

MISSOURI SUPREME COURT

Appeal No. SC 90647

BEVERLY BREWER,

Plaintiff/Respondent,

vs.

MISSOURI TITLE LOANS, INC.,

Defendant/Appellant.

Appellant's Substitute Reply Brief

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I. INTRODUCTION

The issue here, according to plaintiff, is not whether Missouri Title Loans' class action waiver clause is unconscionable, i.e., one that no man in his senses and not under delusion would make, and which no honest and fair man would accept, but rather, whether a company can allegedly immunize itself from suits based on Missouri consumer protection laws by "inserting" a class action waiver into its contract, "especially where [even though amended petition contains no allegation] that class waiver invites systematic and egregious violations of the law that profits the company, but causes financial damage to consumers." *Response* at 26.

Plaintiff relies on the uniqueness and effect of the arbitration provision in responding to Missouri Title Loans' opening brief. She cites the many negatives she contends would result if the arbitration provision's class action waiver were enforced. Plaintiff's emphasis on so-called immunization instead of on unconscionability as it has been defined in Missouri for more than 100 years, is an obvious attempt to add a consumer-oriented social justice component to the analysis of

unconscionability in arbitration agreements.¹ Plaintiff, in essence, argues tautologically that an agreement to arbitrate claims individually is unconscionable simply because it is an agreement to arbitrate claims individually.

Plaintiff also glosses over the undisputed evidence that the Loan Agreement is not a contract of adhesion. Instead, and in spite of such evidence, plaintiff stresses the general need for a sharpened inquiry concerning unconscionability whenever a contract of adhesion is involved. That general principle is not applicable here.

Plaintiff also fails to take into account the clear standard mandated by the Supreme Court in *Perry v. Thomas*, 482 U.S. 483 (1987) and emphasizes instead the similarities she sees between the instant case and *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90 (Mo. App. 2008).

¹ While the class action waiver, applicable to both parties, reminds plaintiff's counsel of a popular quote from the French novelist Anatole France, it is worth noting that France also stated: "I am a Socialist because Socialism is justice." *New York Times*, December 14, 1913; *cf. Response* at 63.

Under *Perry* and its progeny, the trial court's decision is preempted by the FAA. *Woods* is clearly distinguishable and should not determine the outcome of this case.

Similarly, plaintiff trumpets various rights to which she claims she is entitled under the Missouri Merchandising Practices Act ("MPA"), §407.010, *et seq.*, but ignores the fact that the MPA does not apply to businesses, such as Missouri Title Loans, who are supervised and regulated by the Missouri Division of Finance.

For the foregoing reasons, and as discussed in Missouri Title Loans' opening brief, the Court should reverse the trial court's finding of unconscionability.

REPLY ARGUMENT

I. Plaintiff improperly relies on the uniqueness of the arbitration clause in framing her unconscionability argument; her conclusion that the class action waiver immunizes Missouri Title Loans, and is therefore unconscionable, can be reached only by parsing the provisions themselves to determine what they provide, and thus the trial court's ruling and the *Woods* holding are preempted by federal law.

Plaintiff's claim that Missouri Title Loans' class action waiver is unconscionable rests largely on *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90 (Mo. App. 2008). The court in *Woods* determined that "the unconscionability issue in this matter centers on access to a class-wide proceeding in the arbitral setting." *Id.* at 97. More specifically, the *Woods* court, relying on a New Jersey Supreme Court decision, *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 912 A.2d 88 (N.J. 2006), concluded that "[a] class-action waiver in a payday loan contract reduces the possibility of attracting competent counsel to advance the cause of action, and thus can functionally exculpate wrongful conduct." *Id.* (citing *Muhammad*, 912 A.2d at 100). This legal reasoning, plaintiff contends, fully resolves this case. *Response* at 33. The trial court also cited *Muhammad* among examples of cases involving consumers, predictably small damages, and allegations of mass wrongdoing in which courts have struck down as unconscionable arbitration provisions with class action waivers. *See Substitute Brief* at A03.

The trial court's reasoning, as well as plaintiff's immunization arguments based on *Woods*, are similar to *Muhammad*. The trial court, as in *Muhammad*, found that the class action waiver in Missouri Title Loans'

arbitration clause acted as an exculpatory clause protecting the stronger party. Also, Missouri Title Loans' arbitration clause precludes class actions in any forum. Moreover, plaintiff contends that Missouri Title Loans' class action waiver is unconscionable because it provides for arbitration of disputes on an individual basis in place of class claims.

Here, plaintiff relies on many of the so-called immunizing effects of the arbitration provisions found in *Muhammad* (and subsequently shown in *Litman* to be invalid) to frame her unconscionability arguments.² For example, plaintiff points out the claims involve small damages, borrowers allegedly would be highly unlikely to find counsel, and plaintiff supposedly gave up many legal rights. *Response* at 35–36.

Also, the trial court held that “to the extent that it attempts to prohibit class actions and arbitrations, Defendant’s arbitration clause is unconscionable under Missouri law. Defendant’s arbitration clause is also

² Lacking a sufficient argument on the issues, plaintiff repeatedly refers to the interest rate of 300% in an obvious attempt to garner sympathy from the Court. *See Response* at 34–36.

unenforceable for an entirely separate ground: it functions as an exculpatory provision.” *Substitute Brief* at A07. Significantly, plaintiff only asked the trial court to consider whether the arbitration clause was unconscionable, not the contract as a whole.

Under *Perry v. Thomas*, 482 U.S. 483 (1987) and *Gay v. CreditInform*, 511 F.3d 369 (3rd Cir. 2007), federal law preempts the holding in *Muhammad. Litman v. Celco Partnership*, U.S. Dist. LEXIS 87579, *21 (D.N.J., September 29, 2008). In *Litman*, the court noted the New Jersey Supreme Court’s claim that “as a matter of generally applicable state contract law,” it was unconscionable to deprive Muhammad of the mechanism of a class-wide action. *Id.* at *16. Significantly, in *Muhammad*, as in the instant case, the court did not consider the validity of the contract as a whole, but rather the arbitration agreement separate and apart from the contract. *Id.* Thus, the issue was limited in *Muhammad*, as it is in the instant case, to whether it was unconscionable to deprive plaintiff of the mechanism of a class action in arbitration.

The holding in *Muhammad* involving the class action waiver, “written ostensibly to apply general principles of contract law” and

seemingly neutral,³ did not end the *Litman* court’s analysis. *Id.* at *17. The court noted that the Third Circuit, when confronted with a similar seemingly neutral holding in *CreditInform*, on the same issue, had ruled that such a holding interfered with a proper application of federal law and the FAA. *Id.* (citing *CreditInform*, 511 F.3d at 395). The reason? Because “a finding that arbitration provisions in [the Pennsylvania state] cases are unconscionable can be reached only by parsing the provisions themselves to determine what they provide.” *Litman* at *17 (quoting *CreditInform* at

³ Recognizing that unconscionability entails both procedural and substantive aspects, the court in *Muhammad* found: “As a matter of generally applicable state contract law, it was unconscionable for defendants to deprive Muhammad of the mechanism of a class-wide action, whether in arbitration or in court litigation. The public interest at stake in her ability and the ability of her fellow consumers effectively to pursue their statutory rights under this State’s consumer protection laws overrides defendants’ right to seek enforcement of the class-arbitration bar in their agreement.” *Id.* at 100-01.

395).

The rationale in *Woods* follows the reasoning in *Muhammad*. The court in *Woods* found that the provision barring class actions leaves consumers with “no meaningful avenue of redress through the courts.” *Woods*, 280 S.W.3d at 98. By denying class arbitration, defendant in that case “has precluded the possibility that a group of its consumers might join together to seek relief that would be impractical for any of them to obtain alone.” *Id.* The court in *Woods* also determined that individualizing each claim would insulate and immunize defendant from scrutiny and accountability. *Id.*

Where, as in this case, the competing interests are promotion of arbitration agreement and the protection of class actions prohibited by such agreements, under *Perry* and *CreditInform*, the liberal federal policy favoring arbitration agreements must prevail. *CreditInform*, 511 F.3d at 394. The Supreme Court has made clear that the FAA places agreements to arbitrate “as written” above an analysis of unconscionability. Indeed, “[w]hatever the benefits of class actions, the FAA ‘requires piecemeal resolution when necessary to give effect to an arbitration agreement.’” *CreditInform*, 511 F.3d at 394 (citations omitted).

Thus, “to the extent that [state courts] hold that the inclusion of a waiver of the right to bring judicial class actions in an arbitration agreement constitutes an unconscionable contract, they are not based ‘upon such ground as exist at law or in equity for the revocation of *any* contract’ pursuant to section 2 of the FAA, and therefore cannot prevent the enforcement of the arbitration provision in this case.” *Id.*

The rationale of the court in *CreditInform*, which was based on *Perry* and the FAA, clearly applies and controls this case: “It would be sophistry to contend, in the words of *Perry*, that the [Judge Dowd did] not rely on the uniqueness of an agreement to arbitrate as a basis for [his] holding that enforcement would be unconscionable.” *Id.* at 395.

The reasoning in *CreditInform* also applies to the plaintiff’s arguments:

Overall, it is perfectly obvious that [plaintiff] relies on the uniqueness of the arbitration provision in framing her unconscionability argument. Nothing could be clearer because her argument is not predicated on a contention that [defendant] misled her as to the Agreement’s terms or forced her by some unlawful coercion to enter into it and accept the

arbitration provision. Nor can she even fairly contend that she was under any compulsion to enter into the Agreement which she clearly views as having been essentially worthless to her. Quite to the contrary she contends that the provision is unconscionable because of what it provides, i.e., arbitration of disputes on an individual basis in place of litigation possibly brought on a class action basis.

Id.

Under the sound reasoning in *Litman*, Judge Dowd has treated Missouri Title Loans' arbitration agreement differently from other contracts. *Compare* LF at 1140-45. The *Litman* court observed that, as with the state court cases analyzed in *CreditInform*, the state court in *Muhammad* had to parse the provisions of the arbitration agreement to determine what they provide. "Under [*CreditInform*], this appears to be enough to indicate that the New Jersey Supreme Court treats arbitration agreements differently from other contract provisions." *Litman* at *17–18. Moreover, just as in *CreditInform*, the plaintiffs in *Litman* "rely on the effect of the arbitration provisions to frame their unconscionability arguments: they 'contend that the provision is unconscionable because of

what it provides, i.e., arbitration of disputes on an individual basis in place of litigation possibly brought on a class action basis.” *Id.* at 18.

The same is true here. Judge Dowd could not have reached a finding of unconscionability without parsing the provisions of the arbitration clause and class action waiver to determine what they provide. Under *CreditInform*, this demonstrates that class action waivers in consumer contracts in Missouri are treated differently from other contract provisions, and such treatment is prohibited by federal law.

While the holding in *Woods* does support the trial court’s decision here, the Third Circuit and the court in *Litman* clearly demonstrate that the Commerce and Supremacy Clauses of the United States Constitution are directly involved here and why *Perry v. Thomas*, 482 U.S. 483 (1987) and Section 2 of the FAA preempt *Woods* as well as Judge Dowd’s finding of unconscionability here.⁴

⁴ *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213 (9th Cir. 2008), a case cited by plaintiff, is inapplicable here because the holding in that case applies only to obligation governed by California law. Furthermore, the court in *Lowden*, as in *Muhammad*, only reached a finding of unconscionability after carefully parsing the provisions of the

As discussed in Missouri Title Loans' Substitute Brief, when Missouri courts assess a defense of unconscionability or unenforceability of contracts that does not contain class action waivers, no consideration whatsoever is given to the amount in controversy, public policy implications, the proportionate burdens on the parties, or one party's potential inability to find an attorney. *See Substitute Brief* at 31. Based on the cases cited in the Substitute Brief and the reasoning in *CreditInform* and *Litman*, the trial court's decision to parse the provisions of the arbitration clause and class action waiver to determine what they provide impermissibly puts the unconscionability of the arbitration clause on unequal analytical footing with other Missouri contracts.

Plaintiff's counsel is well-acquainted with issues of unconscionability. Prior to representing plaintiff in this case, plaintiff's counsel handled the appeal for plaintiff in *Woods*. He engaged an expert witness to testify about the loan agreement's so-called "fine print." *Woods*, 280 S.W.3d at 96. The expert testified about the difficulties in making out the print characters using an optical scanner and how changing the font

arbitration clause to determine what they provide. *Id.* at 1220.

and line spacing could expand the arbitration clause from a single page to six pages. *Id.*

Here, plaintiff chose not to offer any expert testimony on the issue of “fine print.” Unlike *Woods*, there is no evidence here of what happened after the Loan Agreement, with its arbitration clause and class action waiver, was put through an optical scanner or to how many pages the clause can be expanded. The reason for the lack of such evidence here is evident from the Loan Agreement: Not only is the arbitration clause presented in the same font size as the other terms in the contract, but the class action waiver appears in larger font, bold type, and all capital letters.⁵ An example of fine print may be available in *Woods*, but not here, and the Loan Agreement does not support plaintiff’s statement *ipse dixit*

⁵ Plaintiff urges the Court to examine pages A2–A3 of her brief in order to view Missouri Title Loans’ arbitration clause in its so-called native font. Pages A2–A3, however, show the arbitration clause not in its native font, but in a second generation copy sent via facsimile from the Alzheimers Assoc. It is simply not true that Missouri Title Loans presented plaintiff with an arbitration clause for signature containing the infirm font shown at A2–A3.

that the arbitration clause is “abstruse fine print.” *Response* at 43.

Plaintiff failed to show that the Loan Agreement with its arbitration clause and class action waiver is a contract of adhesion. *Response* at 43–45. The facts here on this issue are very similar to the facts in *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. banc 2006), where this Court stated:

Relators offered no proof that they were unable to look elsewhere for more attractive contracts. Relators offered no proof that *all* St. Louis metropolitan area builders used the same arbitration terms or proof that they were forced to purchase their homes from McBride. Furthermore, there was no “unexpected surprise advantage” for McBride, because each of the Relators signed the contract and initialed the section of the contract providing for arbitration.

Id. at 857 (emphasis in original).

Here, not only did plaintiff fail to prove that she was unable to look elsewhere for more attractive contracts or that she was forced to obtain her loan from Missouri Title Loans, she testified that she could look and did look elsewhere and selected two other lenders to contact about a loan. She

also made it clear there were many consumer lenders she could have gone to for the same kind of loan. LF 277. Plaintiff also offered no proof that all St. Louis metropolitan area consumer lenders use the same arbitration terms. Also, the additional lenders available to plaintiff did not leave her in a “take it or leave it” position when it came to finding consumer credit, and the number of other potential lenders belies plaintiff’s implicit claim that she could not obtain the loan she wanted except by acquiescing to the Loan Agreement offered by Missouri Title Loans.

Finally, there is no unexpected surprise advantage for Missouri Title Loans because plaintiff signed the contract directly below the section providing for arbitration and class action waiver. LF 277, 277B–77C, 287–88. In short, plaintiff here, as in *Vincent*, was unable to demonstrate that the disputed Loan Agreement was a contract of adhesion.

While a heightened inquiry concerning unconscionability may be necessary when a contract of adhesion exists,⁶ such an inquiry begins after, not before or despite the lack of, a determination that a contract is one of

⁶ This principle was expressed in *Woods* and not in *Vincent* as plaintiff’s brief inadvertently indicates. *See Woods*, 280 S.W.3d at 97; *cf. Plaintiff Brief* at 33.

adhesion. Here, under *Vincent* as discussed above, the elements of adhesion that support a finding of unconscionability are not present.⁷

Also, plaintiff's three witnesses – all lawyers offered as experts – testified as consumer advocates. *See, e.g.*, LF 453, 468, 470–75, 485, 505, 521–22. Each based his testimony primarily on personal interaction with consumers seeking legal advice and representation rather than the average consumer seeking a small loan, the applicable objective standard required in these cases. *See, e.g.*, LF 322. Thus, the Court should not rely on such testimony.

Significantly, none of the lawyers testifying for plaintiff stated or opined that Missouri Title Loans' arbitration clause with its class action waiver was “a contract that no man in his senses and not under delusion

⁷ This case is distinguishable from *Woods* in other respects as well. Plaintiff's loan here was based on collateral and not made against her paycheck. There is no evidence here that the borrowers are living paycheck to paycheck, and the various factors in *Woods* which suggest significant economic compulsion or dire personal economic circumstances are not present here.

would make, on the one hand, and as no honest and fair man would accept on the other.” In short, none of these witnesses testified that the arbitration clause was unconscionable as that term is consistently defined under Missouri law.

Compelled to acknowledge the lack of adhesion and procedural unconscionability, plaintiff argues that, “[e]ven if Defendant’s class action waiver is not a contract of adhesion, it should *still* be stricken as unconscionable because there would still be ‘great substantive unconscionability but little procedural unconscionability.’” *Response* at 45 (citations omitted).

Even after fully considering plaintiff’s laundry list, however, no procedural unconscionability can be seen here. The contract formation process did not involve such things as “high pressure sales tactics, unreadable fine print, or misrepresentations” or other unfair procedural issues in the formation process of the Loan Agreement. *Vincent* at 858. Plaintiff was presented with a printed, readable contract. She had alternative loan sources, an opportunity to read the contract, the arbitration clause and class action waiver are plainly stated, no outside pressure or influence was brought to bear to influence her decision, and

she signed the contract.

Finally, *both* procedural and substantive unconscionability must exist before a contract or clause can be voided. *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 308 (Mo. App. 2005).

Plaintiff's contention that Missouri Title Loans should not be allowed to strip away her right under the MPA to a class action is without merit here. The fact is plaintiff has no statutory rights under the MPA because by its terms, the MPA does not apply to any institution or company, like Missouri Title Loans, that is under the direction and supervision of the director of the Missouri Division of Finance. § 407.020, RSMo.

For the foregoing reasons, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and plaintiff's discussion of the principles in *Gilmer* are inapplicable. *See Response* at 56–57.

Moreover, even if plaintiff did have certain rights under the MPA, including the procedural right to seek a class action, her amended petition raises individual issues of fact and law that would trump any common questions of law or fact because plaintiff's loan was not made pursuant to § 367.500, *et seq.*, RSMo. *See* LF 288; *cf.* § 367.100, *et seq.*, RSMo. Plaintiff would not be able to meet the many requirements and prerequisites for

establishing this case as a class action under Rule 52.08 of the Missouri Rules of Civil Procedure. Therefore, a class action would not be available to plaintiff in pursuing her alleged claims against Missouri Title Loans.

II. The arbitration clause, including the class action waiver provision, is clear, conspicuous, and unambiguous.

Plaintiff argues that the arbitration clause with its class action waiver was not clear, conspicuous or unambiguous. *Response* at 84. Under *Alack v. Vic Tanney International of Mo., Inc.*, 932 S.W.2d 330 (Mo. banc 1996), the arbitration clause and class action waiver may serve as an exculpatory clause if they are clearly stated and conspicuously presented in the Loan Agreement. Moreover, a determination of whether the Loan Agreement and arbitration clause is ambiguous is a question of law to be decided by the court. *Id.* at 337. As set forth in the Legal File at 288 and in the Substitute Brief at 2–4, the arbitration clause and class action waiver are clearly stated and conspicuously presented.

III. CONCLUSION

As shown in this case, as well as *Woods*, consumer loan agreements with class action waivers have attracted much attention from plaintiffs’

lawyers and prompted extensive analysis by Missouri courts. However, these agreements must be properly analyzed just as any other Missouri contract is and, because they deal with arbitration, within the constraints of the FAA. For the reasons discussed above and in Missouri Title Loans' Substitute Brief, the trial court erred in deciding that the arbitration clause with its class action waiver was unconscionable. Under decisions of the United States Supreme Court and federal law, Missouri Title Loans' arbitration clause and class action waiver are valid and enforceable as written, and the trial court's finding of unconscionability and its refusal to enforce the class action waiver provision of the arbitration clause should be reversed.

Respectfully submitted,

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ATTORNEY'S CERTIFICATE AND CERTIFICATE OF SERVICE

Pursuant to Rule 84.06(c), the signing attorney certifies:

1. The Appellant's Substitute Reply Brief filed April 21, 2010, on behalf of appellants Missouri Title Loans, Inc., complies with the requirements of Rule 55.03.
2. The brief complies with the limitations in Rule 84.06(b).
3. The brief contains 4,225 words, *including* the cover, table of contents, table of authorities, signature block, and this certificate, all of which are permitted to be excluded from the count.
4. Electronic copies of the brief, in both WordPerfect and Adobe PDF format, are on the enclosed CD-ROM, and have been scanned for viruses and are virus-free.
5. Two copies of the brief and a duplicate of the CD-ROM filed with the Court, have been served on counsel of record for respondent April 21, 2010, by mailing the same by U.S. Mail, first-class postage prepaid, to: Erich Vieth and John Campbell, counsel for Plaintiff, 701 Market Street, Suite 1450, St. Louis, MO 63101.