whether to sign it. *See Conseco* at 343. We do not find that these circumstances were present in this instance. The arbitration provision at issue looks no different than the remainder of the agreement, and was included on page two of what was only a two-page contract. While Students asserted below

that the provision was "hidden in a sea of boilerplate" and very difficult to find, read, or understand, we do not find this to be the case.

Moreover, we disagree with the Students' assertion that the agreement was procedurally unconscionable per se simply because it was a contract of adhesion. Our courts have clearly rejected this position. In *Conseco Fin. Serv. Corp. v. Wilder*, this Court held that an arbitration provision is not unconscionable merely because it is found in an adhesion contract. 47 S.W.3d 335, 342-43 (Ky.App. 2001). Instead, this Court held that, "The fact that the clause appeared single-spaced on the back of a preprinted form did not render it procedurally unconscionable." *Id.* Such was the case in the matter *sub judice*. Accordingly, we must reject the argument that the contract was procedurally unconscionable per se.

Concerning the argument that the students are not bound by the terms of the provision on the second page, which would include the arbitration provision, because they signed their names in the middle of the agreement and not at the end, again, we must disagree. We find persuasive Daymar's argument that KRS 446.060 does not abolish the doctrine of incorporation by reference, which is the case with the back page of the agreement in this instance. As we have previously held, when a party signs below incorporating language in a document, the back page of the agreement is incorporated by reference. *See Hertz Comm. Leasing v. Joseph*, 641 S.W.2d 753, 756 (Ky.App. 1982). *Sub judice*, the enrollment agreement's incorporating language was the only text on the page in bold, capital letters, and each Student wrote his or her initials next to it. Having so found, we

are not persuaded by the argument that the agreement was procedurally unconscionable.

We now turn to the issue of whether the agreement to arbitrate was substantively unconscionable, and whether the court erred in applying a cost-prohibitive analysis in finding same. We note that substantive unconscionability refers to contractual terms that are unreasonably or grossly favorable to one side, and to which the disfavored party does not assent. *Conseco* at 343, quoting *Harris v. Greentree Financial Corp*., 183 F.3d 173 (3rd Cir. 1999). Ultimately, having reviewed the law at issue, we are persuaded by the holding of the Sixth Circuit in *Stutler v. T.K. Constructors, Inc.*, 448 F.3d 343 (6th Cir. 2006), which clearly limited a cost-prohibitiveness analysis to disputes over the arbitrability of federal statutory claims. While Students contend that it would be "nonsensical" for federal courts to apply this analysis only to federal statutory claims, we nevertheless note that this is the clear holding of *Stutler*. Moreover, we note that this policy does not seem "nonsensical" in any event. In a case involving a federal statutory claim, the court is weighing both the federal policy at issue and the pro-arbitration policy of the FAA. When a federal statutory claim is not involved, the FAA trumps any conflicting state law interest. *Id.* at 346.

Beyond the holding in *Stutler*, we must disagree with the conclusion of the court below that that it would be unconscionable for Students to be required to pay fees which they could incur in arbitration, including discovery and expert fees. A review of the law in this Commonwealth reveals that no Kentucky court

has held that expert discovery costs incurred during the course of arbitration can render an arbitration provision unenforceable. Regardless, these are expenses which would be incurred by the Students regardless of whether they proceeded against Daymar through arbitration or in court.

Ultimately, were we to uphold the cost-prohibitiveness analysis of the court below, a very large portion of the citizenry of this Commonwealth would be able to avoid a contractual commitment to arbitrate merely by showing the court that they made less than a certain salary. Quite simply, the law of this Commonwealth does not support the conclusion that the cost of arbitration can render an arbitration provision unconscionable.[17] Having so found, we are compelled to reverse.

Wherefore, for the foregoing reasons, we hereby reverse the October 7, 2010, order of the McCracken Circuit Court, and remand this matter for additional proceedings not inconsistent with this opinion.

CLAYTON, JUDGE, CONCURS.

LAMBERT, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

LAMBERT, JUDGE, DISSENTING: Respectfully I dissent, and would affirm the findings and conclusions of the trial court in their entirety.

[17] In any event, we note that the evidence as to the cost-prohibitiveness of arbitrating was dubious in this instance. Below, proof was introduced to indicate that the cost of arbitrating would be minimal if Students were seeking less than $75,000, which all students were in this instance. Beyond this, the AAA has a clear process in place to seek a waiver or reduction in arbitration fees.

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