*MISSOURI COURT OF APPEALS*
*WESTERN DISTRICT*

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| **ASHLEE RUHL, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,** | ) | **WD70189** |
| | ) | **OPINION FILED:** |
| **Respondent,** | ) | |
| **v.** | ) | **November 3, 2009** |
| **LEE'S SUMMIT HONDA,** | ) | |
| **Appellant.** | ) | |

**Appeal from the Circuit Court of Jackson County, Missouri**
**Honorable Jack Richard Grate, Jr., Judge**

**Before: Thomas H. Newton, C.J., Victor C. Howard, and James Edward Welsh, JJ.**

Lee's Summit Honda (Honda) appeals the judgment denying its motion to compel Ms. Ashlee Ruhl to arbitrate her individual claims against it. Ms. Ruhl filed a class action against Honda, seeking damages for its unauthorized practice of law, section 484.020,[1] and its deceptive practices connected with the sale of merchandise under the Missouri Merchandising Practices Act (MPA), sections 407.010-407.130. Honda claims that the trial court erred in failing to compel arbitration because the claims were within scope of the parties' arbitration agreement, the unauthorized practice of law claim was arbitrable, and the arbitration agreement was valid. We reverse and remand.

[1] Statutory references are to RSMo 2000 and the Cumulative Supplement 2008.

## Factual and Procedural Background

Ms. Ruhl sued Honda for damages on behalf of herself and others similarly situated. The following facts were taken from the pleadings. Ms. Ruhl purchased and/or financed a new car from Honda. She signed a Retail Purchase Agreement, describing her total purchase price to include a "Cash Price of Vehicle," "Other Goods/Services," and a "Dealership Administrative Fee" (fee) of $199.95. On the same day, she also signed an Agreement to Arbitrate.

On January 23, 2008, Ms. Ruhl, on behalf of herself and others who paid the fee as part of the purchase price, sued Honda for damages on two counts and sought class certification. The first count alleged that Honda engaged in the unauthorized practice of law or did law business violating section 484.020 because it charged a fee separate from other sale costs for preparing legal instruments to finance the transactions. The second count alleged that Honda engaged in unfair and deceptive practices connected with the sale of merchandise under section 407.010 *et seq*. of the MPA based upon the same alleged conduct. The damages sought for Honda's violation of these statutes included treble damages under section 484.020, attorney fees and costs, costs for class notice and administration, and punitive damages under section 407.025.

On March 14, 2008, Honda filed its answer and motion to compel arbitration. In its answer, Honda denied engaging in the business of "brokering" the sale or financing of vehicles but admitted that it helps customers seek financing for purchases. It asked the trial court to deny class certification. In its motion to compel arbitration, Honda asked the court to compel Ms. Ruhl to arbitrate her individual claims because she signed an arbitration agreement; her claims were within the scope of the agreement; and the arbitration agreement waives her ability to bring or participate in a class action.

The trial court denied the motion to compel. It found that the claim of unauthorized practice of law was not subject to arbitration because the claim did not require interpretation of the contract or seek to invalidate or enforce any contractual provisions and because the courts exclusively decide what constitutes the unauthorized practice of law. The trial court also found the arbitration agreement to be procedurally and substantively unconscionable. Honda appeals.

**Standard of Review**

The denial of a motion to compel arbitration is reviewed *de novo*. *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15, 21 (Mo. App. W.D. 2008).

**Legal Analysis**

In its first point, Honda argues that the trial court erred in denying its motion to compel arbitration because Ms. Ruhl's claims—unauthorized practice of law and deceptive practice in selling merchandise—were within the scope of the arbitration agreement and were proper matters for arbitration. In its second point, Honda argues that the trial court erred in denying its motion to compel arbitration because the arbitration agreement was neither procedurally nor substantively unconscionable.

Under the Federal Arbitration Act (FAA), 9 U.S.C. § 1, *et seq.*, valid arbitration agreements that affect interstate commerce must be enforced unless an exception applies. *See Kansas City Urology, P.A. v. United Healthcare Servs.*, 261 S.W.3d 7, 10-11 (Mo. App. W.D. 2008). Because the factual allegations here show interstate activity, the FAA applies. *Id.* at 10. Arbitration should be compelled if the disputes are within the scope of an existing valid arbitration agreement. *Swain v. Auto Servs.*, 128 S.W.3d 103, 107 (Mo. App. E.D. 2003).

Honda argues that the trial court erred in determining that Ms. Ruhl's claims did not fit within the scope of the agreement because the challenged purchase price of the new vehicle was

a term of the contract such that the arbitration agreement covered it. A party is not required to arbitrate matters that it has not agreed to arbitrate. *Morrow*, 273 S.W.3d at 21; *Kansas City Urology, P.A.*, 261 S.W.3d at 11. We liberally construe language in arbitration agreements to cover the scope of the dispute. *Getz Recycling Inc. v. Watts*, 71 S.W.3d 224, 229 (Mo. App. W.D. 2002). "A broad scope creates a strong presumption in favor of arbitrability, and the [trial] court should order arbitration of any dispute that 'touches' matters covered by the parties' contract." *See Kansas City Urology, P.A.*, 261 S.W.3d at 12.

> The arbitration agreement between Honda and Ms. Ruhl, in relevant part, states:
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> > [The Parties agree] to settle by binding arbitration any dispute between them regarding: (1) the purchase/lease by Customer(s) of the above-referenced Vehicle; . . . (4) any dispute with respect to the existence, scope or validity of this Agreement. Matters that the Parties agree to arbitrate include . . . any alleged unfair, deceptive, or unconscionable acts or practices.

This arbitration agreement is broad, so we apply the presumption. *See id.* The underlying allegation for Ms. Ruhl's claims is that Honda charging a fee to prepare legal documents to finance vehicles was unlawful. Because the damages for the claims are based on refunding the charged fee—a component of the total purchase price listed in the contract—the claims are within the scope of the arbitration agreement, which covers "any dispute . . . regarding . . . the purchase." *See id.* at 14 (finding disputes within scope of arbitration agreement because the damages "touch[ed] matters covered by the parties' contracts"); *see also Piazza v. Combs*, 226 S.W.3d 211, 226 (Mo. App. W.D. 2007) (listing price as a term of a contract).

Next, we determine whether the unauthorized practice of law claim is arbitrable.[2] "Although all statutory claims may not be appropriate for arbitration," a party who agreed to arbitrate should be compelled to do so absent the legislature's "'intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). We look for such an intention in the text of the statute, its legislative history, or an inherent conflict between arbitration and the statute's purpose. *Id.*

Our review of section 484.020[3] does not reveal an intention to preclude arbitration as a forum in which to seek redress. The statute has been amended but only to provide exemptions from liability to certain business entities. § 484.020 (see history). The judiciary defines and regulates the practice of law; the statute's purpose is to provide penalties as an aide to the judiciary in regulating the practice of law. *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 702-03 (Mo. banc 2008). A statute's purpose is served where the prospective litigant may effectively vindicate her statutory claim in the arbitral forum. *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300, 311 (Mo. App. W.D. 2005). The arbitration agreement states

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[2] *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("[T]he Court of Appeals correctly conducted a two-step inquiry, first determining whether the parties' agreement to arbitrate reached the statutory issues, and then, upon finding it did, considering whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims."); *see also*, Alison Brooke Overby, *Arbitrability of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137, 1138, 1154 n.127 (1986).

[3] Section 484.020, in relevant part states:

> 1. No person shall engage in the practice of law or do law business, as defined in section 484.010, or both, unless he shall have been duly licensed therefor and while his license therefor is in full force and effect, nor shall any . . . corporation . . . , engage in the practice of law or do law business as defined in section 484.010, or both.
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> 2. Any . . . corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor . . . and shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof by the . . . corporation paying the same within two years from the date the same shall have been paid . . . .

that the "arbitrators will apply and be bound by the governing state law when making decisions." We trust that the unauthorized practice of law claim will be decided using Missouri law, thereby allowing the statutory claim to be effectively vindicated.[4] *See Thomas v. Carnival Corp*., 573 F.3d 1113, 1124 (11th Cir. 2009) (finding arbitration clause that would apply foreign law to a U.S. statutory claim would preclude party from vindicating statutory claim).

Because the judiciary "has the inherent and ultimate authority to supervise the practice of law" and "prevent the unauthorized practice of law," we must also determine whether case law precludes arbitration of this claim. *Carpenter*, 250 S.W.3d at 702. The trial court determined that arbitrating this claim would interfere with the "exclusive authority of the Courts to adjudicate all issues regarding the practice of law," citing *Eisel v. Midwest Bankcentre*, 230 S.W.3d 335 (Mo. banc 2007). In *Eisel*, the Missouri Supreme Court stated, "The judiciary is necessarily the sole arbiter of what constitutes the practice of law." *Id.* at 338.

Honda argues that Missouri case law does not prevent an arbitrator from deciding whether Honda engaged in the unauthorized practice of law, relying on *Bass v. Carmax Auto Superstores*, No.07-0883-CV-W-ODS, 2008 WL 2705506, at *2 (W.D. Mo. July 9, 2008). The *Bass* court determined that an unauthorized practice of law claim was arbitrable after limiting the proposition in *Eisel* to a discussion of the court's "role [compared to] the legislature's" in controlling the practice of law. *Bass*, 2008 WL 2705506, at *2. It then concluded that there was no Missouri law preventing arbitration of unauthorized practice of law claims. *Id.* It reasoned that such a claim was arbitrable because an arbitrator has the duty to apply the law regardless of its source based on the parties' arbitration agreement. *Id.*

[4] The federal law permits courts to vacate an arbitration award for a manifest disregard of the law when the challenging party establishes that the arbitrator "'understood and correctly stated the law but proceeded to ignore it.'" *Mead v. Moloney Sec. Co.*, 274 S.W.3d 537, 544 (Mo. App. E.D. 2008).

Although *Eisel*'s statement that the judiciary is the "sole arbiter" could suggest an intention to preclude the waiver of the judicial forum for unauthorized practice claims, we agree with the *Bass* court's interpretation of *Eisel*.[5] We restrict Eisel's statement to the context in which it was made—explaining the legislature's limited effect on the court's power "to enjoin or otherwise punish" fees for the unauthorized practice of law. *See Eisel*, 230 S.W.3d at 338-39, 339 n.5. Contrary to the trial court's conclusion, arbitrating the unauthorized practice of law claim would not interfere with our exclusive authority to decide what constitutes the practice of law. Thus, we cannot preclude the resolution of this claim in the arbitral forum. Honda's first point is granted.

Having determined that the claims are within the scope of the agreement and are arbitrable, we now address whether the arbitration agreement is unconscionable. Although the FAA applies, we use state law to determine whether an arbitration agreement is valid. *Mead v. Moloney Sec. Co.*, 274 S.W.3d 537, 542 (Mo. App. E.D. 2009). Honda argues that the trial court erred in finding the agreement was unconscionable because there was no evidence to support procedural unconscionability and the class waiver itself did not constitute substantive unconscionability.

Procedural unconscionability involves contract formation including high pressure tactics used on the parties, fine print in the agreement, misrepresentations, and unequal bargaining power. *Whitney*, 173 S.W.3d at 308. The trial court determined that the arbitration agreement was procedurally unconscionable because Ms. Ruhl "was in a significantly inferior bargaining position, and was presented with a take-it-or-leave-it, preprinted 'Agreement to Arbitrate.'" Relying on *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 858, 861 (Mo. banc 2006), Honda

[5] We consider the lower federal courts' opinions, but they are not binding. *See Kansas City Urology, P.A. v. United Healthcare Servs.*, 261 S.W.3d 7, 11 (Mo. App. W.D. 2008).

argues that no evidence supports the trial court's finding of procedural unconscionability because the finding was based solely on allegations.

*Schneider* held that a party opposing arbitration cannot prevail simply on an allegation that a pre-printed contract is a contract of adhesion without other proof. 194 S.W.3d at 857. That party has the burden to show that the contract was a contract of adhesion—a contract offered on a "'take this or nothing' basis" because the weaker party could not look elsewhere for a more attractive contract. *Id.*

In her response to Honda's motion to compel, Ms. Ruhl alleged that the arbitration agreement was procedurally unconscionable because although she did not complete discovery, Honda "never negotiated its arbitration clause and the arbitration clause is a form contract." Ms. Ruhl also alleged that the bargaining power between the class members and Honda was unequal and that "[s]he had no opportunity to change or modify any of the terms or conditions." Ms. Ruhl did not provide an affidavit to support her allegation that the arbitration agreement was non-negotiable. She only offered testimonial evidence provided to the United States Senate Committee concerning the unfairness of mandatory arbitration between franchisee car dealers and franchisor manufacturers, which mentioned automobile dealers' practice of using mandatory and binding arbitration in contracts of adhesion. This evidence of industry customs does not sufficiently support her allegation. Consequently, Ms. Ruhl failed to prove that the arbitration agreement was a contract of adhesion. *See Ryan v. Raytown Dodge Co.*, No. 70012, 2009 WL 1514442, *1 (Mo. App. W.D. June 2, 2009) (stating attorney's assertions cannot be used as proof regardless of their accuracy). Thus, the trial court erred to the extent it determined that the agreement was procedurally unconscionable because it constituted a contract of adhesion. *See Schneider*, 194 S.W.3d at 857-58.

Honda further argues that because the agreement was not a contract of adhesion we should reverse the judgment and enforce the arbitration agreement because both procedural and substantive unconscionability must be present to invalidate the agreement for unconscionability. Contrary to Honda's contention, an arbitration agreement can be invalidated absent procedural unconscionability when that provision is substantively unconscionable. *See id.* at 858-61 (refusing to enforce certain provisions within an arbitration agreement that were substantively unconscionable without concluding procedural unconscionability was present); *but see Repair Masters Constr. v. Gary*, 277 S.W.3d 854, 858 (Mo. App. E.D. 2009) (stating that procedural and substantive unconscionability are needed to void a contract or provision). We have stated that procedural unconscionability does not need to be significant when substantive unconscionability is present. *See Whitney*, 173 S.W.3d 300 at 310. This is because "[a]n unconscionable contract or clause of a contract will not be enforced." *Schneider*, 194 S.W.3d at 858. Although Ms. Ruhl did not prove this was a contract of adhesion, there were still aspects of procedural unconscionability because the contract was pre-printed and manifested the unequal bargaining power between Honda, a corporation, and Ms. Ruhl, an individual. *See Whitney*, 173 S.W.3d at 310.

Substantive unconscionability involves the terms within the contract. *Id.* at 308. "An arbitration clause that defeats the prospect of class-action treatment in a setting where the practical effect affords the defendant immunity is unconscionable" and thereby unenforceable. *Woods v. QC Fin. Servs., Inc.*, 280 S.W.3d 90, 100 (Mo. App. E.D. 2008) (citing *Whitney*, 173 S.W.3d at 309). Honda argues that the class waiver in its arbitration agreement was not unduly harsh or unexpected. Honda distinguishes *Woods* and *Whitney* by arguing that the courts in those cases found class action waivers to be unconscionable because they were harsh to those

individual consumers and because of significant procedural unconscionability, which is not present in Honda's arbitration agreement. The issue before us is whether the language of the arbitration clause rises to the level of unconscionability present in *Woods* and *Whitney*.

The arbitration agreement in relevant part states:

> Nothing in this Agreement shall be interpreted as limiting or precluding the arbitrator(s) from awarding monetary damages or any other relief provided for by law. Furthermore, neither party is precluded from filing a complaint with the Office of the Attorney General of this State or from participating in a mediation program administered by the Attorney General or Better Business Bureau, but the Parties agree that by entering into this Agreement, they are waiving their right to a jury trial and their right to bring or participate in any class action or multi-plaintiff action in court or through arbitration. Once one of the Parties has demanded arbitration, binding arbitration is the exclusive method for resolving any and all claims between them.

Honda argues that its arbitration clause is not unconscionable because, unlike those in *Woods* and *Whitney*, the agreement here does not have other limiting provisions in addition to the class waiver. Ms. Ruhl asserts that similar to *Woods* and *Whitney*, the class waiver here immunizes Honda from liability for this particular alleged unlawful practice. Relying on *Woods*, Ms. Ruhl claims that Honda's fee-sharing provision makes representation unattractive for an attorney. That provision provides that Honda will pay any filing fee for arbitration that exceeds the cost of what it would cost to file in court. It then provides that Honda will pay administrative costs for arbitration that exceed $750.

If she prevailed on her unauthorized practice claim, Ms. Ruhl would only be entitled to around $600; success on her MPA claim would entitle her to actual damages of $200 along with possible attorney fees and punitive damages. § 407.025. The *Woods* court determined that a plaintiff's opportunity to recover attorney fees was not sufficient to prevent finding a class waiver unconscionable. 280 S.W.3d at 97-98. The same is true here. An attorney will not find it an attractive risk to represent consumers on these claims because the potential recovery is so low.

Furthermore, consumers have a right to bring a class action if they meet certain requirements under section 407.025. To enforce the class action waiver in a situation of unequal bargaining power, on a preprinted form, would unfairly deprive them of this right.[6] Consequently, the class waiver provision would immunize Honda from such claims and allow it to continue in its alleged deceptive practices against individuals purchasing a new car. *See id.* at 99. The trial court did not err in determining that the arbitration clause was unconscionable. Honda's second point is denied.

**Conclusion**

The claims are within the scope of the arbitration agreement. Additionally, the unauthorized practice of law claim is suitable for arbitration. However, the arbitration agreement immunizes Honda from consumer claims based on the charge of a $199.95 document preparation fee and, thus, is substantively unconscionable. Because the class waiver provision is not essential to the enforcement of the arbitration agreement, it is severable. *See id.* at 100. Invalidation of the entire arbitration agreement based on an unconscionable provision that is severable would undermine the policy of the FAA. *See Swain*, 128 S.W.3d at 108.[7] Therefore, we reverse and remand the case to the trial court to enforce the arbitration agreement absent the class waiver provision.

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Thomas H. Newton, Chief Judge

Howard and Welsh, JJ. concur.

[6] "Having enacted paternalistic legislation designed to protective those that could not otherwise protect themselves, the Missouri legislature would not want the protections of Chapter 407 to be waived by those deemed in need of protection." *Huch v. Charter Commc'ns* ., 290 S.W.3d 721, 727 (Mo. banc 2009).

[7] The arbitration agreement states that if any provision is "found unenforceable for any reason," the remainder of the agreement shall be enforceable.