Agreeing to Arbitration

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Of the state law defenses, unconscionability is the most often used and most effective legal justification for invalidating arbitration agreements. As a creature of state common law and state versions of the Uniform Commercial Code, its specific application may vary from state to state. However, the basic elements of unconscionability are common to all states and can effectively be discussed in general.

The doctrine consists of two elements – procedural and substantive unconscionability. For a court to find a contract term unconscionable and thus unenforceable, a party must show that both elements are present in the transaction.

The procedural element addresses how the contract was negotiated and focuses on “oppression” and “surprise” in the negotiating process with regard to the suspect provision. The substantive element focuses on the actual terms of the agreement, emphasizing terms that are overly harsh or one-sided.

In determining whether a particular contract provision or the entire contract is unconscionable, the two elements need not be found in the provision or the contract to a specific degree. Rather, they are weighed in a balancing test. The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to conclude that the term is unenforceable, and vice versa.

Standard industry retail installment sale contracts typically come in arbitration and non-arbitration versions. The arbitration provisions in the arbitration versions of the contracts are designed to avoid claims of both procedural and substantive unconscionability. One such provision, designed to avoid procedural unconscionability by requiring customer assent to arbitration, found its way into an opinion in a recent Florida case. In this case, a signature acknowledging that the contract contained an arbitration provision went unsigned.

A used car buyer signed a financing contract that was assigned to a bank. The two-page contract included an arbitration provision at the bottom of the second page. There was no signature line beneath the arbitration provision. However, the first page of the contract included a separate “Agreement to Arbitrate” provision with a signature line below it. This provision stated, in pertinent part:

By signing below, you agree that, pursuant to the Arbitration Provision on the reverse side of this contract, you or we may elect to resolve any dispute by neutral, binding arbitration and not by a court action. See the Arbitration Provision for additional information concerning the agreement to

arbitrate.

The buyer did not sign below that provision. After the buyer fell behind on her payments, the bank repossessed the car.

The buyer sued the bank and others, asserting federal and state law claims. The federal trial court denied the bank's motion to compel arbitration of her claims. The bank argued that the arbitration provision at issue was binding even though there was no signature under it and that a valid arbitration agreement can be created without either party signing it.

The court distinguished the facts of this case from the precedent case relied on by the bank. In this case, the financing contract explicitly stated that the buyer would agree to arbitrate "[b]y signing" her name on the signature line below the arbitration provision. Therefore, the contract defined the terms of acceptance of the arbitration provision. Because the buyer did not sign the provision, she did not assent to arbitration and thus could not be compelled to arbitrate her claims against the bank.

The moral of the story? Whether a contract complies with the law is irrelevant if it's not completed and signed. So, make sure your retail installment sale contract is complete, there are no blanks to be filled in, and it is signed in all places requiring signature.

Sullivan v. PNC Bank, N.A., 2019 U.S. Dist. LEXIS 171672 (M.D. Fla. October 3, 2019).