



Forum Selection Clause Upheld in the 7th Circuit

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The extension of financing to small business has undergone something of a revolution in the last few years. With the growth of Independent Sales Organizations and the advent of online lending, more and more small businesses are obtaining credit from alternative finance sources. Many of these alternative financiers operate with certain contractual clauses hard-baked into their merchant-facing agreements. A recent U.S. Court of Appeals decision sheds light on one clause commonly found in these agreements – the forum selection clause.

A forum selection clause, although anathema in a consumer financing agreement, is fairly common in a commercial agreement. The clause binds the parties to face lawsuit (or bring lawsuit) in a specific court. For small business financiers with a nationwide footprint, the forum selected is usually one that is convenient to them, but inconvenient to merchants who do not happen to reside in the same location. Forum selection clauses allow small business financiers to obtain consistency in the enforcement of judgments and certainty of processes necessary to file litigation. Forum selection clauses are generally not prohibited in a commercial setting.

In *Johnson v. Pushpin Holdings LLC*, a purported class of merchants who obtained credit card processing equipment through a lease offered by the now-exited CIT claimed in state court that Pushpin Holdings, LLC, the subsequent holder of the lease, violated the Illinois Consumer Fraud and Deceptive Business Practices Act, and committed related torts, in collecting debts in Illinois. The leases at issue were mostly for amounts of \$5,000 or less, a small enough amount that might lead merchants to determine, perhaps rationally, that the cost of defense in an Illinois court would not be worth the expense of litigation. Pushpin removed the case to federal court and in two proceedings at the trial level, the court dismissed the lawsuit. The merchants appealed twice to the U.S. Court of Appeals for the Seventh Circuit. In its most recent opinion, the court, through Chief Judge Richard Posner, offered some relevant insights into how courts might view such forum selection clauses.

Noting that the purported class did not challenge the legality of forum selection clauses, Judge Posner wrote that there is no rule, nor should there be, “that forbids bringing a suit just because the cost of defending against it is likely to exceed the claim.” Indeed, Judge Posner noted that “just by committing themselves to spend heavily on the legal defense to any small claims suit brought against them, potential defendants could insulate themselves from liability for small claims.”

After noting that the law under which the merchants sued applied only to consumer, and not commercial, debt, Judge Posner rejected the merchants’ claim that the lease amounts were

overpriced, even if the credit card processing equipment was \$250 per lease, as the merchants alleged. As Pushpin did not originate the lease or determine the lease payments, but was merely the enforcer of the original lease agreement, the court was not convinced of Pushpin's liability for terms at lease origination. Judge Posner also rejected the argument that a guaranty is unenforceable if the guarantor is the same person as the lessee, noting that no applicable law supported that conclusion.

Judge Posner did, however, remark of a feature of the case he found "troubling." First, he commented on the enforceability of forum selection clauses against unsophisticated signers of the clauses, which may describe many of the sole proprietors and other small businesses that leased credit card processing machines from CIT. The forum selection clause was hard-coded into the agreement and not negotiated by the merchants. However, the U.S. Supreme Court in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) upheld a forum selection clause printed on the "contract" pages attached to a cruise ticket, which involved a case of consumers, not merchants. Judge Posner noted that because most lessees of credit card processing machines lease them for use in business, a defense of unconscionability to the enforcement of the leases and the guaranties would be unlikely to succeed, as the standard for such a claim is even greater for a commercial case than a consumer case. Judge Posner finally concluded that even if existing law would invalidate the clauses in a business-purpose transaction, the class challenged the forum selection clauses only on the ground that it inconvenienced nonresidents of Cook County, Illinois, the selected forum. Judge Posner noted that any forum selection clause will inconvenience a nonresident signer of the contract containing the clause, by definition. A challenge that amounts to a blanket prohibition of such clauses goes beyond the scope of what might be necessary to address the inconvenience. We anticipate that more courts will rule on aspects of small business financing agreements as the industry continues to grow, a development that is good for lawyers if no one else, as it gives us much-needed guidance in the crafting and enforcement of such agreements.

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