

MIBA'S COMPLIANCE CORNER

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Recent Cases Concerning Waiver of Class Action Remedies

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Recently, the Missouri Supreme Court issued two opinions regarding the validity and enforceability of contract provisions providing for waiver of class action remedies by a customer. *Brewer v. Missouri Title Loans* and *Robinson v. Title Lenders, Inc., d/b/a Missouri Payday Loans* are the two cases that were heard. Both cases involved form agreements from payday loan or title lenders that included a provision where the consumer borrower waived class action remedies. Citing recent decisions of the United States Supreme Court, the *Brewer* and *Robinson* cases changed the law in the State of Missouri concerning these waivers, but not necessarily the result, in part, of the *Brewer* case. These two opinions are important for bank management to understand as class action waivers can be found in a variety of bank related agreements.

Last year, the U.S. Supreme Court upheld the enforceability of a clause in a consumer contract that required consumers to arbitrate their claims. In *Concepcion*, a husband and wife signed a contract with AT&T Mobility that included a class action waiver. Instead of filing the individual arbitration claim as provided in the contract, the consumers filed a class action lawsuit against AT&T in the United States District Court of California. AT&T's request to compel arbitration was originally denied as the trial court because the trial court followed a decision handed down by the California Supreme Court in 2005, where a covenant compelling arbitration was held to be unenforceable for the sole reason that the agreement barred the consumer from seeking relief by a class action claim. The United States Supreme Court overruled the lower court's decision in *Concepcion* and further vacated the Missouri Supreme Court's decision in *Brewer v. Missouri Title Loans, Inc.*

On March 6, on remand from the United States Supreme Court, the Missouri Supreme Court issued its opinion in concerning the *Brewer* case ("*Brewer II*"), as well as a second case involving a contract containing a class action waiver in *Robinson v. Missouri Title Lenders, Inc.* These two opinions overrule prior precedent in

which inclusion of a class arbitration waiver would render an arbitration clause invalid in its entirety. In *Brewer I*, the Missouri Supreme Court held that the class arbitration waiver unconscionable and struck the entire arbitration agreement provided in the lender's contract.

In *Brewer II*, the Missouri Supreme Court held that while a class waiver does not by itself invalidate an arbitration covenant, which is consistent with *Concepcion*, Section 2 of the Federal Arbitration Act ("FAA") allows covenants that require the parties to arbitrate to be invalidated by state law contract defenses, such as fraud, duress, or if the agreement is unconscionable. The Court proceeded then to review facts of the case and held again that the arbitration clause in the agreement was unconscionable. The Court found that the agreement as presented to the consumer was not negotiable, it was difficult for an average consumer to understand, the lender was in a superior bargaining position, and the terms of the agreement were extremely one-sided. The Court also found that no consumer had challenged the lender through arbitration at the time *Brewer* brought her claim and this factor was taken into consideration in determining the clause interfered with the objectives of the FAA.

The Court took on a similar issue in *Robinson v. Title Lenders, Inc.*, in determining the enforceability of an arbitration agreement containing a class action waiver. The trial court in *Robinson* held that Title Lenders arbitration covenants were unconscionable based on the class waiver contained in its agreement. The Missouri Supreme Court followed the ruling in *Concepcion* and reversed the trial court's decision that invalidated the requirement to arbitrate only because the agreement contained a class waiver provision.

Brewer and *Robinson* must be taken into consideration when drafting consumer agreements and using form contracts that include a requirement for the consumer to arbitrate its claims. Class action waivers are permissible and alone will not invalidate a covenant

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requiring the parties arbitrate the claim, but when taken together with the surrounding circumstances of the agreements formation, can be a factor in determining its enforceability.

So, a contract that contains a class action waiver is enforceable and cannot be attacked only because it contains a class action waiver. However, the circumstances surrounding that contract and its formation will be closely examined by a court applying Missouri law. The factors considered in determining whether a contract is unconscionable are many, including whether the contract provisions are unfair, whether the contract is an adhesion contract resulting from unfair bargaining positions or a “take it or leave it” negotiating position, and other factors noted in the *Brewer II* and *Robinson* decisions. Bank management must keep the negotiation procedure and the fairness of the contract in mind when relying on waivers or mandatory arbitration covenants. ■

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