

**Summary of SC90647, *Beverly Brewer v. Missouri Title Loans, Inc.***

Appeal from the St. Louis city circuit court, Judge David L. Dowd  
Argued and submitted May 19, 2010; opinion issued Aug. 31, 2010

**Attorneys:** The loan company was represented by Jonathan F. Andres and Martin M. Green of Green Jacobson PC in Clayton, (314) 862-6800; and Brewer was represented by John Campbell, Erich Vieth and John Simon of The Simon Law Firm PC in St. Louis, (314) 241-2929.

*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 title loan company appeals the trial court's judgment requiring a woman's suit against the company to proceed to arbitration for a determination of whether it is suitable for class arbitration. In a 4-3 decision written by Judge Richard B. Teitelman, the Supreme Court of Missouri affirms the trial court's finding that the class arbitration waiver was substantively unconscionable but reverses the judgment allowing it to proceed to arbitration, finding the only appropriate remedy is to strike the arbitration agreement in its entirety.

In a dissenting opinion, Chief Justice William Ray Price Jr. would enforce the arbitration agreement. Invalidating the entire agreement without a showing of procedural unconscionability departs from Missouri law. Further, Supreme Court precedent encourages giving effect to the parties' intent to arbitrate and severing any unconscionable portions over invalidating the entire agreement. Balancing the power between stronger business interests and weaker individual consumers is best left to the legislature.

In a separate dissenting opinion, Judge Patricia Breckenridge would hold that while a provision waiving class arbitration may be unconscionable under certain circumstances, the facts here do not support a finding of unconscionability. It is not necessary to the resolution of this case to determine whether both substantive and procedural unconscionability are required to invalidate a contract as unconscionable.

**Facts:** Beverly Brewer borrowed \$2,215 from Missouri Title Loans, securing the loan with the title to her 2003 Buick Rendezvous. She signed a loan agreement, promissory note and security agreement. The annual percentage rate on the loan was 300 percent, and the loan agreement included language requiring individual arbitration and a waiver of Brewer's right to class arbitration. Brewer filed a class action suit against Missouri Title Loans, alleging violations of statutes including the merchandising practices act, chapter 407, RSMo. The loan company moved to compel Brewer to arbitrate her claims individually. The trial court entered judgment finding the class action waiver in the loan agreement to be unconscionable and unenforceable and ordered the claim to proceed to arbitration to determine whether it was suitable for class arbitration. The loan company appeals.

**AFFIRMED IN PART; REVERSED IN PART; REMANDED.**

**Court en banc holds:** (1) The trial court correctly found the arbitration waiver was unconscionable. An unconscionable arbitration provision in a contract will not be enforced. Procedural unconscionability relates to the formalities of making an agreement and encompasses such things as fine print clauses, high-pressure sales tactics or unequal bargaining positions. Substantive unconscionability refers to undue harshness in the contract terms. Generally, there must be both procedural and substantive unconscionability before a contract or clause can be voided, but there are cases in which a contract provision is sufficiently unfair to warrant a finding of unconscionability on substantive grounds alone. The analysis in *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 858-59 (Mo. banc 2006), supports the conclusion that the party claiming unconscionability is not required to prove both forms of unconscionability. Under Missouri law, then, unconscionability can be procedural, substantive or both. Here, the evidence supports the trial court's determination that the class waiver is unconscionable. It is procedurally unconscionable because the lender was in a superior bargaining position because the high-interest loan agreement was offered to people in financial distress on a take-it or leave-it basis. It also is substantively unconscionable. A requirement for individual arbitration is unconscionable only when the practical effect of forcing a case to individual arbitration denies the injured party a remedy because a reasonable attorney would not take the suit if it could not be brought on a class basis, either in court or through class arbitration. The nature of this case would limit Brewer's ability to retain counsel to pursue a cause of action, allowing lenders to continue unfair lending practices because none of its consumers would have a practical remedy to stop the conduct.

(2) The trial court erred in severing the class arbitration waiver and in requiring an arbitrator to determine the propriety of class arbitration. The United States Supreme Court recently held that when an arbitration agreement is silent as to class arbitration, the parties cannot be compelled to submit the dispute to class arbitration because an arbitrator's authority over claims and parties is limited by the scope of the arbitration agreement; without consent, the arbitrator lacks authority to act. *Stolt-Nielsen v. Animal-Feeds International Corp.*, 130 S.Ct. 1758, 1774-1775 (2010). Here, however, a central aspect of the arbitration agreement between the loan company and Brewer was the class arbitration waiver that Brewer seeks to invalidate. With the waiver, the loan company expressly withheld consent to class arbitration. As such, the loan company cannot be compelled to participate in class arbitration. The only remedy available here is to strike the entire arbitration agreement.

(3) The class arbitration waiver here will not be enforced as a valid exculpatory clause. A defendant cannot exculpate itself from liability unless the language is clear and unambiguous. The issue here is not whether the consumer realizes she is forsaking class arbitration but instead is whether the consumer realizes she effectively is bypassing the opportunity to retain counsel to litigate a claim against the lender, effectively immunizing the lender from liability. Nothing in the language of this class arbitration waiver so informs the consumer unambiguously.

**Dissenting opinion by Chief Justice Price:** The author would hold that Brewer did not establish that the contract and the arbitration agreement it contained was procedurally unconscionable or that the class action waiver was substantively unconscionable. Under Missouri law, a contract will not be voided for unconscionability unless it is both procedurally and substantively unconscionable. *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 858-59 (Mo. banc 2006), did not discard the long-standing Missouri requirement of procedural unconscionability for

invalidating a contract or the entirety of an arbitration agreement. Rather, it enforced the parties' basic agreement to arbitrate, striking merely the substantively unconscionable provisions. Here, there is no evidence of procedural unconscionability. The loan company did not engage in coercive or high-pressure sales tactics, and the class arbitration waiver was in all capital letters and bold font. Although the loan company was in a better bargaining position, not all non-negotiated contracts are unconscionable contracts of adhesion. The evidence shows Brewer considered 20 competing companies before choosing to contract with Missouri Title Loans. As such, to the extent the principal opinion invalidates the entire arbitration agreement without a showing of procedural unconscionability, it departs from Missouri law.

The author also disagrees with the steps the principal opinion followed in analyzing the arbitration clause. Although the removal of Brewer's right to arbitrate on a class basis may diminish her bargaining power and the amount of attorneys fees available, it does not substantively – or practically – bar her from an adequate remedy for any harm she has suffered. *Charles v. Spradling*, 524 S.W.2d 820, 824 (Mo. 1975), is directly on point on this issue and is directly contrary to the argument used in the principal opinion. Further, *Stolt-Nielsen* does not hold that state courts no longer may sever class waivers without voiding the entire arbitration agreement. In fact, it provides that if the parties do not demonstrate in some way an affirmative intent to engage in class arbitration, then they will proceed to individual arbitration. As such, the principal opinion's result of class action litigation is contrary to the result in *Stolt-Nielsen*.

The author would hold that class waivers in arbitration are enforceable. Balancing the competing public policies behind consumer protection measures and freedom of contract is best left to the legislature, not the courts. He would enforce the arbitration agreement here.

**Dissenting opinion by Judge Breckenridge:** The author would hold the facts here do not support a finding of unconscionability. The issue of whether both substantive and procedural unconscionability are required to find a contract unenforceable has not been resolved sufficiently in Missouri but, because it is not necessary to resolve this case, it should be left for another day. It is not necessary to the holdings of either the principal or the chief justice's dissent to determine whether *State ex rel. Vincent v. Schneider* should be interpreted as rejecting prior appellate decisions holding that both procedural and substantive unconscionability are needed to invalidate an unfair contractual provision. A contract provision waiving class action arbitration may be unconscionable under certain circumstances, but not under the facts here.