

Summary of SC90647, Beverly Brewer v. Missouri Title Loans

Appeal from the St. Louis circuit court, Judge David L. Dowd
Argued and submitted Nov. 9, 2011; opinion issued March 6, 2012

Attorneys: Missouri Title Loans was represented by Jonathan F. Andres and Martin M. Green of Green Jacobson PC in St. Louis, (314) 862-6800; and Brewer was represented by John Campbell, John Simon and Erich Vieth of The Simon Law Firm in St. Louis, (314) 241-2929. The Missouri Automobile Dealers' Association, which filed a brief as a friend of the Court, was represented by Gregory C. Mitchell, Jamie J. Cox and Johnny K. Richardson of Brydon, Swarengen & England PC in Jefferson City, (573) 635-7166.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A borrower and a lender entered into a loan agreement that required the borrower to resolve any disputes relating to the agreement in binding, individual arbitration under the federal arbitration act. The borrower filed suit, and the circuit court found the class arbitration waiver was unconscionable and unenforceable. On appeal, this Court held that the class arbitration waiver was unconscionable and struck it from the agreement. *Brewer v. Missouri Title Loans, Inc.* 323 S.W.3d 18 (Mo. banc 2010). The United States Supreme Court subsequently vacated that decision and remanded (sent back) the case to this Court for consideration as to whether the class arbitration waiver was unconscionable in light of the Supreme Court's recent decision in *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011).

In a 4-3 decision written by Chief Justice Richard B. Teitelman, the Supreme Court of Missouri affirms the circuit court's judgment in part, reverses it in part and remands the case. The presence and enforcement of the class arbitration waiver does not make the arbitration clause unconscionable. The borrower, however, has demonstrated unconscionability in the formation of the agreement. The Court affirms the circuit court's judgment that the class arbitration waiver is unconscionable, reverses the trial court's severance of the class arbitration waiver and requirement of an arbitrator to determine the propriety of class arbitration, and remands the case.

In a dissenting opinion, Judge Zel M. Fischer points out that the circuit court's judgment must be reversed and remanded for factual determinations because the circuit court only considered the class arbitration provision of the contract and not the whole contract to determine conscionability.

In another dissenting opinion, Judge William Ray Price Jr. disagrees with the principal opinion that the contract in this case may be invalidated by the agreement to arbitrate absent an additional defense such as fraud, duress or unconscionability. He writes separately to explain why, regardless of the goal behind the principal opinion, this contract should have been enforced as written.

Judge Michael A. Wolff, a retired judge of the Supreme Court of Missouri, and Judge Mark D. Pfeiffer, a judge of the Missouri Court of Appeals, Western District, sat in this case by special designation in place of judges George W. Draper III and Mary R. Russell, respectively.

Facts: Beverly Brewer borrowed \$2,215 from Missouri Title Loans, secured by the title to her automobile and with an annual percentage interest rate of 300 percent. The agreement required

Brewer to resolve any claim against the loan company in binding, individual arbitration under the federal arbitration act. The loan company reserved its right in the agreement to utilize the courts for enforcement of its rights in the automobile. Brewer filed a class action petition against the loan company, citing violations of the state merchandising practices act and numerous other statutes. The loan company filed a motion to stay the claims and to compel Brewer to arbitrate her claims individually. The trial court held that the class arbitration waiver was unconscionable and unenforceable and ordered the claim to proceed to arbitration to determine if it was suitable for a class arbitration proceeding. The loan company appealed, and this Court held that the class arbitration waiver was unconscionable and struck it from the agreement. *Brewer v. Missouri Title Loans, Inc.* 323 S.W.3d 18 (Mo. banc 2010). The United States Supreme Court subsequently vacated the original judgment, remanding the case to this Court for consideration in light of its decision in *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011), that the federal arbitration act generally does not allow a state to bar class action waivers by finding that an arbitration agreement is unconscionable on the basis of a class action waiver provision alone.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Court en banc holds: Although *Concepcion* generally will not permit a state to invalidate an arbitration agreement on the basis of class action waiver alone, it is silent as to state law contract defenses such as fraud, duress and unconscionability. The federal act does not preempt all state law unconscionability defenses, as shown in the recent cases *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), and *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. ___ (2012). The evidence in the record supports the determination that the arbitration clause in the agreement is unconscionable. The evidence also showed that the terms of the agreement were one-sided and that the facts of the case differed from those in *Concepcion*. The unavailability of counsel alone is insufficient to invalidate the requirement for individual arbitration but still may be considered in determining the overall unconscionability of the agreement. Even if some attorneys may take a case of individual arbitration based on the promise of fees under the merchandising practices act, this does not prove Brewer could have obtained counsel for the present case. The disparity in bargaining power and options available to Brewer are evidence of unconscionability. As such, the agreement between Brewer and Missouri Title Loans is unconscionable.

Dissenting opinion by Judge Fischer: The author writes to explain that, to be consistent with the United States Supreme Court decisions in *Concepcion*, *Marmet* and this Court's unanimous opinion, issued today, in *Robinson v. Title Lenders*, ___ S.W.3d ___ (Mo. banc 2012), the circuit court's judgment here should be reversed and the case remanded for further factual determinations. If the circuit court would have had the benefit of these opinions, it would have realized it was necessary to consider the contract as a whole under state law regarding unconscionability. Further, it is the circuit court's place to determine the necessary facts in the first instance and then apply the law based on these recent decisions.

Dissenting opinion by Judge Price: The author disagrees that the contract defenses considered here applied to the entire contract and not merely the arbitration agreement. The federal arbitration act prevents states from using contract defenses to interfere with enforcement of agreements to arbitrate. States are preempted from creating a rule inconsistent with the act even if it is "desirable for unrelated reasons." *Concepcion*, 131 S.Ct. at 1753. The principal opinion allows the arbitration agreement to influence the finding of unconscionability instead of using traditional state law principles. The author would find the principal opinion's reasons for finding the agreement unenforceable fail. The arbitration agreement is not procedurally unconscionable because Brewer's

case lacks proof that the agreement was non-negotiable. Brewer also failed to prove that she did not understand the contract and that there was an uneven advantage in bargaining power. Finding that the requirement of individual arbitration did not provide an adequate remedy conflicts with both the act and the holding of *Concepcion*. The principal opinion here does not follow or apply the controlling law.